STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-706
FOIL-AO-2307

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

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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 4, 1982

Pauline Schultz
Councilwoman
City of Port Jervis
28 Mc Allister 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 Ms. Schultz:

I have received your letter of December 29 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, your inquiry pertains to the status of the Port Jervis Development Corporation under the Freedom of Information Law. The question was apparently precipitated by a request for the by-laws of the corporation in question, to which you received a response indicating that the officials of the corporation were unsure of whether its records would be subject to the Freedom of Information Law.

In this regard, I recently responded to the same inquiry submitted to this office by Mr. William D. Bavoso, whose firm represents the Corporation.

Although the status of a local development corporation is in my view unclear in terms of the Freedom of Information Law, I advised Mr. Bavoso that, based upon the language of §1411(a) of the Not-for-Profit Corporation Law and judicial interpretations of the Freedom of Information Law, it appears that a local development corporation is subject to the Law. I have enclosed a copy of the opinion rendered at the request of Mr. Bavoso for your consideration.

As indicated in my letter to Mr. Bavoso, the key question in my view is whether a local development corporation falls within the definition of "agency" appearing in §86(3) of the Freedom of Information Law, for the definition makes reference to governmental entities performing a governmental function. While the provision of the Not-for-Profit Corporation Law cited above indicates that a local development corporation performs a governmental function, it is not entirely clear whether such a corporation would be considered a "governmental entity".

Nevertheless, I believe that the meetings of the board of a local development corporation would be subject to the Open Meetings Law, for the definition of "public body" appearing in §97(2) of the Open Meetings Law is not in my opinion as restrictive as the definition of "agency" in the Freedom of Information Law.

"Public body" is defined to include:

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

By breaking the definition into its components, I believe that each condition necessary to a finding that a local development board is a "public body" may be met. A local development corporation is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. Its board consists of more than two members. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which is quoted in the letter to Mr. Bavoso, I believe that a local development board conducts public business and performs a governmental function for a public corporation, in this instance, the City of Port Jervis.

In view of the foregoing, while it is not completely clear that the records of a local development corporation are subject to the Freedom of Information Law, its meetings would in my view fall within the scope 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

cc: William D. Bavoso

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2308

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman
~~DOUGLAS L. TURNER~~

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 5, 1982

Gerald Kitt
79 A 3215
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. Kitt:

I have received your letter of December 29, in which you requested information regarding the New York Freedom of Information Law as well as advice regarding an unanswered request directed to the court reporter's office of the Supreme Court, New York County.

First, 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.

Second, it appears that the Freedom of Information Law does not apply to the records in which you are interested. 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".

Further, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record".

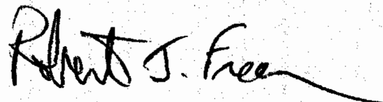
In view of the definitions quoted above, the Freedom of Information Law does not apply to the courts or court records, such as those in which you are interested.

Nevertheless, there are various provisions of law applicable to court records that may serve as a vehicle for gaining access to the records in which you are interested. For instance, §255 of the Judiciary Law (see attached) provides in brief that a clerk of a court must search for and provide access to records in his or her possession upon payment of the appropriate fees for copying. Therefore, it is suggested that you might want to submit a new request and direct it to the clerk of the Supreme Court, New York County. The request should provide as much identifying information as possible, such as names, dates, docket and index numbers, as well as the information to which you made reference in your request, i.e., the name of the case, the date and the indictment number.

It is suggested that you might also want to seek the assistance of an organization such as Prisoners' Legal Services. Perhaps that organization could expedite the process of gaining access to the records in which you are interested.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2309

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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~~DOUGLAS L. TURNER~~

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 5, 1982

Ms. Marion Maye

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. Maye:

I have received your letter of December 22 in which you requested "the proper authorization for the release of a case action summary" prepared by an instructor for the Association for the Help of Retarded Children in Suffolk County. The case action summary apparently pertains to an individual residing in your foster case home.

I have contacted Norma Pitcher, director of the Association, on your behalf. In this regard, Ms. Pitcher informed me that the substance of the case action summary was shared with you, but that a copy of the document was not provided.

In my view, the Association is not required to provide you with a copy of the record in question.

The New York Freedom of Information Law is applicable to governmental entities in New York. Specifically, the Law is applicable to records of an "agency", which is defined to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other

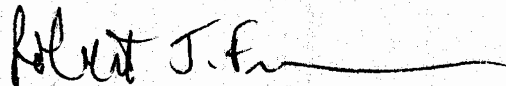
> governmental entity performing a
> governmental or proprietary function
> for the state or any one or more
> municipalities thereof, except the
> judiciary or the state legislature."

Having discussed the matter with Ms. Pitcher, it was found that the Association in question is a non-profit organization that could not in my opinion be considered a "governmental entity". As such, the Association and its records in my view fall outside the scope of rights of access granted by the Freedom of Information Law.

If the findings to which reference was made in the preceding paragraph are accurate, the Association is not required to provide a copy of the records in which you are interested.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Norma Pitcher

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2310

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

January 6, 1982

Ms. Etta C. Gray

<u>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.</u>

Dear Ms. Gray:

I have received your note of December 22 in which you made reference to one of several telephone conversations we had within the last month.

During our last conversation on December 30, you requested suggestions regarding records that you believe were withheld in response to your initial request directed to the Ithaca City Clerk.

First, §89(3) of the Law provides in part that an agency on request "...shall certify that it does not have possession of such record or that such record cannot be found after diligent search". In addition, as indicated to you by phone, §1401.2(b)(6)(ii) of the Committee's regulations, a copy of which I have enclosed, may be applicable to the situation you described with respect to records you believe remain in possession of the City of Ithaca.

Second, you requested advice as to the specific time period you must wait for a response after having submitted a request under the Freedom of Information Law. In this regard, §89(3) also provides 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)].

Lastly, I have received your most recent correspondence of January 4, 1982, which is a copy of a new request you submitted to the Ithaca City Clerk. To reiterate a point made during our recent conversation, please be advised that §89(3) of the Law does not require an agency, such as the City of Ithaca, to create a record in response to a request. Therefore, if the City of Ithaca does not have in its possession records reflective of the additional information you are seeking, it would not be required to create them on your behalf.

Ms. Etta C. Gray
January 6, 1982
Page -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

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Enc.

cc: Joseph A. Rundle

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2311

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[illegible]
BARBARA SHACK
GILBERT P. SMITH, Chairman
[illegible]

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 6, 1982

Supervisor Stephen R. Johnson
Town of Irondequoit
1280 Titus Avenue
Rochester, NY 14617

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 Supervisor Johnson:

As you are aware, your letter addressed to Adam Ciesinski of the Department of Audit and Control 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.

As Town Supervisor and a member of the Town's Board of Police Commissioners, you indicated that you recently issued a directive to all department heads to consolidate personnel files within a single office, the Town Personnel Department. However, having reviewed the provisions of §50-a of the Civil Rights Law, which concerns police officers' personnel records, questions have arisen regarding the status of records subject to §50-a.

Before responding to your inquiry, I would like to point out that the questions raised do not deal directly with the Freedom of Information Law or the jurisdiction of the Committee. Nevertheless, having discussed the issues with representatives of both the Department of Audit and Control and the Bureau of Municipal Police at the Division of Criminal Justice Services, I have been unable to locate any authoritative source

that is able to respond. Therefore, the ensuing comments are being provided in an effort to give a service that cannot apparently be provided elsewhere. Further, should the issues arise in a judicial setting, the value of the comments may be questionable.

Your first question relates to the location of police personnel records and has arisen due to a phrase in subdivision (1) of §50-a, which refers to personnel records "under the control of any police agency or department..." The issue is whether police officers' personnel files must be located within the offices of a police department or whether they may be located in a different town office "with proper access procedures to conform with the confidential nature of such files".

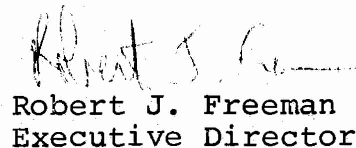
From my perspective, all statutes should be given a reasonable interpretation. In addition, a statute should not in my view be interpreted in a manner that would negate its clear intent. In this instance, I believe that it is the clear intent of the Civil Rights Law to maintain the confidentiality of certain personnel records of police officers. Concurrently, the Town Law contains numerous provisions regarding the responsibilities of town officers. In my opinion, the applicable statutes should be carried out in a way that permits town officers to carry out their official duties. Therefore, assuming that town officials can maintain the necessary confidentiality required by §50-a of the Civil Rights Law and that the records in question will remain under the control of the Police Department, I cannot envision any reason why the personnel records could not be kept in a location other than an office within the Police Department itself.

The second question concerns access to records subject to §50-a of the Civil Rights Law by a police commissioner or employees of the personnel department who deal with civil service records, payroll, absenteeism, retirement, employee benefits and related matters. The issue that you raised is whether those individuals may have access to the records in question under subdivision (4) of §50-a, which states that the confidentiality requirements do not apply to designated public officers and others, as well as "any agency of government which requires the records described in subdivision (1), in the furtherance of their official functions."

If the police commissioner or the employees of the personnel department, for example, could not gain access to the records in question, it would appear that those individuals could not carry out their official duties. In my view, such a result would likely be unreasonable. Therefore, it is my view that records considered confidential under §50-a of the Civil Rights Law may be inspected and reviewed by those town officials who have a need to review those records in order to perform their official duties.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Adam Ciesinski

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2312

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman
~~DOUGLAS L. TURNER~~

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 12, 1982

Mr. Keith Grant
81-A-0863
P.O. Box 149
Attica, NY 14011-9688

<u>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.</u>

Dear Mr. Grant:

I have received your letter of December 15, 1981.

You have requested advice with respect to gaining access to various types of criminal information.

I would like to make the following comments in response to your request for advice.

First, as indicated in Mr. Freeman's previous correspondence dated December 28, 1981, records of your judicial proceedings should be requested from the clerk of the court in which you were convicted.

Second, you have enclosed a copy of a request transmitted to the New York County District Attorney. In general, the form of your request is in my opinion appropriate. However, you might not be able to gain access to a copy of the "grand jury minutes" that you are seeking if they have been sealed under provisions of Article 190 of the Criminal Procedure Law. 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.

Third, some of the records in which you are interested may be available from the Division of Criminal Justice Services, which maintains criminal history information. To request criminal 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.

I hope 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-2313

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BARBARA SHACK
GILBERT P. SMITH, Chairman
~~DOUGLAS L. TURNER~~

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 14, 1982

Ms. Genevieve Berman

<u>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.</u>

Dear Ms. Berman:

I have received your letter of December 23. Please accept my apologies for the delay in response.

Your inquiry concerns a request for a list in possession of the Rockland Psychiatric Center identifying eligible candidates for the position of medical technologist. You indicated that you have been unable to learn the name of the person at the Rockland Psychiatric Center who is the designated records access officer.

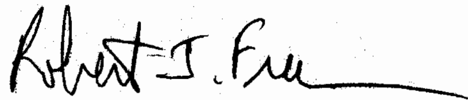
In this regard, I have contacted the Office of Counsel of the Office of Mental Health on your behalf and was informed that the records access officer is the deputy director for administration. Further, in discussing the matter with the attorney, the address of the psychiatric center was provided. Please note that the zip code given for the center was 10962. The zip code to which you made reference in your letter was 10952. Consequently, it is possible that the request did not reach the access officer.

I would also like to point out that under the provisions of the Civil Service Law as well as the Freedom of Information Law, it has consistently been advised that eligible lists are available.

Once again, I regret that a response could not have been forwarded to you sooner and hope that your other request directed to the Department of Civil Service was answered in a timely manner.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Deputy Director for Administration

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2314

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 14, 1982

Mr. Vernon Bagby
79-A-3943
Drawer B
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. Bagby:

I have received your recent letter as well as the correspondence attached to it.

In your letter, you requested an "officer to be appointed to assist" you "in accessing and identifying certified records".

Please be advised that there is nothing in the Freedom of Information Law or the jurisdiction of the Committee pertaining to the appointment of an individual for the purpose of assisting an applicant in gaining access to records. In essence, I believe that the Freedom of Information Law is a statute intended to be used by members of the public individually. If, however, you continue to have difficulties, it is suggested that you seek the assistance of a legal aid group or Prisoners' Legal Services, for example.

In addition, I would like to offer the following comments with respect to certain aspects of your correspondence with various offices of the City of Mount Vernon.

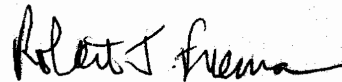
First, you submitted a request to the Mount Vernon Police Department on December 17 for its subject matter list. Under the regulations promulgated by the Committee, the head or governing body of an agency is required to

designate one or more records access officers. Further, under §1401.2(b)(1) of the regulations, a records access officer is responsible for maintaining an up to date subject matter list. If a records access officer has been designated in the Police Department to deal with the Department's records, that person would be responsible for maintaining a subject matter list. If, however, no records access officer has been designated within the Police Department, the records access officer for the City would be responsible for maintaining the subject matter list.

Second, in your request to the Mount Vernon City Court, you applied for records under the federal Freedom of Information and Privacy Acts as well as the Freedom of Information Law. In this regard, please note that the federal acts that you cited are in my view inapplicable to records in possession of state and local government in New York. Further, the New York Freedom of Information Law specifically excludes the courts and court records from its coverage. Consequently, the procedural requirements of the Freedom of Information Law are not in my opinion applicable to the courts and court records. Nevertheless, as you indicated, §255 of the Judiciary Law, which you did cite in your letter, would appear to be applicable to records in possession of the courts.

I hope that I 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: Mount Vernon Police Department
Mount Vernon City Court

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2315

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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MARCELLA MAXWELL
BASIL A. PATERSON
[illegible]
BARBARA SHACK
GILBERT P. SMITH, Chairman
[illegible]

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 15, 1982

Joel Klein

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. Klein:

As you had requested during our conversation of last week, I am responding to your letter of December 28, 1981. In particular, you requested that we inform you if this office received a copy of an appeal you transmitted to the New York City Board of Education. Additionally, you requested advice with respect to the time limitations for response to a request made under the Freedom of Information Law.

I would like to offer the following comments regarding our conversation and your correspondence.

First, as of this date, the Committee has not yet received a copy of the appeal you submitted to the Board of Education.

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)].

Lastly, I would like to note that the delay in response to your request by the Board of Education does not appear to be unusual. Correspondence received from the Board often indicates to an applicant that a response might be delayed several months. In my view, the staff of the Board is attempting to comply with the provisions of the Law in good faith. However, the volume of requests received may preclude the Board from responding within the prescribed time periods. Therefore, as we discussed previously, in order to expedite a response, it may be useful to contact Ms. Ruth Bernstein, Deputy Records Access Officer. Since you indicated your willingness to assist in searching for the records sought, it is suggested that you discuss your offer of help with Ms. Bernstein.

I hope 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: Ruth Bernstein

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2316

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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COMMITTEE MEMBERS

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BASIL A. PATERSON
~~IRVING P. SEIDMAN~~
BARBARA SHACK
GILBERT P. SMITH, Chairman
~~DOUGLAS L. TURNER~~

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 18, 1982

Mr. Gordon Ward

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. Ward:

I have received your letter of December 28 in which you sought advice under the Freedom of Information Law.

Your inquiry is apparently precipitated by a request directed to the records access officer of the New York City Board of Education on October 15. In response to that request, you were informed that a determination would be forwarded to you on approximately February 16.

In this regard, it is noted that this office has communicated on numerous occasions with the Board of Education and its records access officer. It appears that the Board has an ongoing backlog of requests that precludes the issuance of quick responses.

While I believe that the Board of Education seeks to respond to requests in good faith, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed 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 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)].

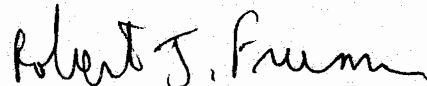
In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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, it appears that you have the option of waiting for a response in February, or appealing what may be considered a constructive denial of access.

Enclosed for your review is an explanatory pamphlet that may be useful to you.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2317

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

COMMITTEE MEMBERS

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C. MARK LAWTON
MARCELLA MAXWELL
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BARBARA SHACK
GILBERT P. SMITH, Chairman
~~DOUGLAS L. TURNER~~

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 18, 1982

Dorothy Darijczuk

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. Darijczuk:

Your letter of January 14 addressed to the Department of State's records access officer has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

In your letter, you indicated that you heard of an "Information Please" report which is listed in the Department's subject matter list and is subject to the Freedom of Information Law.

Having discussed your inquiry with both the records access officer and the Department's bureau of publications, there appears to be no report published by the Department that bears the title you identified. It is possible, however, that you may be referring to a publication of this office, which is housed in the Department, which is entitled "The Freedom of Information and Open Meetings Laws...Opening the Door". I have enclosed a copy of that pamphlet in the hope that it is the publication that you are seeking.

I would also like to point out, with respect to a subject matter list, that such a list generally would not identify particular records, but rather categories of records maintained by an agency. Specifically, §87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

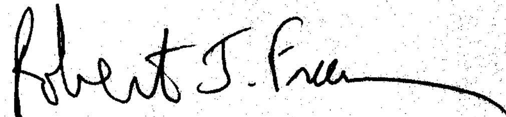
Dorothy Darijczuk
January 18, 1982
Page -2-

"...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 language quoted above, the list required to be compiled need not identify with particularity each and every record in possession of agency; rather, the subject matter list is in my view required to indicate the types of records maintained by an agency by category.

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-2318

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

COMMITTEE MEMBERS

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WALTER W. GRUNFELD
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MARCELLA MAXWELL
BASIL A. PATERSON
~~IRVING P. SEIDMAN~~
BARBARA SHACK
GILBERT P. SMITH, Chairman
~~DOUGLAS L. TURNER~~

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 18, 1982

Leroy E. Green
Box 51 #81-694
Comstock, NY 12821

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. Green:

I have received your letter of January 13, in which you requested information regarding a person who apparently had been employed by the Department of Correctional Services.

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.

Nevertheless, I would like to offer the following suggestions.

First, each agency, such as the Department of Correctional Services, is required to designate one or more "records access officers" responsible for dealing with requests made under the Freedom of Information Law. As such, it is suggested that you direct a request to the following address:

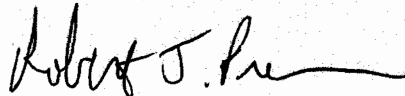
Records Access Officer
Department of Correctional Services
State Office Building Campus
Building #2
Albany, New York 12226

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, in your request to the Department of Correctional Services, you should provide as much detail as possible regarding the records in which you are interested, such as names, dates, file designations, and similar information that will enable the access officer to locate the records sought.

Third, enclosed for your consideration is an explanatory pamphlet regarding the Freedom of Information Law. 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

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2379

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

COMMITTEE MEMBERS

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WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
BASIL A. PATERSON
[illegible]
BARBARA SHACK
GILBERT P. SMITH, Chairman
[illegible]

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 19, 1982

Mrs. Victoria Lawson

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 Mrs. Lawson:

I have received your letter of January 4 and the correspondence appended to it.

You have requested:

> "...opinions as to whether the Greenburgh Central 7 school board, Hartsdale, acted properly in denying information to voters prior to a special referendum on the sale of a school, and whether State Commissioner of Education properly dismissed an appeal in which denial of information was an issue."

In addition, in a recent request addressed to the District, you were denied access to appraisals of school properties, the names of bidders and their offers, and an answer to a question regarding the terms of the "Warburg Indenture". In response to your request, the District Clerk wrote that "Items 1 and 2 are not presently available. There is no document covering Item 3."

I would like to offer the following comments with respect to the situation that you described.

It is emphasized that the Committee does not have the jurisdiction to comment with respect to the interpretation of the Education Law or the propriety of a determination rendered by the Commissioner of Education. Consequently, the remaining comments will deal solely with the Freedom of Information Law.

Based upon your correspondence, it appears that the District Clerk of the Greenburgh Central School District has not complied with the procedural requirements of the Freedom of Information Law or the regulations promulgated by the Committee regarding your request of December 16. While I concur with the Clerk's response to your third area of request, the remainder of the response is in my view insufficient.

The third area of request in your letter of December 16 addressed to the Clerk involves "a reply to the question" as to whether the School Board acted in accordance with the instructions of the donor of the Warburg Indenture. As you may be aware, 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 need not create a record in response to a request. From my perspective, a "reply to a question" does not involve a request for records made under the Freedom of Information Law.

With respect to the other two items, it appears that you did seek records. Again, a response to the effect that "Items 1 and 2 are not presently available" is in my opinion insufficient. Enclosed for your consideration is a copy of the regulations promulgated by the Committee, which in part requires that a records access officer in responding to a request:

> "Deny access to the records in whole or in part and explain in writing the reasons therefor..." [see §1401.2 (b)(3)(ii)].

In view of the language quoted above, reasons for a denial must be stated.

It is suggested that you appeal the denial of access to the person or body designated to determine appeals. Here I direct your attention to §89(4)(a) of the Freedom of Information Law which states that:

> "[E]xcept as provided in subdivision five of this section, 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. In addition, each agency shall immediately forward to the committee on public access to records a copy of such appeal and the determination thereon."

It is emphasized that the individual or body designated to determine appeals in the case of a further denial must "fully explain" the reasons for such a denial. It is important to point out that several courts, including the state's highest court, have stressed that all records are available, except to the extent that one or more among the eight grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law may appropriately be asserted [see e.g., Doolan v. BOCES, 48 NY 2d 341 (1979); and Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979)]. Further, it has been found that an agency cannot merely assert a ground for denial without more and prevail; on the contrary, an agency must demonstrate that the effects of disclosure described in a 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)].

The contentions expressed above may be of particular interest with respect to the two items to which you were denied access. In the case of bids, for example, if a bid is prematurely disclosed, an advantage might be given to other bidders. In addition, in such a situation, a public corporation, such as a school district, might be placed at a disadvantage in its negotiations. In that type of situation, §87(2)(c) of the Freedom of Information Law might appropriately be cited as a basis for withholding. The cited provision states that an agency may withhold records or portions thereof which:

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

Nevertheless, if all bids must be submitted by a specific date and have indeed been submitted, the "impairment" envisioned in §87(2)(c) would not likely arise, for there would be no additional prospective bidders and the District would have all of the potential bids in its possession, thereby diminishing any possible disadvantage that might arise by premature disclosure. As such, it does not appear that §87(2)(c) or any other ground for denial could appropriately be cited with respect to the records in question. Moreover, it is questionable whether §87 (2)(c) is applicable, for it is unclear whether a "contract award" is involved.

With respect to appraisals, based upon the facts as you described them, it also appears that disclosure would not at this juncture be damaging to the District's capacity to engage in an optimal contractual arrangement.

Lastly, it may be important to point out that §89 (6) of the Freedom of Information 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."

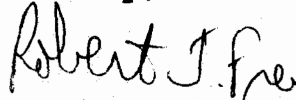
Stated differently, if other provisions of law grant rights of access to records, nothing in the Freedom of Information Law may be cited as a basis for withholding such records. Here I direct your attention to §2116 of the Education Law, which has long stated that:

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

It is possible that the quoted provision of the Education Law might constitute a basis for disclosure in addition to the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Elizabeth Weinberg, District Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2320

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

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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 19, 1982

Robert J. Ayling
Case, Leader & Ayling
Attorneys at Law
107 East Main Street
Gouverneur, NY 13642

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. Ayling:

I have received your recent communication concerning a request by Carl B. Raymo for a letter of recommendation pertaining to him which is in possession of the Gouverneur Central School District.

In previous correspondence, it had been advised that the record in question might justifiably be withheld. You have contended that the letter of recommendation is available based upon §89(2)(c)(ii) of the Freedom of Information Law, which states that:

> "Unless 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..."

Since Mr. Raymo has consented to disclosure, you have contended that release of the letter of recommendation would not result in an unwarranted invasion of personal privacy. As such, you have asked that I "reconsider and request that the information be provided to Mr. Raymo".

I would like to offer the following comments regarding the situation that you have described.

First, the Committee is authorized to issue advisory opinions; it does not have the capacity to compel an agency to comply with the Freedom of Information Law or otherwise make records available.

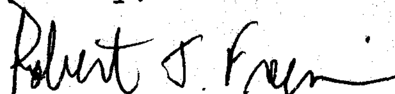
Second, I have contacted Ms. Bonnie Bettinger, the Superintendent of Schools, on your behalf. In brief, it is the contention of Ms. Bettinger that disclosure would result in an unwarranted invasion of personal privacy with respect to the author of the letter of recommendation, the former superintendent, Bernier L. Mayo.

In all honesty, as I explained to Ms. Bettinger, the manner in which a court would view rights of access is in my view unclear at this juncture. While the letter of recommendation might pertain to Mr. Raymo, there may be privacy considerations with regard to the author of the letter of recommendation. Ms. Bettinger suggested that if the subjects of letters of recommendations could gain access to such records, supervisors would no longer be willing to prepare letters of recommendation or that letters of recommendations would not be prepared in a manner that reflects the author's true sentiments. In short, if individuals could as a matter of course gain access to letters of recommendation pertaining to them, it is possible that such letters might not often be written.

In view of the foregoing, although I appreciate the position that you have taken, based upon Ms. Bettinger's contentions concerning the privacy of another, I do not believe that I could in good faith advise that the letter in question is clearly accessible as of right under the Freedom of Information Law. Further, as stated previously, this office does not have the authority to compel an agency, such as the District, to make records 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: Bonnie Bettinger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2321

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

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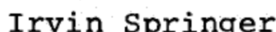
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 19, 1982

Irvin Springer


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. Springer:

I have received your letter of January 14 in which you requested advice regarding the Freedom of Information Law.

Specifically, you wrote that you had been denied access to "information" and have asked for a description of the options open to you.

I would like to offer the following comments and suggestions.

First, I noticed that you are writing from Pennsylvania. In this regard, please note that the Freedom of Information Law of New York applies only to entities of government in New York State.

Second, you did not specify the nature of "information" to which you were denied. Please be advised that the Freedom of Information Law grants access to existing records and states in §89(3) that an agency need not create a record in response to a request for "information". It is unknown to me at this juncture whether you requested information that might not exist in the form of a record or records, or whether you were indeed denied access to existing records.

Third, if you were denied access to records, §89(4)(a) of the 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".

As such, if the denial occurred less than thirty days ago, you may appeal to the head or governing body of the agency or whomever has been designated to determine appeals.

Lastly, 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-2322

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

COMMITTEE MEMBERS

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BASIL A. PATERSON
[illegible]
BARBARA SHACK
GILBERT P. SMITH, Chairman
[illegible]

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 19, 1982

Mr. Melvin F. DeFendini
241-80-7286
1414 Hazen Street
East Elmhurst
Queens, NY 11370

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. DeFendini:

I have received your letters of December 30 and 31 thank you for your kind words.

According to your letters, you have tried for several months without success to obtain court records.

I would like to offer the following comments with respect to the situation that you described.

First, it is emphasized that the courts and court records fall outside the scope of the Freedom of Information Law and the jurisdiction of the Committee. Section 86(3) of the Freedom of Information Law defines "agency" broadly, but excludes the judiciary. Section 86(1) of the Freedom of Information Law defines "judiciary" to mean "...the courts of the state, including any municipal or district court, whether or not of record." Consequently, it is reiterated that the Freedom of Information Law does not apply to the records in question.

Second, there are, however, various other provisions of law that might be applicable. 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 direct future requests for the records in which you are interested to the clerk of the appropriate court.

Third, it is my understanding that minutes of proceedings are often not prepared for a lengthy period of time following a proceeding. It is possible that the records in which you are interested might not yet exist.

And lastly, it is recommended that you might want to seek assistance from a group such a the Legal Aid Society or Prisoners' Legal Services, for example. Perhaps a representative of one of those organizations can expedite the process of obtaining records on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2323

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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COMMITTEE MEMBERS

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MARIO M. CUOMO
JOHN C. EGAN
WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
BASIL A. PATERSON
[illegible]
BARBARA SHACK
GILBERT P. SMITH, Chairman
[illegible]

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 19, 1982

Clare J. Lilholt
Executive Secretary
Civil Service Commission
City of Oneida
109 North Main Street
Oneida, NY 13421

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. Lilholt:

I have received your letter of January 13 and appreciate your interest in compliance with the Freedom of Information Law.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern its procedural implementation, model regulations designed to assist agencies in complying, the Committee's latest annual report on the Freedom of Information Law, which includes an index to advisory opinions as well as a summary of judicial determinations, and ten copies of a pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

Please note that the Freedom of Information Law contains two recent amendments. One of the areas of change concerns the treatment of records containing trade secrets. However, the new provisions concerning trade secrets apply only to state agencies. The other change involves an addition to the Committee of an elected official of a local government. The new member is Stephen J. Pawlinga, Mayor of Utica.

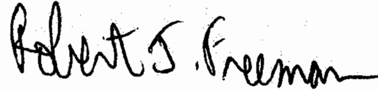
Lastly, you indicated that questions have been raised regarding salaries. In this regard, I would like to point out that §87(3)(b) of the Freedom of Information Law requires that each agency, such as the City of Oneida, shall maintain:

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

In view of the language quoted above, each agency must maintain on an ongoing basis a list of all employees with their salaries, as well as the other information required by §87(3)(b).

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

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2324

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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COMMITTEE MEMBERS

THOMAS H. COLLINS
MARIO M. CUOMO
JOHN C. EGAN
WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
BASIL A. PATERSON
~~[illegible]~~
BARBARA SHACK
GILBERT P. SMITH, Chairman
~~DOUGLAS L. TURNER~~

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 20, 1982

Douglas E. Lee
75-A-1894
Greenhaven Correctional Facility
Stormville, New York 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 letters of December 15, 17, 22 (2) and 25, each of which pertains to requests for records that you submitted under the Freedom of Information Law to various agencies of New York State government. You have requested with each letter that the Committee issue an opinion under the Law with respect to your application.

I would like to offer the following comments with respect to your correspondence.

First, among its various duties, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. However, the limited staff of the Committee makes it impossible to render an advisory opinion as a matter of course when an initial request for records is made.

Second, your December 25 letter to Commissioner Coughlin seeks information concerning the authorization for several actions taken as a public official. To the extent that records exist which are reflective of the Commissioner's authority to act in a particular manner, they are in my view available, for they would likely be found in various statutory provisions. However, if there are no records reflective of authority to take specific action, the Commissioner would not be required to create such records in response to a request made under the Freedom of Information Law [see Freedom of Information Law, §89(3)].

I regret that I am 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2325

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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[illegible]
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[illegible]

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 20, 1982

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

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:

As discussed during our conversation of January 14, I am responding to your letter of January 6 in which you requested an advisory opinion.

You outlined your efforts to obtain access to records pertaining to an inmate that you represent. To date, several requests have been made under the Freedom of Information Law to the Department of Correctional Services (DCS) in order to obtain the contents of records pertaining to your client, an inmate. The requests have apparently been sent to Mr. Rodney Moody, the inmate records coordinator of the Clinton Correctional Facility. However, both your original request to Mr. Moody and your appeal were denied. The basis for this denial was that you failed to reasonably describe the records sought.

In an effort to address the objections set forth by DCS, you submitted an additional request containing what you believed was a more specific description of the records in which you are interested. Nevertheless, a response was not apparently received until several weeks had passed; you believe that a failure to respond within five days constituted a violation of the Law.

I would like to offer the following comments with respect to your request for advice.

First, prior to a recent decision of the Court of Appeals, it had been the policy of the Committee to comment with respect to determinations rendered on appeal when there was disagreement with the determination. However, in Matter of John P. v. Whelan [____ NY 2d ____, (1981)], the Court questioned the Committee's authority to comment once a determination on appeal has been rendered. In the situation you described in your correspondence, however, the denial was based on an alleged procedural defect; in other words, in the opinion of DCS, you did not meet the initial threshhold requirement of reasonably describing the records you are seeking. Consequently, a substantive denial of your request under one or more of the eight categories of deniable records listed in §87(2)(a) through (h) of the Law was never considered. Therefore, it does not appear that it would be inappropriate to comment given the circumstances.

Second, on your behalf, I have contacted Mr. Moody in order to discuss the description he would consider to be reasonable. After discussing both of your requests with Mr. Moody, it is my opinion that the specificity he believes necessary goes beyond the language of the Law, i.e., that records be "reasonably described" [see §89(3)]. Mr. Moody's requirement of even more detail than that supplied in your second request would in my view unfairly place any applicant for records under the Freedom of Information Law in a "Catch-22" situation. Stated differently, if one agreed with Mr. Moody's contention, an applicant might be required to have prior knowledge of the specific contents of every record within a file without having been able to review the contents and without assistance from a person having custody of those records. I would like to point out, too, that the provisions of the Freedom of Information Law as originally enacted required an applicant to request "identifiable" records [see original Law, §88(6)]. That standard, however, was in my view changed to enable applicants to avoid exactly the kind of situation that you have encountered.

Additionally, Mr. Moody wrote in his January 11, 1982 letter to you that "your request is denied in that the records are not reasonably described and there are many portions of an inmate's file which are exempt from disclosure". In this regard, it is emphasized that the Freedom

of Information Law places the burden of reviewing records and determining rights of access upon an agency. The introductory language of §87(2), as indicated earlier, states that all records are available, except those records or portions thereof falling within one or more grounds for denial. Therefore, when an agency receives a request for a record, it is obliged to review the records sought in their entirety to determine which portions, if any, fall within the grounds for denial.

Third, you have expressed concern that the Department of Correctional Services has failed to respond within the five business days as required under the 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 Practice Law and Rules [Floyd v. McGuire, 437 NYS 2d 886 (1981)].

Lastly, in your request for an opinion, you referenced sections of the DCS regulations concerning access to inmate records. Specifically, an inmate and his or her counsel under §5.20 of the regulations promulgated by the Department of Correctional Services may inspect and copy inmate records. In my view, it appears that your request fulfills the requirements of the Freedom of Information Law, as well as those set forth in DCS regulations. Consequently, I feel unable to advise you further as to the manner in which you could provide a better description of the records contained in the files in question so as to overcome Mr. Moody's objection.

I hope 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: Mr. Rodney Moody
Mr. Ramon Rodriguez, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2326

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman
[illegible]

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 21, 1982

Thomas K. Noonan

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. Noonan:

I have received your letter of January 10 in which you sought to "appeal" a decision made by Mary Hays of the New York State Council on the Arts with respect to a denial of access to records under the Freedom of Information Law.

According to your letter, Ms. Hays' assistant, Ms. Laureen Mar, deleted portions of records without explaining either that deletions had been made or the rationale for so doing.

I would like to offer the following comments with respect to your inquiry.

First, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. Consequently, although this office has the capacity to provide advice, it does not render determinations on appeal following denials of access.

In this regard, however, I direct your attention to §89(4)(a) of the Freedom of Information Law (see attached), which specifies the procedure under which an individual may appeal a denial of access by an agency. 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".

Moreover, under the regulations promulgated by the Committee [see attached, §1401.7(b)], when records are denied, the:

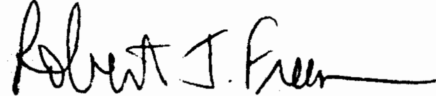
> "[D]enial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number".

Second, assuming that records were requested and not all of those sought were made available, I believe that the records access officer was responsible for indicating that records or portions thereof had been withheld. In addition, the records access officer is responsible for providing reasons for a denial [see regulations, §1401.2 (b)(3)(ii)].

Lastly, I have no knowledge of the contents of the records in which you are interested or the nature of the records that may have been withheld. As such, I could not conjecture as to the sufficiency of the denial or rights of access. However, should you decide to appeal in accordance with §89(4)(a), which is quoted above, that provision requires that a denial on appeal be "fully explained" in writing. Further, perhaps after reviewing the enclosed copy of the Freedom of Information Law, the basis for the denial may become evident due to your familiarity of the nature 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

cc: Mary Hays
Laureen Mar

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2327

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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[struck out]
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GILBERT P. SMITH, Chairman
[struck out]

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 21, 1982

Mr. Jeff Converse

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. Converse:

I have received your letter of January 5 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you have been involved in a dispute with a board of fire commissioners. In this regard, you believe that a series of communications have been prepared regarding you within the Locust Valley Fire District and between the District and the legal division of the New York City Fire Department, your employer. Your initial question is the extent to which the Freedom of Information Law applies to the Locust Valley Fire District and its Board of Fire Commissioners. The second question pertains to rights of access to communications between the Fire District and the New York City Fire Department.

I would like to offer the following comments with respect to the issues that you have raised.

First, the scope of the Law is determined in part by the definition of "agency" appearing in §86(3) of the Freedom of Information Law. Specifically, "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".

In my view, a fire district or its board of fire commissioners would constitute an "agency" subject to the Freedom of Information Law in all respects. This contention is based upon §174(6) of the Town Law, which states in relevant part that "a fire district is a political subdivision of the state and a district corporation..." Since the definition of "agency" includes within its scope a "public corporation", and since the definition of "public corporation" as defined in §66 of the General Construction Law includes a "district corporation", a fire district in my view clearly falls within the definition of "agency" and is required to comply with the Freedom of Information Law.

It is also noted that the state's highest court held in 1980 that a volunteer fire company is also subject to the Freedom of Information Law, even though it may be a not-for-profit corporation [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)].

Second, 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 fall within one or more grounds for denial appearing in §87(2)(a) through (h) (see attached, Freedom of Information Law).

Based upon your description of the records in which you are interested, it appears that only one of the eight grounds for denial would be 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.

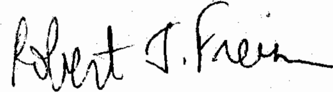
In my view, records transmitted between officials of the Fire District would constitute "intra-agency" materials. Records transmitted between two agencies, such as the Fire District and the New York City Fire Department, would constitute "inter-agency" materials. Nevertheless, as indicated above, statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations found within those materials must be made available, unless a different ground for denial may properly be cited. Consequently, if a request is made and denied on the basis that the records consist of inter-agency or intra-agency materials, it is suggested that an appeal be made in accordance with §89(4)(a) of the Law. In such an appeal, it should be stressed that portions of such materials may be available as of right.

Third, you asked whether a request under the Freedom of Information Law could also be directed to the New York City Fire Department. Based upon the explanation of the definition of "agency" described in previous paragraphs, the New York City Fire Department is also in my opinion clearly an "agency" subject to the Law. Consequently, it, too, would have the obligation of responding to a request made under the Freedom of Information Law.

Lastly, in some instances, collective bargaining agreements contain provisions regarding rights of access to personnel records on the part of the individuals to whom the records pertain. Often contractual provisions may grant rights of access to individuals that exceed those provided by the Freedom of Information Law. It is suggested that you review the provisions of any collective bargaining agreement that affects you, for it may contain provisions which would enable you to view your personnel file, notwithstanding the provisions of the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Attachment

cc: Locust Valley Fire District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2328

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman
~~DOUGLAS L. TURNER~~

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 22, 1982

Mr. Richard 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 January 4 concerning a request directed to the Keshequa Central School District under the Freedom of Information Law.

Specifically, you have been attempting to gain access to the "contract salary figures" that appeared on pay stubs for particular School District employees for designated pay periods. Apparently you discussed the matter with Mr. Roger Ryan, Business Manager of the School District, who informed you that information contained on the pay stubs would if disclosed result in "an invasion of privacy". You also indicated that I had previously explained to you that contract salary figures were available.

Once again, I have contacted Mr. Ryan on your behalf. As indicated in my earlier letter to you of December 28, neither the District nor Mr. Ryan maintains possession of check stubs. According to Mr. Ryan, the check stubs are distributed to District employees with their paychecks. In short, if the District does not have possession of check stubs, they would fall outside the scope of the Freedom of Information Law and could not be made available by the District.

In addition, even if the check stubs were in possession of the District, I would agree with Mr. Ryan that much of the information contained on check stubs might justifiably be withheld on the ground that disclosure would constitute a "unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. The types of information contained on check stubs were described in my earlier letter and need not be reiterated here.

Lastly, I would like to resubmit to you the suggestion made in the letter of December 28. As stated in that letter, §87(3)(b) of the Freedom of Information Law requires that each agency, including a school district, shall maintain:

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

The provision quoted above specifies that each agency must maintain a payroll record containing the salaries of every District employee. As such, to the extent that the payroll records envisioned by §87(3)(b) continue to exist with respect to the employees and the pay periods that you identified, those records would be available and would indicate the "contract salary figures" for the individuals in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Roger Ryan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 26, 1982

Mr. Wallace Nolen

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. Nolen:

I have received your letter of December 23, which did not reach this office until January 7. Please accept my apologies for the delay in response.

You have requested advice with respect to difficulties you encountered in making a request under the Freedom of Information Law to the Town of Greenburgh Police Department. According to your letter, you believe that the Town of Greenburgh has implemented certain procedures that are in violation of the Freedom of Information Law. In particular, you inquired with respect to the Town's request form, the reasons for denial of your request, the Town's appeal procedure, and as indicated during our phone conversation on January 11, the Town's fee of five dollars per page.

I would like to offer the following comments with respect to the questions you raised.

First, you indicated that the Greenburgh Police Department informed you that your request for records cannot be made by letter, but rather that it must be submitted on a prescribed form. 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 must 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.

Second, in the denial you received from Chief Singer of the Greenburgh Police Department on December 21, 1981, you were notified that:

> "the information you asked for in your original request is 'overbroad' and is prohibitive if it does not identify the specific record".

In this regard, the Freedom of Information Law indicates that an applicant for records need not identify the records sought with particularity; again, all that the Law requires is that a request "reasonably" describe the records sought. An agency may ask for additional identifying information if a request appears to be overly broad. However, if Mr. Singer believes that an individual must specifically describe the records sought, that, in my opinion, would require a more stringent standard than that of reasonably describing records as stated in the Law.

Enclosed is a copy of the regulations promulgated by the Committee which govern the procedural aspects of the Law. Of relevance to your question is §1401.2(b)(2), which states that one of the duties of a designated records access officer is to "Assist the requester in identifying requested records, if necessary".

It is emphasized that the Freedom of Information Law places the burden of reviewing records and determining rights of access upon an agency, such as the Police Department of the Town of Greenburgh. Moreover, the introductory language of §87(2) of the Law states that all records are available, except those records or portions thereof falling within one or more grounds for denial. Therefore, when an agency receives a request for a record, even if the greater detail is needed, it is in my view obligated to review the records sought in their entirety in order to determine which portions, if any, fall within the grounds for denial.

Third, you expressed concern regarding what you consider to be a two-step appeal procedure required by the Town of Greenburgh. On the application form you were required to complete, there is a statement indicating that an appeal of a denial must be directed to the Chief of Police. However, the Chief of Police in his December 21 letter informed you that a local law requires you to direct another appeal to the Town Board. In my view, a two-step appeal procedure following an initial denial would violate the Freedom of Information Law. Section 89(4)(a) of the 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".

In view of the foregoing, there is no statutory authority of which I am aware by which a municipality can include an additional appeal level by enactment of a local law.

Fourth, with respect to the five dollar per page fee for photocopying assessed by the Town of Greenburgh, 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 Town of Greenburgh, 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, for instance. Therefore, if, for example, the fee of five dollars per photocopy is based upon an ordinance or local law adopted by the Town of Greenburgh, that fee is in my opinion 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.

It is suggested that you attempt to determine the basis for the fee in question 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).

I hope 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

Attachments

cc: Chief Donald Singer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2338

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 27, 1982

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 both of your items of recent correspondence. In this regard, I would like to offer the following comments with respect to the difficulties you have encountered in contacting various law enforcement agencies in New York.

First, you wrote that you have attempted to obtain various items in the nature of personal belongings believed to be in the possession of a correctional facility at which you were previously housed. Although I would like to assist you, it is noted that the jurisdiction of the Committee is limited to providing advice regarding rights of access to records under the Freedom of Information Law. Consequently, the only advice that I can offer is that you write the Rikers Island facility and submit a request under the Freedom of Information Law for any documents that might contain information regarding personal effects. If there is a property clerk, you might inquire directly to that person regarding the status or location of your personal effects.

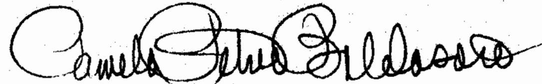
Second, as Mr. Freeman indicated in his letter of December 31, the problems you have encountered with respect to your conviction may require legal advice which is also beyond the jurisdiction of the Committee. Perhaps a representative of Prisoners' Legal Services or a legal aid group could provide you with assistance of that nature.

Lastly, it appears that you may be confused with regard to the responsibility of the Committee. As intimated earlier, the Committee issues written and oral advisory opinions under both the Freedom of Information and Open Meetings Laws. Although the Committee advises units of government in New York State as to the implementation of the Open Meetings Law, it does not conduct or attend meetings of the thousands of public bodies that exist throughout the state.

I regret that I am unable to be of any further assistance.

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-2331

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 27, 1982

Frank L. Schneider

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. Schneider:

As you are aware, I have received your letter of January 14 as well as the correspondence attached to it.

You have sought advice regarding a request directed to the Clerk of the Village of Sands Point. The first area of the request concerned analyses of water supplied by the Village of Sands Point. In response, the Clerk indicated that copies of the report would be made available upon payment of a fee for photocopying. The second aspect of your request, according to your letter to the Clerk of December 17, is:

> "[I]f private use of village-owned vehicles is reported by the Village to the I.R.S. as part of the compensation to individuals using such vehicles".

In response to that inquiry, the Clerk wrote on December 28 that:

> "[V]illage vehicles are provided for personnel when it is deemed by the Trustees to be for the Village in its best interests, purposes and responsibilities".

It appears that your request for advice has arisen due to the response offered by the Clerk. In this regard, I would like to offer the following comments and suggestions.

First, your inquiry to the clerk was presented in the form of a question rather than a request for records. It is emphasized that the Freedom of Information Law is a statute under which an individual may request records; it is not in my view a vehicle under which an individual can request "information" that may not exist in the form of a record or records.

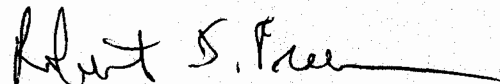
Second, as intimated above, it is also noted that an agency, such as a village, is not generally required to create records in response to a request [see attached, Freedom of Information Law, §89(3)]. As such, if a request is made for "information" that does not exist in the form of a record or records, an agency would not be obliged to create a new record in response to a request.

And third, as suggested during our telephone conversation, it is recommended that you resubmit a new request that would conform with the requirements of the Freedom of Information Law. Stated differently, rather than raising a question, perhaps a request could be made for records. For instance, a request might be made for records or portions thereof reflective of the private use of village owned vehicles.

Lastly, enclosed for your consideration is a pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door". 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

Attachment

cc: Evan Stephens, Village Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2332

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 28, 1982

Mr. Alexander Rogers

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. Rogers:

I have received your letter of January 18 in which you requested an advisory opinion regarding the Freedom of Information Law.

Having reviewed your letter as well as the correspondence attached to it, you requested to inspect and/or copy:

> "1. General Bills & Highway Bills---for Town of Deerfield, for October, November, December...1981 (Bills-Vouchers-Dates)
>
> 2. Total amount of Revenue Sharing Funds received by the Town of Deerfield ...1981; and Disbursements of said Revenue Sharing Funds. (Bills-Vouchers-Dates)
>
> 3. Total cost of Renovation Work, for the Town of Deerfield Municipal Bldg. (Bills-Vouchers-Dates)".

In response, although the Acting Town Attorney assured you that records would be made available upon your specification of the documents in which you are interested, he indicated that the Town is not required to compile documents on your behalf.

I would like to offer the following comments and observations with respect to your correspondence.

First, I agree with the statement of the Town Attorney that, as a general rule, an agency, such as the Town, need not create records or a "compilation" on behalf of an applicant. In this regard, I direct your attention to §89(3) of the Freedom of Information Law (see attached), which states that, unless otherwise provided, an agency is not obligated to create a record in response to a request.

With regard to your request, items 2 and 3 involve the "total" amounts of revenue sharing funds and costs of renovation of the Town Municipal Building. Under the circumstances, if there is no record indicating a "total", the Town would not be required to create such a record on your behalf. Nevertheless, individual records regarding revenue sharing or the cost of renovation, for example, would in my view be available and might enable you to compile the figures yourself to create a total.

Second, I do not believe that the Freedom of Information Law requires you to "specify" the records in which you are interested. It is noted in this regard that the Freedom of Information Law as originally enacted stated that an applicant for records was required to seek "identifiable" records [original Freedom of Information Law, §88(6)]. Nevertheless, one among a series of amendments to the Law that became effective on January 1, 1978, provides that an applicant must "reasonably describe" the records in which he or she is interested [see §89(3)]. Consequently, I do not believe that an individual must identify with particularity the record or records in which he or she is interested. Once again, a request for records "reasonably described" should be sufficient.

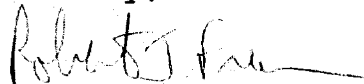
Lastly, the Town Attorney made reference to the Town Supervisor, who acts as the chief financial officer of the Town and maintains custody of bills and vouchers. In this regard, I would like to direct your attention to §29 of the Town Law, which in subdivision (4) states that the town supervisor:

> "[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."

Based upon the provision quoted above, it is suggested that you might want to resubmit a request.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Vincent Rossi, Sr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-713
FOIL-AO-2333

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 28, 1982

Warren J. Grossman

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. Grossman:

I have received your letter of January 19 in which you requested an advisory opinion. As you are aware, this office has received numerous copies of documents regarding requests that you have made under the Freedom of Information Law and directed to the Village of Scarsdale.

Your first question is whether an applicant must pay for copies of minutes of an open meeting. In this regard, I direct your attention to §87(1)(b)(iii) of the Freedom of Information Law, which states that an agency may assess a fee 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".

As such, it is clear that an agency may assess a fee for photocopying records of up to twenty-five cents per photocopy.

Your second question is whether, assuming that an applicant may be assessed a fee for photocopying minutes, a village may selectively charge for copying minutes "of some meetings and not for others". In response to this question, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations regarding

the procedural implementation of the Law. In turn, §87(1)(a) of the Law requires the governing body of each public corporation, such as a village, to promulgate rules and regulations in conformity with those developed by the Committee. The Committee's regulations include provisions regarding the establishment of rules under which an agency may assess fees. From my perspective, if the Village of Scarsdale has adopted rules under the Freedom of Information Law that establish fees for photocopying, such rules should be carried out uniformly.

Your third question is based upon your understanding that you are:

> "...entitled to minutes consisting of a record or <u>summary</u> of all motions, proposals, resolutions, and any matter formally voted upon the the vote thereon" (emphasis yours).

In conjunction with your statement, you have asked whether you may request a "summary", or whether you must "take a full set of working 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 other matter formally voted upon and the vote thereon."

In my opinion, the language quoted above provides basic requirements concerning the contents of minutes. Further, even though minutes need not consist of a verbatim transcript or contain reference to all comments made during an open meeting, more information than that required by §101(1) may be present in minutes. Moreover, I believe that a public body has the option of creating either a record or a summary. Consequently, if the minutes consist of a lengthy record and no summary is prepared, there would be no obligation on the part of a public body to create a summary in lieu of or in addition to other records.

I would also like to point out that an applicant for records may inspect accessible records at no cost. The fees that may be assessed arise only when an individual seeks photocopies of records. Therefore, it may be worthwhile in some instances to inspect records in order to determine whether you want a document copied in its entirety, or whether portions of a document may be sufficient for your purposes. For instance, if after reviewing a document of thirty pages, you find that you are interested only in ten pages, you may request photocopies of the ten pages, thereby diminishing the fees that might otherwise be assessed.

I would also like to offer the following comments with respect to certain aspects of the other correspondence that you have forwarded to the Committee.

First, it is important to note that the Freedom of Information Law is an access to records law. Stated in another way, the Law grants access to certain existing records and is not a vehicle under which a unit of government must provide "information" that does not exist in the form of a record or records. Further, §89(3) of the Law states in relevant part that, as a general rule, an agency is not required to create records on behalf of an applicant. As such, if an individual requests "information" that does not appear in the form of a record or records, the agency in receipt of the request would not be obliged to create a new record on behalf of the applicant.

Second, at the beginning of §89(3), the Law states that an applicant must submit a request for records "reasonably described". Based upon the quoted language, it is clear that an applicant for a record need not identify with particularity the record in which he or she is specifically interested. However, a request is in my view required to "reasonably describe" the records sought in order to enable the agency to determine which record or records are being requested.

Third, there appears to have been an implicit reference to the requirement that an agency create a list of records. Here I direct your attention to §87(3)(c) of the Freedom of Information Law, which states that an agency shall maintain:

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

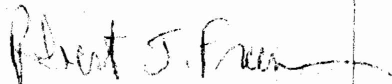
Based upon the language quoted above, I do not believe that an agency is required to create an index that identifies all of its records individually; on the contrary, as the Law indicates, I believe that a subject matter list must identify categories of records in possession of an agency, by subject matter, in reasonable detail.

Lastly, there also appears to be a question regarding the time limits within which an agency is required to respond to a request. 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 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:ss

cc: Lowell Tooley
James Emery

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2334

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 28, 1982

Mr. Vincent G. Sheridan

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. Sheridan:

I have received your letter of January 20, in which you described difficulties encountered with respect to the capacity to examine records in possession of Greene County.

Specifically, you wrote that the County requires "identification of a particular item, which is not readily possible", as well as the agency or department of interest and "specifics". You indicated that it was your intention to inspect the voucher journal in order to determine the manner in which public monies are being spent. In this regard, you stated that the journal cannot be examined in its entirely and that the clerk will make available only the vouchers that you identify by agency.

I would like to offer the following comments with regard to the situation that you described.

First, in my opinion, an applicant for records need not identify the records sought with particularity. In this regard, it is important to note that the Freedom of Information Law in its original form required an applicant to request "identifiable" records [see original Freedom of Information Law, §88(6)]. The problem that arose under that standard was exactly what you have described, i.e., that records sought could not be identified unless there

was some specific knowledge of a recordkeeping system and the exact nature of records in possession of an agency. As a consequence, one among a series of amendments to the Freedom of Information Law that became effective on January 1, 1978, involved a provision that now requires an applicant to merely "reasonably describe" the records in which he or she is interested. Therefore, it is in my opinion clear that an applicant for records need not "identify" the records sought in detail; on the contrary, I believe that any request made in writing that "reasonably describes" the records sought should be sufficient.

In addition, I would like to point out that the records in which you are interested have long been available under a different provision of law. Specifically, §51 of the General Municipal Law has for decades granted access to:

> "All books of minutes, entry or account, and the books, vills, 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..."

Further, §89(6) of the Freedom of Information Law provides that:

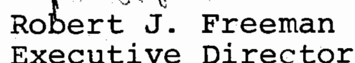
> "[N]othing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

Stated differently, if a provision of law other than the Freedom of Information Law grants access to records, nothing in the Freedom of Information Law could be cited to diminish rights of access granted by those provisions.

In order to ensure that the advice provided herein is available to Greene County, a copy of this opinion will be sent to the County 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: County Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2335

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 1, 1982

Michael J. Baum

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. Baum:

I have received your letter of January 27.

According to your letter, you are attempting to determine the nature of investments of particular banks and specifically whether those banks invest in corporations doing business in South Africa. You indicated that representatives of the bank contacted thus far have been unwilling to provide the information, and "hinted" that the information is not public.

Your questions are whether I am aware of successful efforts to obtain the information in which you are interested and whether there is a governmental agency that would keep records of the investments of savings and commercial banks in New York.

I would like to offer the following comments with respect to the situation that you have described.

First, the Freedom of Information Law defines "agency" in §86(3) to include "governmental" entities. As such, although the banking industry may be regulated in part by the state, in my opinion, banks are part of the private sector, would not constitute governmental entities and, therefore, fall outside the scope of the Freedom of Information Law. Consequently, rights of access granted by the Freedom of Information Law would not be applicable to banks.

Second, I contacted the Office of Counsel of the State Banking Department on your behalf. In this regard, I was informed that, in some instances, annual reports submitted to the Banking Department contain references to the types of investments in which you are interested. It is stressed, however, that the degree of detail included in annual reports apparently differs. While some banks might include the specificity in which you are interested in their reports, others may not.

Nevertheless, in order to request copies of annual reports, it is suggested that you write to:

New York State Banking Department
Thrift Division
Two World Trade Center
New York, New York 10047

If you would prefer to telephone the Thrift Division, it can be reached at (212)488-2383.

I hope that 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- 2336

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 1, 1982

Genevieve Berman

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. Berman:

I have received your thoughtful letter of January 22, in which you wrote that a request directed to the Rockland Psychiatric Center, the subject of an earlier advisory opinion, had been properly addressed. Your letter also raises questions regarding the Freedom of Information Law.

In brief, your correspondence relates to a request for responses made to Rockland Psychiatric Center's canvas of eligibles for the position of medical technologist. In this regard, you wrote that an eligible list had been issued on October 30, 1981. However, in response to your request, Peter Bittle, the access officer for Rockland Psychiatric Center, wrote that your request for canvas responses would be denied on the ground that disclosure would constitute "an unwarranted invasion of personal privacy". You have contended contrarily that, since you already possess the eligible list:

> "...the only additional information to be yielded by responses to that canvas would be DATES OF RESPONSE, I fail to see that personal privacy would be invaded by such disclosure. Is it possible that personnel privacy is the actual issue" (emphasis yours)

You also raised a general question regarding the proper course of action in a situation in which a request is made under the Freedom of Information Law and ignored.

With respect to your first area of inquiry, it is noted that one of the grounds for denial appearing in 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" [see attached Freedom of Information Law, §87(2)(b)]. In my view, it may often be difficult to make determinations with respect to issues dealing with privacy. Since the Law permits an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy, I believe that it is clear that there must be instances in which disclosure would result in a permissible invasion of personal privacy. Nevertheless, often reasonable people may differ with respect to the effects of disclosure. For instance, one individual might view a specific item of personal information and contend that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy. An equally reasonable person, however, might view the same record and contend that disclosure would be innocuous. In such an instance, disclosure in the view of the second person might result in a permissible invasion of privacy.

Although I do not have the benefit of reviewing the record in which you are interested and, therefore, could not substitute my personal judgment in lieu of Mr. Bittle's, if indeed the only information that you would obtain by means of the record in question involves a date of response, it would in my view be questionable whether the ground for denial offered by Mr. Bittle was appropriately asserted.

Further, as indicated in the ensuing paragraphs, a denial may be appealed to the head or governing body of an agency. Under the circumstances, you might want to resubmit a request and appeal a denial of access to the person or body designated to determine appeals for the Office of Mental Health. Please note that an appeal may be made within thirty days of an initial denial of access [see attached, Freedom of Information Law, §89(4)(a)].

Your second question concerns a situation in which a request is "simply ignored".

In this regard, I would like to point out that the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, provide direction regarding the time limits for a response. Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations

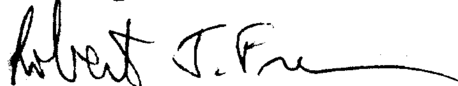
provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing 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. 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

Attachment

cc: Jamie Benfield
Peter Bittle

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2337

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

February 1, 1982

Paul J. Baroncelli, Esq.

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. Baroncelli:

I have received your letter of January 20, as well as the correspondence attached to it.

You have asked for a review of three requests made under the Freedom of Information Law that "are effectively being denied by the N.Y.S. Civil Service & Tax Departments..."

According to your correspondence, the issue is apparently the same with respect to each of the requests. Specifically, although information might exist reflective of that which you are seeking, the responses by the agencies indicate that there are no existing records that would be responsive to your inquiries. As a basis for your contentions that the information should be made available, you have cited the decision rendered in Zanger v. Chinlund, 106 Misc. 2d 86, 430 NYS 2d 1002 (1980).

I would like to offer the following comments and observations regarding the correspondence.

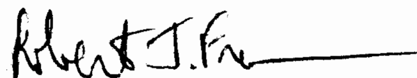
As you are aware, §89(3) of the Freedom of Information Law provides in part that an agency, as a general rule, need not create a record in response to a request. Consequently, if a request is made for "information" that does not exist in the form of a record or records, an agency would not in my view be obliged to create a new record on behalf of an applicant.

Second, in my opinion, the issues present in the Zanger case, supra, may have been somewhat different from the situation that you have described. As I understood the situation in Zanger, a request had been made for a voluminous amount of information, in terms of both the number of records and their contents. Questions were also raised regarding the specificity of the request and the degree to which records sought were "reasonably described" as required by §89(3) of the Freedom of Information Law. Unless I am mistaken, there was never a question regarding whether or not records existed in Zanger. Further, it is noted that an advisory opinion was prepared at the request of Ms. Zanger prior to the initiation of a judicial proceeding. One of the thrusts of that opinion (see enclosed) was that an agency in receipt of a request under the Freedom of Information Law is required to review records sought in their entirety to determine which portions, if any, may justifiably be withheld under one or more of the eight grounds for denial appearing in §87(2). Stated differently, in Zanger, the issue in my view dealt with the responsibility of an agency to review existing records to determine which portions, if any, could be withheld, notwithstanding the time and effort such a review might entail. In the case of the information in which you are interested, it appears, based upon the agencies' responses, that data contained within a series of records would have to be culled out of those records and prepared as a new record in order to present to you the "information" that you are seeking.

Under the circumstances, I could not conjecture as to the response that a court might offer with respect to your situation. On the one hand, it is possible that a court might conclude that an agency is not required to review or "research" numerous records in order to prepare or make available from those records the information that you are seeking. On the other hand, it is possible that a court might require the agency to review records falling within the categories of your request and produce copies of those portions of the records that you are seeking to the extent that no ground for denial would be applicable.

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

OML-AO-714
FOIL-AO-2338

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 2, 1982

Ms. Vivien Maisey
Adult Services Librarian
Haverstraw King's Daughters
Public Library
Haverstraw, New York 10927

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. Maisey:

I have received your letter of January 18, 1982.

You raised several questions with respect to my presentation before the Rockland County Librarians Association on January 20. In particular, you requested advice in six areas dealing with the Freedom of Information and Open Meetings Laws.

I would like to offer the following comments in response to the questions you raised. For purposes of consistency, I will limit my remarks under these two laws to records and meetings of a public library and assume that such a library would be subject to both the Freedom of Information and Open Meetings Laws.

First, you wrote that you are interested in the types of personnel information that are accessible under the Freedom of Information Law. As indicated during my discussion, there have been several judicial determinations on that subject. Those decisions indicate that, as a general rule, public employees enjoy a lesser right to privacy than any other identifiable group, for the courts have found that public employees must be more accountable than any other group. Moreover, the courts have held, in brief, 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 rather than an unwarranted invasion of personal privacy

[see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been held that records or portions thereof that are irrelevant to the performance of a public employee's official duties are deniable, for disclosure in such circumstances would result in an unwarranted invasion of personal privacy [see Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

With respect to specific information that may be requested under the Freedom of Information Law, it is suggested that an employee's identification, social security or retirement numbers likely have no bearing upon the manner in which the public employees to whom the numbers relate perform their official duties. Consequently, based upon extant case law, it appears that such information could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

On the other hand, items such as the name, title, salary and similar information are relevant to the manner in which public employees perform their duties. Consequently, I believe that those items must be made available upon request under the Freedom of Information Law.

It is also important to point out that §87(3)(b) of the Freedom of Information Law requires each agency to maintain a payroll record that identifies each employee of an agency by name, public office address, title and salary.

Another possible ground for denial relative to personnel records might be §87(2)(g), which permits 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 noted that the language cited 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. Materials that may be withheld under the cited provision might include memoranda containing advice, suggestions, recommendations and similar comments of an advisory nature.

Second, you have requested clarification with respect to a request made by telephone for information contained in a reference document known as a "criss-cross directory". If I understand the use of this directory, it appears that telephone requests for names and addresses of local residents are made to librarians, who are required to locate the directory information sought. Nevertheless, under §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. As such, it appears that there may be three options: a response may (but need not) be given by phone, you may require that a request be made in writing, or you may provide access to the directory at the library itself.

Third, you have requested information regarding circulation records. As I discussed during the meeting, Assembly bill number 5935-B has been introduced again in the Legislature. If this bill is enacted, it would make personally identifying information contained in library circulation records confidential.

Notwithstanding the status of the bill to which reference was made, it has been advised that circulation records may likely be withheld under §87(2)(b) of the Freedom of Information Law, which enables an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy (see attached, an earlier opinion on the subject).

Fourth, you have inquired as to the applicability of the Open Meetings Law to a "regular board of trustees meeting" as well as meetings of staff librarians. Additionally, you expressed concern that the taking of a vote during a meeting determines whether or not the Open Meetings Law applies. In my view, the meetings of public library trustees are subject to the Open Meetings Law, but meetings

of staff librarians of such a library would fall outside the scope of the Law. In this regard, §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".

In view of the definition, the board of a library, i.e., the trustees, would in my opinion constitute a "public body". Staff, however, would not in my opinion constitute an "entity" that deliberates, collectively, as a body.

Further, the definition of "meeting" appearing in §97(1) of the Open Meetings Law has been interpreted expansively by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the State's highest court, held that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes for the purpose of discussing public business. The decision specified that the Open Meetings Law and its definition of "meeting" are applicable whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottaway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, a meeting of a library board of library trustees would in my view be subject to the Open Meetings Law whether or not a vote occurs or is intended to be taken during a meeting.

Fifth, §99 of the Open Meetings Law requires that all meetings of a public body be preceded by notice. 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 posted 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 in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. As such, it is clear that notice must be given to the news media, and to the public by means of posting, prior to all meetings, whether regularly scheduled or otherwise. To reiterate, since staff meetings are not subject to the Open Meetings Law, such a group would not be subject to the notice requirements set forth in §99 of the Law.

Sixth, you made reference to remarks I made with respect to the requirements concerning minutes. Under the Law, each public body 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 other 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. 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, however, include reference to all motions, proposals, resolutions, matters voted upon, the date and the vote.

Therefore, any formal action taken by a public body such as a library board of trustees, must be reflected in the minutes of both the open and closed portions (i.e., executive sessions) of a meeting. Failure to record formal decisions of such public bodies could possibly result in confusion, particularly if the public body took action without documenting the authorization to do so. It is also noted that, to the extent that minutes of an executive session contain information falling within one of the eight categories of deniable records under the Freedom of Information Law, which I discussed in detail, they could properly be withheld.

Lastly, I am enclosing a copy of the lecture outline that you requested. If you have any further questions or need additional clarification, please feel free to call or write.

Thank you for your kind words regarding my presentation; I enjoyed the questions that were generated by your very lively group!

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2339

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

COMMITTEE MEMBERS

[illegible]MAS H. COLLINS
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 3, 1982

Mr. John Batts
81-A-6050
A Block - K-207
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. Batts:

I have received your letter of January 21.

In your letter, you explained your siutation with respect to sentencing and requested information regarding the work release program.

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. As such, the Committee does not maintain possession of records generally, such as those in which you are interested.

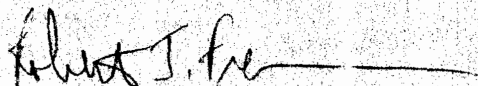
Nevertheless, I would like to offer the following suggestions.

First, the laws regarding the work release program for state correctional institutions are found in §§851 through 861 of the Correction Law. It is suggested that you review a copy of the Correction Law at your facility to become familiar with the applicable provisions of law. If you cannot obtain a copy of the Correction Law at your facility, please contact me and I will obtain copies of the appropriate provisions.

Second, the Freedom of Information Law requires the Committee to adopt regulations of a procedural nature. In turn, each agency, such as the Department of Correctional Services, is required to develop regulations consistent with those of the Committee. In this regard, I have enclosed a copy of the regulations regarding access to records promulgated by the Department of Correctional Services designed to implement the Freedom of Information Law. Please note that §5.20 specifically pertains to the examination of inmate records by inmates or their attorneys.

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

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2380

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 4, 1982

Mr. John Chronin 81A-4090
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

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. Chronin:

I have received your letter of January 29, in which you requested various records under the Freedom of Information Law. Specifically, you appear to be seeking access to information you believe is in possession of the Federal Bureau of Investigation (FBI), as well as information in possession of agencies of government in New York obtained from confidential informants which may pertain to yourself.

I would like to offer the following comments with respect to your request.

First, please be advised that the Committee on Public Access to Records is responsible for providing advice under the Freedom of Information Law. The Committee, however, does not have possession of records generally, such as those in which you are interested.

Second, it would appear that the records in question, to the extent that they exist, would likely be in possession of various state or federal law enforcement officials, including those to which you referred in your letter. As such, it is suggested that you renew your requests and direct them to the specific state and federal agencies believed to have possession of the records.

Third, I would like to point out that §87(2)(e)(iii) of the Freedom of Information Law permits an agency to withhold records compiled for law enforcement purposes

Mr. John Chronin
February 4, 1982
Page -2-

which, if disclosed, would "identify confidential information relating to a criminal investigation". Additionally, §87(2)(f) of the Law also authorizes an agency to withhold records or portions of records when disclosure would "endanger the life or safety of any person".

Fourth, with respect to information that may be in possession of federal agencies, such as the FBI, it is suggested that you direct your requests to the particular agencies in accordance with the federal Freedom of Information Act (FOIA).

I regret that I cannot be of any 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-2341

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 4, 1982

Robert E. Mills

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. Mills:

I have received your letter of January 21 as well as the correspondence attached to it.

According to your letter:

> "[F]or many years, the taxpayers who attended school board meetings in the Wm. Floyd School district, were given copies of the agenda, minutes and warrants. As of November 1981 access to warrants were denied to those who sought them. The excuse was 'We're trying to save money'".

You explained further that you "fear this denial is one way of keeping the public from knowing what is going on in the district".

Having reviewed your correspondence, I would like to offer the following comments.

First, while the School Board may have by means of policy distributed copies of an agenda, minutes and warrants to interested members of the public at its meetings, there is no provision of law of which I am aware, including the Open Meetings Law and the Freedom of Information Law, that would require the distribution of those documents at a

meeting. Further, while it may be common practice for many public bodies to distribute agendas at or prior to meetings, I know of no provision of law that requires that an agenda be prepared in advance of a meeting.

Second and perhaps most importantly, the Freedom of Information Law is a statute that grants access to certain existing records. As a general rule, §89(3) of the Law states that an agency, such as a school district, is not required to create a record in response to a request on behalf of an applicant.

In this regard, several of your requests contain inquiries involving information that may be derived from a number of records in possession of the School District, but that may not appear in any single record. In such a situation, the District would not in my view be required to review its records and prepare a compilation or total based upon information contained within a number of records. In the context of your correspondence, several requests involve the total interest on cash investments deposited with particular banks for specified periods. While records pertaining to the investments of the District would in my view be available, if no individual record exists with respect to the interest earned for a particular time period, I do not believe that the School District would be required to tabulate the amount of interest for that period in response to your request.

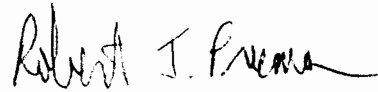
Lastly, I would like to emphasize that the District, pursuant to regulations promulgated by the Commissioner of Education, is required to follow prescribed rules regarding its financial accounting methods. Here, I would like to direct your attention to §170.2, involving financial accounting requirements of union free school districts, a copy of which has been enclosed for your consideration. Among the provisions of §170.2 is a requirement that a "note register" be kept in which the treasurer:

> "...shall record the dates of the resolutions authorizing notes; the types of notes; the dates on which notes are drawn; the numbers of the notes; the banks from which the money was borrowed; the amounts of the notes; the rates of interest; the dates of maturity; the dates the notes were paid, and, the amounts of principal and interest paid".
> [see §170.2(g)].

Similarly, §170.2 contains provisions requiring receipt forms, vouchers check forms, and similar aspects of financial accounting. The records envisioned by §170.2 would in my opinion be available under the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosure

cc: James Wright

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2342

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 5, 1982

Ms. Lucy Wrightington
Box 275 - Town Clerk's Office
South Otselic, New York 13155

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. Wrightington:

As you are aware, I have received your letter of January 18 in which you raised various questions with respect to the responsibilities and duties of a town clerk in making assessment records available to the public. In addition, you have asked whether an assessor must be present when assessment records are shown to the public. In this regard, Mr. Rankl, Assessor for the Town of Otselic called to discuss assessment records and requested a copy of this opinion.

I would like to offer the following comments with regard to the issues raised.

First, as Town Clerk, I believe that you are the legal custodian of all Town records. Section 30(1) of the Town Law states in relevant part that:

> "[T]he town clerk of each town:
>
> 1. Shall have the custody of all the records, books and papers of the town."

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 the Town of Otselic 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, §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, it is clear that any information "in any physical form whatsoever" constitutes a "record" subject to rights of access granted by the Law.

Fourth, 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 were available to the public, even though the cards were prepared by a third party, a private contractor. Therefore, in my view, records which identify property by block, lot, owner's name, address, sale price, etc., are available.

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) stated that documents such as an "assessor's workbook" or "field book" would also be a public record available under the Freedom of Information Law, §51 of the General Municipal Law and case law.

Fifth, you have requested information as to the accessibility of transfer or real property forms under §574 of the Real Property Tax Law (RPTL). 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."

On the basis of that provision, you would be authorized to withhold property transfer forms representative of properties transferred within the Town. You have written that such forms are "exempt from the freedom of information requirements." Section 87(2)(a) of the Freedom of Information Law enables an agency to withhold records or portions thereof which:

> "...are specifically exempted from disclosure by state or federal statute..."

Therefore, §574(5) of the RPTL appears to enable a clerk to withhold transfer forms. Nevertheless, despite the prohibition regarding disclosure described in the provision quoted above, if a person seeks to challenge an assessment by filing a grievance, in my view, the records 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 for transfer forms is made under this provision in conjunction with a grievance proceeding, the forms would, in my opinion, be available.

Sixth, it appears that there is confusion as to the existence of a requirement that an assessor must be present when a member of the public attempts to inspect assessment records. Certainly, if a member of the public needs additional information or clarification after a review of assessment records, an appointment could be made with the assessor at a mutually convenient time. However, under the Freedom of Information Law, access to records cannot be prohibited by limiting access to the occasions in which an assessor might be present. Additionally, there are no other statutory provisions of which I am aware which would mandate the presence of an assessor in the situation that both you and Mr. Rankl have described.

Seventh, questions also arose during my discussion with Mr. Rankl as to the extent to which physical access to records must be provided in accordance with the Freedom of Information Law. Part of the difficulty you may have experienced may be due to the facts that a records access officer has not yet been appointed in accordance with the requirements of the Freedom of Information Law. In this regard, the Committee on Public Access to Records, in accordance with the Freedom of Information Law, has adopted regulations which have the force and effect of law (see attached). Specifically, §1401.2(a) states in part that a governing body, such as a town board, must 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 responses to public requests for access to records."

Therefore, if, for example, a town board in its adopted regulations has designated a single records access officer, (which in many instances is a town clerk due to the duties imposed on a clerk by §30 of the Town Law), requests for records in possession of any unit within town government would fall within the scope of that person's responsibility, even if he or she does not have continuous physical possession of records sought.

Additionally, §1401.2(b) of the regulations sets forth the responsibilities of a records access officer. Although the records access officer must make records available for inspection, there is no requirement that a requester by allowed to search for or "browse" through records in a government office. In my view, access to records as envisioned by the Law involves the right to physically inspect requested records made available by a records access officer; it would not in my opinion include a physical search of records, unless authorized by the custodian of records.

It should also be noted that the responsibility of the town clerk as legal custodian of town records includes the reasonable protection of those records from theft, loss, defacement, etc. Therefore, the clerk can in my view impose reasonable restrictions on the inspection of records in order to ensure their safety. In this regard, I would like to point out that §175 of the Penal Law could be cited to impose criminal sanctions for tampering with public records.

Eighth, the issue of hours and times of inspection arose in my conversation with Mr. Rankl. Specifically, he inquired as to the number of hours per day that records must be available for public inspection. The Committee has recognized the difficulty smaller municipalities may have in providing access to records. Accordingly, §1401.4 states that:

> "(a) Each agency shall access requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

It should be noted, however, that adoption of a procedure to permit inspection by appointment must nonetheless comply with the required time limits for responses to requests.

With regard to time limits, §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.

Lastly, Mr. Rankl stated that on various occasions he has taken assessment records home. Apparently, situations arise in which he must review records at home, since the town hall may not be open. It was advised that, in my view, there is no statutory provision that would prohibit him from taking such records to his home. However, use of his home as a permanent repository for such records could cause concern with respect to their safety and compliance with the Freedom of Information Law. It was suggested that location of the records at a site other than the Town Hall should not in any way interfere with or limit rights of access under the Freedom of Information Law.

In sum, although it would not in my opinion be unreasonable for the assessor to remove records from the Town Hall on a temporary basis when he works with those records at his home, I believe that, as a general rule, the duties imposed by the Town Law and the Freedom of Information Law could be better fulfilled when such records are kept in your custody at the Town Hall.

I hope 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.

cc: Millard Rankl

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2343

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

February 8, 1982

Mr. Jeffrey Berdy

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. Berdy:

As you are aware, your letter of January 14, which was received by the Office of the Lieutenant Governor on January 27, 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.

According to your letter to the Lieutenant Governor, you requested records pertaining to yourself under the Freedom of Information Law from the New York State Department of Labor. However, the Department of Labor withheld the records on the basis of §537 of the Labor Law.

In my view, the response of the Labor Department was likely appropriate under the circumstances.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Department of Labor, 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.

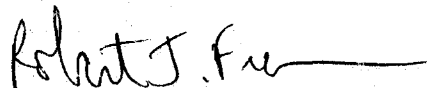
Relevant to your inquiry is §87(2)(a), which states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". One such statute that prohibits disclosure of particular records is §537 of the Labor Law. The cited provision states in relevant part that:

> "1. Use of information. Information acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provision of law. Such information insofar as it is material to the making and determination of a claim for benefits shall be available to the parties affected and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement.
>
> 2. Penalties. Any officer or employee of the state, who, without authority of the commissioner or as otherwise required by law, shall disclose such information shall be guilty of a misdemeanor."

As stated in the denial by the Department of Labor, §537 of the Labor Law prohibits disclosure, except under limited situations. If, after having reviewed the provisions quoted above, you believe that your situation falls within one of the exceptions under which records may be disclosed, it is suggested that you resubmit your request to the Department of Labor. In the request, you should indicate the reason or reasons for which you are requesting the records in conjunction with the situations described in §537 under which records may be disclosed to an employee.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Bennett Liebman
Ray Charles
Burton Landesman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2344

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 9, 1982

Mr. Frank Estrada

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. Estrada:

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

You have requested assistance with respect to the agency to which you should request copies of summonses issued by a Suffolk County police officer. Specifically, you wrote that you would like to inspect traffic tickets issued by one police officer on the same day in which you had received a traffic ticket.

I would like to offer the following comments regarding your inquiry.

First, I have contacted the Department of Motor Vehicles (DMV) in Albany on your behalf. Personnel responsible for the Department computers have advised me that certain municipalities in Suffolk County participate in an "Administrative Adjudicative System" with the DMV. Under that system, particular localities are required to send one copy of any summons that is issued locally to Albany, at which time the number contained on the summons is entered on a computer tape.

While the Albany DMV office believes that the municipalities subject to this system should retain copies of summonses for their records, that may not be the case in every situation. It is possible that this may explain why

the Suffolk County Police advised you to direct your inquiry for copies to Albany. Additionally, it appears that the method of computerization would not permit a search by means of an officer's name, for the information is tracked according to a numerical designation found on each summons. Apparently one would be able to seek tickets issued on a specific day for a particular person only by first obtaining the numbers of each summons.

As you may know, an agency is not required to create a record or listing that does not already exist. Therefore, in accordance with §89(3) of the Freedom of Information Law (see attached), the DMV would not be required to prepare a list of summonses issued by particular patrol officers.

Second, assuming that the localities have retained copies of the summonses in which you are interested, in my view, those copies should be available for inspection and/or photocopying under the Freedom of Information Law. The Freedom of Information Law states, in brief, that all records are accessible, except to the extent that records or portions thereof fall within specified categories of deniable information listed in the Law [see §87(2)]. Relevant to your inquiry is §87(2)(e), which provides that an agency may deny access to records or portions thereof that:

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

While traffic tickets may be compiled for law enforcement purposes, disclosure would not likely result in the harmful effects envisioned by the language quoted above. For example, the issuance of a traffic ticket rarely results in an investigation, and there would not likely be confidential informants, for a ticket is reflective of a single event.

Third, §370 of the General Municipal Law enables the legislative bodies of cities, villages, or towns to authorize the creation of traffic violations bureaus. Section 373 of the General Municipal Law provides that such bureaus "shall keep records of all violations which each person has been guilty, whether such guilt was established in court, or in the bureau, and also a record of all fines collected and the disposition thereof." If the locality which issued your ticket has a traffic violations bureau or is part of the Administrative Adjudicative System in conjunction with the DMV, it is possible that other persons who received tickets on the same day as you may be found in records of such bureau.

Fourth, if the records you are seeking are in possession of a town justice, they would likely be accessible pursuant to §2019-a of the Uniform Justice Court Act, which states that, as a general rule, all records and dockets in possession of a justice are accessible during reasonable hours.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2345

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 9, 1982

Mr. Richard Philip Berman

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. Berman:

I have received your correspondence regarding requests for records in possession of the New York City Housing Authority under the Freedom of Information Law.

Specifically, you have requested advice with respect to the possibility of enforcing the Freedom of Information Law "within the federal courts".

I would like to offer the following comments with respect to your inquiry.

First, since the New York City Housing Authority is an entity of government of New York State, it would be subject to the provisions of the New York Freedom of Information Law. Consequently, if the legal action contemplated pertains to the enforcement of the Freedom of Information Law, a suit would not be brought in the federal courts, but rather in New York State courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules.

Second, I have contacted the New York City Housing Authority on your behalf, and as indicated in the correspondence, the Authority has offered to make records available to you. Apparently, the fees for photocopying the records determined to be accessible would be $26.25. Nevertheless, I was informed that you did not obtain the records determined to be available. In this regard, it is suggested that before considering legal action, you avail yourself of the records that have been made available by the Authority.

Lastly, with respect to the substance of your inquiry, I regret that I cannot offer advice regarding the specific nature of the records sought, for a determination on appeal has already been rendered by the Chairman of the Authority. In view of a decision rendered by the state's highest court, it appears that the authority of the Committee to advise might exist only in those situations in which a final determination on appeal has not been rendered. Since a final determination on appeal was rendered by Chairman Christian, it would not likely be appropriate to provide advice at this juncture regarding the specific 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2346

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 10, 1982

Ms. Eileen Webb

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. Webb:

I have received your letter of January 27, in which you requested an address concerning where you might write to obtain your "dossier".

It is noted at the outset that there is no single agency or central source that would maintain all records pertaining to an individual. On the contrary, there may be many agencies that maintain information regarding you. For example, a birth certificate pertaining to you might be in possession of both the clerk of the municipality in which you were born, as well as the Bureau of Vital Records at the State Health Department. Similarly, if you were involved in a traffic accident, an accident report might be found at the local police department and the State Department of Motor Vehicles. Nevertheless, those two types of records would not in all likelihood be in a single location or at the offices of a single agency.

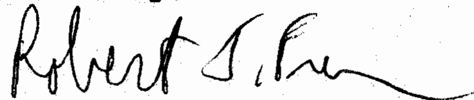
In order to request records under the Freedom of Information Law, your inquiries should be directed to the state or local agencies that have possession of records pertaining to you. As in the cases mentioned in the previous paragraph, you would request records by writing directly to the agencies maintaining them.

In terms of the procedure, the Freedom of Information Law states that an agency may require that a request be made in writing, and that the request "reasonably describe" 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 that govern the procedural implementation of the Law, and an explanatory pamphlet on the subject that may be particularly useful to you, for it contains sample letters of request and appeal. In addition, I have enclosed a copy of special report prepared approximately a year ago that deals with the treatment of personal information in possession of state 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO - 2342

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 10, 1982

Edgar Correa #81-A-3837
Attica Correctional Facility
P.O. Box 149
Attica, New York 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. Correa:

I have received your letter of January 21 in which you requested assistance in obtaining records.

According to your letter, you are currently serving a term based upon a conviction for several crimes. You have contended that the trial was not fair, for the court would not permit you to prove your innocence. Specifically, although your attorney requested Brady materials including 911 tape recordings pertaining to a particular date, the tape recordings provided were for a different date.

I would like to offer the following comments regarding your inquiry.

First, it is possible that the tape recordings in which you are interested might no longer exist. Often schedules are devised under which agencies dispose of particular types of records within specified time limits. If, for example, the time limit for the destruction of tape recordings by the ~~New York City~~ Police Department is one year, the tapes in which you are interested might no longer exist.

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

Under the circumstances, it would appear that there could be two grounds for denial. One such ground for denial might be §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". It is possible that the recordings, to the extent that they exist and identify individuals other than those involved in your proceeding, might be withheld under the cited provision, for there might be strong privacy considerations of others unrelated to your proceeding.

Another ground for denial of possible relevance is §87(2)(e), which states that an agency may withhold 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".

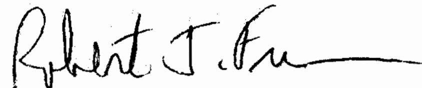
The language quoted above indicates that it is based largely upon potentially harmful effects of disclosure. From my perspective, it is questionable whether a 911 tape recording could be considered a record "compiled for law

enforcement purposes", for it might be viewed as a record compiled in the ordinary course of business. Assuming, however, that §87(2)(e) would be applicable, it is possible that those aspects of the tape recording pertaining to your case would not, at this juncture, result in the harmful effects of disclosure by its language, for a trial has already been held and judicial proceedings have been completed.

~~Lastly,~~ I would like to point out that you may have difficulty obtaining the information in question, assuming that it exists, due to a decision in which it was held that the Freedom of Information Law cannot be used by a defendant if that individual had not employed all of the discovery devices available to him under Article 240 of the Criminal Procedure Law [see attached, People v. Billups, Sup. Ct., Queens Cty., Criminal Term, NYLJ, July 31, 1981]. As such, it is suggested that you discuss the matter with your attorney.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Attachment

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-716
FOIL-AO-2348

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

February 10, 1982

Mr. John H. Cosgrove

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. Cosgrove:

I have received your letter of January 27, as well as the correspondence attached to it. You have requested my comments regarding the materials.

Having reviewed the correspondence, the nature of the controversy is, from my perspective, somewhat unclear.

Nevertheless, I would like to offer the following observations with respect to the contents of the materials.

First, with respect to minutes, it is noted that amendments to the Open Meetings Law that became effective on October 1, 1979, provided new and specific direction regarding the time limits within which minutes of meetings must be compiled and made available. Specifically, §101 (3) of the Open Meetings Law states that minutes of open meetings must be compiled and made available within two weeks of such meetings; minutes of executive sessions reflective of action taken during an executive session must be compiled and made available within one week of an executive.session. Prior to the effective date of the amendments, the Committee recognized that, in some instances, a public body might not meet within one or two weeks, as the case may be, to approve minutes. As a consequence,

in a memorandum distributed to all public bodies in the state in August of 1979, it was suggested that if minutes cannot be approved within the specified time limits, they be marked as "draft", "unofficial" or "non-final", for example. By so doing, the provisions of the Law would be followed while, concurrently, members of the board would be given a measure of protection by informing the public that minutes are subject to change.

Second, with regard to the general time limits for responses to requests under the Freedom of Information Law, §89(3) of the Freedom of Information Law dn §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)].

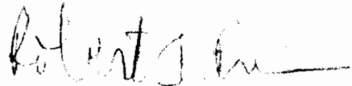
Third, one of your requests dealt with copies of notices of meetings or cancellation of meetings. While some public bodies might keep copies of notices, it is possible that such records might not in every instance exist. For instance, if a meeting is called on short notice, it is possible that the only method of complying with the Open Meetings Law would involve a telephone call to the local news media. In such a case, there might be no copy of a notice.

In a related vein, §99(3) of the Open Meetings Law provides that the notice specified by the Law should not be construed to require a legal notice. In the case of a legal notice, an entity would be required to publish specific information in a newspaper. Under the Open Meetings Law, however, while notice must be given, there is no requirement that a public body pay to publish a notice in a newspaper. Moreover, there is no requirement imposed upon a newspaper that receives notice to publish that notice. As such, instances have arisen in which a public body may have complied with the Open Meetings Law in all respects, but in which no notice is published in a newspaper.

Lastly, with respect to a letter addressed to you by Alan Koppel, Chairman of the Canaan Planning Board, I would agree that if a procedure has been adopted whereby requests for records should be directed to the Town Clerk as records access officer, such a procedure should be followed.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Alan Koppel
Keith Flint
Eugene Carlough

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2349

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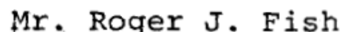
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 11, 1982

Mr. Roger J. Fish



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. Fish:

I have received your letter of January 22 and the correspondence attached to it.

The materials concern your efforts in gaining access to lists of voters of certain school districts. You specified in your letter as well as the correspondence that the reason behind your requests involves research for a study of public schools and public education.

I would like to offer the following comments with respect to the records sought and your correspondence with particular school districts.

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.

Under the circumstances, it does not appear that any of the grounds for denial could likely be cited as a basis for withholding the records sought. One ground for denial of possible relevance 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) lists five examples of unwarranted invasions of personal privacy. One of those examples deals with lists of names and addresses and 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..." [see Freedom of Information Law, §89(2)(b)(iii)].

Since you have indicated that the lists would not be used for commercial or fundraising purposes, I believe that they would be available [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (Sept. 5, 1980); New York Teachers Pension Associates, Inc. v. Teachers' Retirement System of City of New York, 71 AD 2d 250 (1979)].

Second, as you may be aware, the Freedom of Information Law is applicable to existing records. As a general rule, §89(3) of the Law states that an agency need not create a record in response to a request. Therefore, if, for example, a voter list does not exist, a school district would have no obligation to create such a list on your behalf.

You have indicated that, in lieu of a list, you would be willing to obtain information contained on voter registration cards. In this regard, one of the districts contacted indicated that it had such cards in its possession, but that in your view, the cost of photocopying each of those cards would be prohibitively expensive.

As you intimated, there may be a solution which, with the cooperation of the school district, would result in a lesser fee. Specifically, since you are interested only in obtaining information appearing at the top of a card, a number of cards could be placed only with the tops appearing for the purpose of photocopying. By so doing, even if items appearing on only ten cards could be photocopied, the cost of reproduction could be substantially reduces. All that I can recommend is that you appeal to the District and stress that the information is needed for research purposes in an effort to assist public education and that it should be made available in the manner suggested in a spirit of cooperation.

Third, one of the items of correspondence indicates that you directed a request to a particular school district on November 24, but that no response had yet been received. I would like to point out in this regard that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed 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 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)].

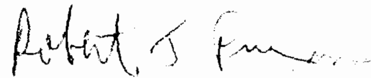
In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Lastly, one of the items of correspondence appears to indicate that a school district is willing to make the information sought available, but only if you can visit the district offices. From my perspective, if an applicant for records is willing to pay the costs of photocopying and mailing, a request that records be mailed to the applicant should be honored.

In order to provide the advice appearing in this opinion to the school districts that you have identified, copies will be forwarded to those districts.

I hope that 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: Anthony A. Lapinsky
C. P. Tufano
Richard P. Little
Alden A. Larson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2350

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 11, 1982

Mr. Larry Barnes
76-C-595
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 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. Barnes:

I have received your letter of January 29 in which you requested assistance in your efforts to gain access to records.

According to your letter, one of your requests was directed to the County Court House in Ithaca with respect to court records. You were informed that the only means by which you could obtain the records sought would involve a court order. In this regard, since I have no knowledge of the nature of the records in which you are interested, I could not offer any specific direction. However, I would like to point out that the Freedom of Information Law specifically excludes the courts and court records from its coverage. Therefore, while many court records might be accessible under provisions of the Judiciary Law and various court acts, those records would not be subject to the provisions of the Freedom of Information Law.

Your second area of inquiry concerns a letter from a district attorney indicating that you would be required to pay twenty-five cents per page for copies of records in his custody. While a district attorney's records are subject to the Freedom of Information Law [see New York Public Interest Research Group v. Greenberg, Sup. Ct., Albany Cty., (April 27, 1979)], §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge up to twenty-five cents per photocopy. Therefore, it would appear that the fees that the district attorney seeks to assess would be completely legal and in compliance with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2351

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 18, 1982

Scott Martelle
The Post-Journal
15 West 2nd Street
Jamestown, NY 14701

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. Martelle:

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

According to your letter, in November of 1981, "the deputy city clerk and acting director of development were each served a summons and complaint by the Chemical Bank of New York". You wrote further that the City's "Development Department" had been involved in a grant application by the developer for a project. Although the grant was awarded by the federal Department of Housing and Urban Development to the City, you indicated that the City refused to turn the money over the developer on the ground that he allegedly failed to meet certain criteria. Following the City's refusal to distribute the grant money, the developer went bankrupt and the bank lost its money.

The Post-Journal requested a copy of the summons and complaint, which was withheld pursuant to a denial rendered by the Corporation Counsel, Richard L. Sotir.

Based upon the facts as you presented them and the response to your request by the Corporation Counsel, I believe that the summons and complaint should be available under the Freedom of Information Law.

The first ground for withholding offered by the Corporation Counsel is based upon a contention that "[Neither a summons or complaint is a record as such is defined by Section 86 of the Public Officers Law". In this regard, very simply, if the City of Jamestown, through any of its officers or employees, maintains possession of the summons and complaint or copies thereof, I believe that those documents would fall within the definition of "record" appearing in §86(4) of the Freedom of Information Law. The cited provision 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 all encompassing scope of the language quoted above, it is reiterated that if the City has possession of the summons and complaint, those documents would in my view fall within the scope of the definition of "record" and, therefore, be subject to rights of access granted by the Freedom of Information Law.

The second ground for withholding the summons and complaint is based upon a contention that disclosure would constitute an unwarranted invasion of personal privacy, for, according to the Corporation Counsel,

> "...an individual who is neither an officer nor an employee of the City of Jamestown or the Jamestown Urban Renewal Agency is also named in the proceeding".

Unless I am mistaken, many of the details of the controversy that surrounds the summons and complaints have for some time been known to the public. Moreover, it would appear that numerous public documents would exist regarding the grant application and which identify parties to which reference might be made in a summons and complaint. If that is so, it would in my view be difficult to justify a denial on the

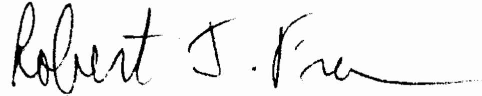
ground that disclosure would result in an "unwarranted invasion of personal privacy". Further, it appears that the parties to the proceeding are likely corporate entities rather than individuals. Again, if that it so, it is difficult to envision how such records could justifiably be withheld under the privacy provisions of the Freedom of Information Law.

The third ground for withholding is based upon a contention that the summons and complaint have been referred to a particular law firm, which will be defending the City in the proceeding. As a consequence, it has been argued that disclosure would violate §4503 of the Civil Practice Law and Rules regarding the attorney-client privilege. Although I would agree that communications between City officials and their attorney would fall within the scope of the attorney-client privilege and would therefore be exempt from disclosure under §87(2)(a) of the Freedom of Information Law, the summons and complaint were transmitted to the City by a party that is not a client of the City's law firm. In my view, a distinction should be made between the privilege as it applies to communications between the City and its attorney related to the summons and complaint and the proceeding generally, as opposed to the application of the privilege to the summons and complaint itself. If the summons and complaint were transmitted to the City by a third party which would not have an attorney-client relationship with the City's attorney, I do not believe that the attorney-client privilege could be claimed as a ground for denial.

The last ground for denial is based upon procedural contentions involving the Civil Practice Law and Rules. In all honesty, I have no expertise with respect to issues regarding the accomplishment of service. Nevertheless, whether or not service has been properly accomplished is in my view irrelevant under the circumstances. The issue in my opinion is whether the City maintains possession of the summons and complaint. If the City does indeed have possession of a summons and complaint, once again, I believe that such documents would constitute "records" subject to rights of access granted by the Freedom of Information Law. Further, as intimated above, it does not appear that there are any grounds for denial appearing in the Freedom of Information Law that could justifiably be cited to withhold the records in question.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Richard L. Sotir, Jr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2352

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

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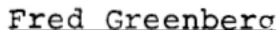
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 19, 1982

Fred Greenberg



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 letter of February 1 in which you requested an advisory opinion regarding requests that you have directed to the New York City Board of Education.

As noted in my earlier letter to you of December 9, the Committee has the authority only to advise; it has no power to compel compliance with the Freedom of Information Law or otherwise require an agency to make records available. Further, it is reiterated that, with respect to some aspects of your request, it is possible that records might not exist. As you are aware, the Freedom of Information Law does not require an agency, such as the Board of Education, to create records in response to a request [see Freedom of Information Law, §89(3)].

I would like to point out that the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, contain prescribed 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 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)].

If a determination to deny access on appeal is rendered, or if an appeal is unanswered within the statutory time limit, seven business days, I believe that an applicant for records would have exhausted his or her administrative remedies and may initiate a proceeding under Article 78 of the Civil Practice Law and Rules [see Matter of Floyd v. McGuire, Police Commissioner, City of New York, Sup. Ct., New York Cty., March 19, 1981, 437 NYS 2d 886]. Further, although the burden of proof in an Article 78 proceeding generally falls upon a member of the public, the burden is the opposite under the Freedom of Information Law. Section 89(4)(b) of the Freedom of Information Law requires that the agency that denied access to the records has the burden of proving that the records in fact fall within one or more of the eight grounds for denial appearing in §87 (2)(a) through (h) 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2353

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 19, 1982

Bartley J. Costello, III
Hinman, Straub, Pigors
& Manning, P.C.
90 State Street
Albany, NY 12207

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. Costello:

I have received your letter of February 1 in which you sought a review of a request directed to the Division of the Budget and advice regarding rights of access to the information in which you are interested.

In brief, you have requested information regarding the distribution of salary increases within particular classes of employees as well as documents that led to decisions to withhold salary increases.

I would like to offer the following comments with respect to your inquiry.

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 Division of the Budget, 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 is emphasized that the Freedom of Information Law is an "access to records" law. Stated differently, as a general rule, an agency is not required to create a record or records in response to a request for

"information" [see Freedom of Information Law, §89(3)]. Therefore, although the information in which you are interested might exist by means of a number of sources, if, for example, as in the case of your second area of your request, no record exists that identifies a supervisor to whom an employee reports whose salary was withheld, an agency would have no obligation to create such a record on behalf of an applicant. If, however, an agency chooses to prepare records in response to a request, it may do so, for there is nothing in the Law that would preclude an agency from creating a new record based upon information in its possession.

Third, assuming that records reflective of the information sought do exist, I believe that two grounds for denial might be of possible relevance.

One of the grounds for denial in the Freedom of Information Law involves records the disclosure of which would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)]. However, under the circumstances, it would appear that the cited provision could not be employed as a basis for withholding salary information. While the provisions pertaining to privacy often involve the making of subjective judgments, the language of the Freedom of Information Law as well as judicial interpretations indicate that information regarding salaries of public employees is generally available.

For instance, §87(3)(b) of the Law requires that each agency maintain a payroll record consisting of the name, public office address, title and salary of all officers or employees. As such, an increase (or absence thereof) in an employee's salary could be detected by means of a review of payroll records required to be compiled by agencies. Therefore, it would appear that salary information regarding particular employees would if disclosed result in a permissible rather than an unwarranted invasion of personal privacy. Moreover, it has been held on several occasions that records regarding 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, Oct. 30, 1980].

The other ground for denial of possible relevance would in my view be §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..."

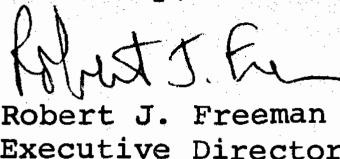
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, it would appear that salary information would fall within the scope of "statistical or factual tabulations or data" and, therefore, would be available under §87(2)(g)(i). Nevertheless, I believe that inter-agency or intra-agency communications consisting of opinions, advice, suggestions, recommendations and the like could justifiably be denied, for such records would not fall within the scope of the three areas of accessible information listed in §87(2)(g)(i) through (iii).

In this regard, the last area of your requested involved "all documents which led to each decision to withhold a salary increase in whole or in part". If the records leading to decisions to withhold a salary increase could be characterized as inter-agency or intra-agency materials, and if those documents are essentially advisory in nature, rather than statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations, those documents could in my opinion be withheld under §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

cc: William Mulrow

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2354

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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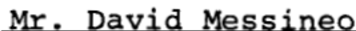
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 22, 1982

Mr. David Messineo


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. Messineo:

I have received your letter of February 2. Please accept my apologies for the delay in response.

According to your letter, you recently requested a copy of a map in possession of the Chenango County Clerk. You indicated that the map was less than nine inches by fourteen inches and that it could be reproduced by means of an ordinary office photocopier. You were informed, however, that the charge would be one dollar per photocopy.

You have asked for an advisory opinion regarding the fee of one dollar and whether the maximum fee that may be charged is twenty-five cents per photocopy.

In this regard, I direct your attention to §87(b)(iii) of the Freedom of Information Law, which 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."

In view of the language quoted above, an agency may charge no more than twenty-five cents per photocopy up to nine by fourteen inches, unless there is some other provision of law that permits an agency to assess a higher fee.

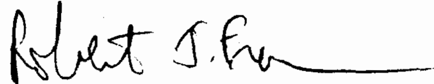
If, for example, Chenango County has passed a local law enabling the clerk to charge one dollar per photocopy for maps, the fee that you were assessed would in my view be valid. Further, in some instances, county clerks are required to assess fees based upon other provisions of law, such as the Civil Practice Law and Rules. For example, §8021(a)(7) of the Civil Practice Law and Rules states that a county clerk is entitled:

> "[F]or preparing and certifying a copy of any paper or instrument filed or recorded, one dollar for each page or portion thereof..."

If the quoted provision of the Civil Practice Law and Rules was applicable, the clerk was permitted to assess a fee of one dollar 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:jm

cc: County Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-717
FOIL-AO-2355

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 22, 1982

Frank A. Kreidler, Esq.
Lake Worth Utilities Authority
Legal Department
City Hall
7 North Dixie Highway
Lake Worth, Florida 33460

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. Kreidler:

As you may be aware, your letter of February 8 addressed to Attorney General Abrams 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 Law.

In brief, your question is whether there is any provision of the New York State Constitution, statute, judicial interpretation or opinion "that recognizes an attorney-client privilege exemption" under the Freedom of Information or Open Meetings Laws.

Based upon statutory law as well as case law, it has been advised that communications between a municipal attorney and his or her client, a municipal board or official, would be privileged when certain circumstances are present.

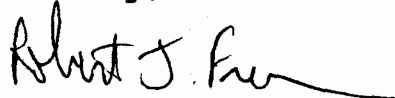
With respect to the Freedom of Information Law, the first ground for denial in that statute involves records that are "specifically exempted from disclosure by state or federal statute" [see Freedom of Information Law, §87(2)(a)]. In this regard, §4503 of the Civil Practice Law and Rules makes confidential communications between an attorney and a client. Consequently, it has been advised by this office and held judicially for approximately a century that records communicated pursuant to an attorney-client relationship are specifically exempted from disclosure by state statute and, therefore fall outside the scope of rights of access granted by the Freedom of Information Law.

Under the Open Meetings Law, there is an exemption similar to that found in the Freedom of Information Law which provides that the Open Meetings Law does not apply to "matters made confidential by federal or state law". Once again, since §4503 of the Civil Practice Law and Rules makes communications between an attorney and a client confidential, when such communications involve a municipal attorney and a client, such as a municipal board, and when an attorney provides legal advice and is acting in his or her capacity as an attorney, it has been advised that such communications are confidential under state law and therefore would be exempt from the provisions of the Open Meetings Law.

I have enclosed for your consideration copies of the Freedom of Information Law and the Open Meetings Law, as well as advisory opinions written in the past that pertain to the subject 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

Encs.

cc: George Braden

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2356

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 22, 1982

Mr. Joel Klein

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. Klein:

I have received your letter of January 25 and apologize for the delay in response.

I would like to offer the following comments regarding the problems you have encountered with respect to your request for records from the New York City Board of Education.

In my previous letter to you of January 15, I suggested that you indicate your willingness to the Deputy Records Access Officer of the Board to assist her in locating the records in which you are interested. However, you notified me that your offer of assistance was rejected.

It now appears that your initial request under the Freedom of Information Law will not be answered until after the time periods for response set forth in the Law have expired. Therefore, as I suggested in my earlier letter, one option would be to appeal on the ground that your request was "constructively" denied.

Finally, as we have discussed in the past, if a final denial is rendered on appeal, you could commence an Article 78 proceeding. If you decide that you do not wish to pursue a remedy in court, it would appear that you must wait for the response given by the 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

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2357

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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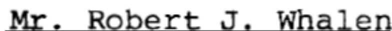
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 22, 1982

Mr. Robert J. Whalen


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. Whalen:

I have received your correspondence of February 2. Please accept my apologies for the delay in response.

In brief, you have raised a number of questions regarding rights of access to records of the Brentwood Fire District.

I would like to offer the following comments and observations regarding the issues that you have raised.

First, I believe that a fire district is an "agency" subject to the Freedom of Information Law. Section 174(6) of the Town Law states that "a fire district is a political subdivision of the state and a district corporation..." In this regard, the Freedom of Information Law defines "agency" in §86(3) to include any "public corporation". Since §66 of the General Construction Law defines "public corporation" to include a "district corporation", I believe that a fire district is an "agency" subject to the Freedom of Information Law in all respects.

Second, one of the issues raised involves a failure to respond to your requests by the District. Here I would like to point out that the provisions of the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, prescribe time limits within which an agency must 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 day 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 amy 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, having reviewed the correspondence, it appears that Mr. Schwarz, the Records Access Officer for the Board of Fire Commissioners, appropriately acknowledged receipt of your request and informed you that you would be notified within approximately a week of your opportunity to examine and make copies of records. As such, I believe that his response was consistent with the requirements of the Law and the regulations.

A third issue involves a deduction from a check which was made due to an alleged "mistake". You asked that the Fire District explain the nature of the mistake, and your question is whether you were entitled to the

reasons for the deduction from your paycheck. Here I would like to point out that the Freedom of Information Law is an access to records law; it is not a statute that requires an agency to respond to questions or create records if none exist [see Freedom of Information Law, §89(3)]. As such, if no records regarding the "mistake" exist, the District would have no obligation to create such records in response to your inquiry. However, if records of a statistical or factual nature exist regarding the deduction, they would in my view be available under §87(2)(g)(i), which grants access to "statistical or factual tabulations or data" found within inter-agency or intra-agency materials.

A fourth question is whether the Fire District can require you to make copies requested under the Freedom of Information Law. Section 89(3) of the Freedom of Information Law requires that an agency shall "upon payment of, or offer to pay" the appropriate fees, provide copies of accessible records. As such, I believe that the Law imposes a requirement upon agencies to prepare photocopies of accessible records if the appropriate fees are paid. Unless I am mistaken, in a letter to you dated January 25, Mr. Schwarz offered copies of accessible records at the rate of twenty-five cents per photocopy. I am not sure that Mr. Schwarz intended to require you to make photocopies; rather, it appears that photocopies would be made if you seek them.

Fifth, you asked whether the records access officer is required to publish "set office hours" during which records may be requested and made available. Here I direct your attention to §1401.4 of the Committee's regulations, which states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly upon for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Lastly, as [illegible], [illegible] copies of the Freedom of Information [illegible] laws.

[illegible] Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: [illegible] Williams [illegible]

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2358

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 22, 1982

Mr. Steven Rogers
New York Public Interest
Research Group, Inc.
5 Beekman Street - Rm. 1000
New York, NY 10038

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. Rogers:

As you are aware, I have received your correspondence of February 9 in which you requested an advisory opinion regarding a denial of access to records by the Town of North Hempstead.

According to your request of January 19 you are seeking:

> "...all correspondence between the Town of North Hempstead and the Sea Crest Construction Corp., and between the Town and any other contractors or subcontractors working on the Town's Shredder-Baler facility. I would also like access to Town copies of correspondence exchanged between these contractors and subcontractors and Leonard S. Wegman, Inc."

In a denial, Howard Sinnott, Deputy Town Attorney, wrote that:

> "[Y]our application for access must be denied. This correspondence involves some contracts which are the subject of pending and possible litigation. Any documents prepared in contemplation of preparation of such

> litigation are privileged. Other documents which were not prepared in preparation or contemplation of litigation are still privileged as intra-agency materials which are not final in nature or do not contain final determinations, but merely contain recommendations for action by the Town. As you may know, the case of Sea Crest Construction Corp., vs. Stubing, 442 N.Y.S. 2d 130 (2d Dept. 1981) holds these documents to be intra-agency materials."

I would like to offer the following comments regarding the situation.

First, the case of Sea Crest Construction Corp., supra, may yet, to the best of my knowledge, be appealed to the Court of Appeals. Therefore, it would be inappropriate to comment with respect to any of the records in which you are interested that might be the subject of the Sea Crest litigation.

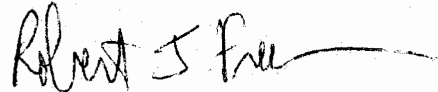
Second, it appears, however, that some of the records that you have requested may be distinguished from those sought in Sea Crest. Specifically, it appears that records involving communications between the Town and contractors or subcontractors, as well as correspondence between those contractors and Leonard S. Wegman, Inc., are different from those requested in Sea Crest. If I am mistaken, I would appreciate hearing from you or the Town, which will receive a copy of this opinion.

Third, it would appear that the records regarding contractors that you have requested would not fall within the scope of the exception regarding inter-agency and intra-agency materials [see Freedom of Information Law, §87(2)(g)] which was found to be applicable with respect to materials communicated between the Town and a consulting firm in Sea Crest. If the thrust of the decision in Sea Crest is based upon the notion that a consulting firm employed by a municipality is charged with the responsibility of advising, and therefore that its communications with the Town could be considered intra-agency in nature, communications between the Town and contractors or among contractors would apparently fall outside the scope of the ground for denial offered in Sea Crest. As such, I do not believe that the decision rendered in Sea Crest would be applicable to the records in possession of the Town which are not the subject of the Sea Crest litigation.

Fourth, while I would agree that records prepared for litigation might be considered either "intra-agency" materials or perhaps exempt under the provisions of §3101 of the Civil Practice Law and Rules, other materials related to litigation would not in my view fall within the scope of the two aforementioned grounds for denial. Stated differently, even though records might relate to litigation, if they do not consist of inter-agency or intra-agency materials, and if they were not prepared for litigation, but rather in the ordinary course of business, it appears that such records would be subject to rights of access granted by the Freedom of Information Law [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; and Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234].

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Howard Sinnott

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2359

162 WASHINGTON AVENUE, ALBANY, NEW YORK 1223
(518) 474-2518, 279

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 23, 1982

Mr. Jack McAndrew

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. McAndrew:

I have received your letter of February 20 in which you, once again, requested a copy of a determination on appeal made by the Port Jervis School District in response to a request made by Mr. Robert Sandy.

In terms of background, you wrote that Mr. Sandy submitted a request for minutes of a particular meeting of the School Board on December 30. You indicated that the request was denied and that Mr. Sandy appealed the denial on January 5. You have requested a copy of the appeal as well as the District's determination regarding Mr. Sandy's inquiry.

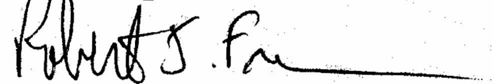
As I indicated to you last week, having reviewed the Committee's files regarding appeals, I do not believe that any records regarding Mr. Sandy's appeal have been forwarded by the School District to this office. In my view, however, the issue is apparently moot, for the Superintendent of Schools, Dr. Patrick R. DiCaprio, granted access to the records in response to the appeal on January 7.

Nevertheless, I believe that the Freedom of Information Law requires that copies of appeals and the determinations that follow, even if such determinations reverse an initial decision to withhold, are required to be sent to the Committee. That is the only method by which the Committee has the capacity to determine whether an agency

complies with the Freedom of Information Law in a procedural sense by informing the Committee of its determinations, as well as in a substantive sense regarding the bases for withholding records. As stated in §89(4)(a) of the Freedom of Information Law, when in receipt of an appeal, "each agency shall immediately forward to the committee on public access to records a copy of such appeal and the determination thereon." From my perspective, even if a determination on appeal results in a grant of access to an individual who had been initially denied, the agency is nonetheless required to transmit copies of appeals and determinations to the Committee. Again, however, since Mr. Sandy has been given an opportunity to obtain the records sought, it appears that the issue has become moot.

I hope that I 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. Patrick R. DiCaprio

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-721
FOIL-AO-2360

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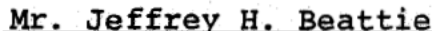
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 25, 1982

Mr. Jeffrey H. Beattie



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. Beattie:

I have received your letter of February 3. Please accept my apologies for the delay in response.

Your letter concerns a request directed to the Town Clerk of the Town of Lake Luzerne regarding minutes of meetings of the Lake Luzerne Planning Board and Zoning Board of Appeals. In response, the Clerk indicated that she did not maintain such records and that tapes were on file in the Office of Zoning Enforcement. You wrote further that a zoning ordinance of the Town indicates that minutes of proceedings "shall immediately be filed in the Office of the Town Clerk and shall be a public record".

I would like to offer the following comments with respect to your inquiry.

First, the Freedom of Information Law requires the Committee to promulgate regulations governing the procedural aspects of the Law [see attached, Freedom of Information Law, §89(1)(b)(iii)]. In turn, §87(1)(a) requires that the governing body of each public corporation, such as a town and its board, promulgate uniform regulations regarding all agencies within that public corporation in conformity with the Committee's regulations.

In this regard, §1401.2 of the Committee's regulations requires that the governing body designate one or more records access officers responsible for dealing with requests made under the Freedom of Information Law. From my perspective, if the Town Clerk is the designated records access officer, she would be responsible for locating and obtaining the records in which you are interested on your behalf.

Second, I would like to point out that §30 of the Town Law states that the town clerk is the legal custodian of all records. Consequently, although the town clerk might not have physical custody of specific records, the clerk would nonetheless have legal custody and responsibility for such records.

Third, if you have correctly cited a provision of the zoning ordinance of the Town of Lake Luzerne, minutes of meetings of the Zoning Board of Appeals would be required to be kept and made available the town clerk.

Fourth, with respect to minutes generally, §101(1) of the Open Meetings Law states that:

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

Although it has been held judicially that a tape recording of an open meeting is a "record" subject to rights of access granted by the Freedom of Information Law [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], it is in my view doubtful that a tape recording alone could be considered as "minutes" of a meeting. While a tape recording might often be used as an aid in transcribing or preparing minutes, I do not believe that the tape recording would be a substitute for what might ordinarily be characterized as minutes of a meeting. If my contentions are accurate, I believe that the tape recording would be insufficient and that written minutes of meetings of the Planning Board and the Zoning Board of Appeals should have been kept in addition to the tape recordings.

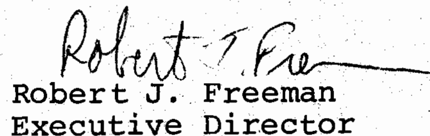
And fifth, it is important to note that §87(3)(a) of the Freedom of Information Law requires that each agency, including a planning board or a zoning board of appeals, shall maintain:

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

As such, the Freedom of Information Law imposes an affirmative duty upon public bodies to prepare a record indicating the manner in which each member of a public body voted in every instance in which a vote is taken.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2362

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

February 25, 1982

Mr. Lawrence J. Wyetzner

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. Wyetzner:

I have received your letter of February 4. Please accept my apologies for the delay in response.

Your letter seeks to bring to my attention problems that you have encountered with respect to the time within which the New York City Board of Education has responded to a series of requests that you directed to the Board under the Freedom of Information Law.

I would like to offer the following comments regarding your inquiry.

First, having reviewed your request of August 26, obviously the request involves a voluminous amount of information. Moreover, it is possible that in some cases the information might not exist in the form of a record or records. In this regard, §89(3) of the Freedom of Information Law states in part that an agency, such as the Board of Education, is not, as a general rule, required to create a record in response to a request. As such, in some instances, if you have requested information that does not exist in the form of a record or records, the Board of Education would not be required to create or prepare records reflective of the information on your behalf.

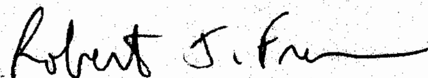
Second, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can 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)].

Third, although the Board of Education may have exceeded the time limitations described above, I have discussed the matter on several occasions with various representatives of the Board and believe that the Board's employees attempt in good faith to respond to requests as expeditiously as possible.

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-722
FOIL-AO-2363

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

February 26, 1982

Thomas R. Olson
Qualley, Larson & Jones
P.O. Box 407
609 1/2 First Avenue North, Suite 206
Fargo, North Dakota 58107

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. Olson:

As you are aware, I have received your letter of January 19. Please accept my apologies for the delay in response.

You have requested an advisory opinion with respect to the application of the Freedom of Information Law to the statutory colleges of Cornell University and, in particular, the New York State Colleges of Agriculture and Life Sciences and Veterinary Medicine. Apparently, you have been in contact with officials of both the State University of New York and Cornell University; you have been advised by Mr. Thomas Santoro, Associate General Counsel at Cornell University, that Cornell is not subject to the Freedom of Information Law and does not constitute an "agency" as defined in §86(3) of the Freedom of Information Law.

As noted during our phone conversations, the Committee on Public Access to Records is authorized to render advisory opinions under the Freedom of Information and Open Meetings Laws. However, it has no authority to compel an agency to make records available or otherwise comply with those statutes. Consequently, the following comments should not in any way be construed as binding upon yourself or any other party.

First, in my view, the primary question is whether the statutory colleges of Cornell University fall within the definition of "agency" as it appears in the Freedom of Information Law. Section 86(3) of the Law defines "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state..." (emphasis added).

As we discussed, Holden v. Board of Trustees of Cornell University [440 NYS 2d 58, aff'd 80 AD 2d 378 (1981)] held that the Cornell Board of Trustees is subject to the Open Meetings Law when it deliberates with respect to the four statutory colleges administered by Cornell under the supervision of the State University of New York. Although the court found that such activities of the Board of Trustees fell within the scope of the Open Meetings Law, it did not determine whether the records regarding statutory colleges would be subject to the Freedom of Information Law. It is emphasized that §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..." (emphasis added).

From my perspective, a possibly crucial distinction between the definition of "agency" in the Freedom of Information Law and "public body" in the Open Meetings Law involves the restriction to "governmental" entities in the case of the former, as opposed to "any" entity in the latter. Whether a court would equate these two phrases in view of the activities performed by Cornell with respect to the statutory colleges is as yet undetermined.

Second, the difficulty in determining whether or not an entity is "governmental" in character was recognized by the Court of Appeals in Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)]. In that case, the State's highest court found that records of a volunteer fire company,

a not-for-profit-corporation, providing fire protection services to a municipality, are subject to the Freedom of Information Law. However, the Court stated that:

> "[F]or not only are there expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (Westchester News v. Kimball, supra, at 581).

The Court of Appeals disagreed with the argument of the volunteer fire company that it should not be subject to the Freedom of Information Law because it did not constitute an "organic arm of government". The extent to which there may be similarities or analogies that can be drawn between the Kimball holding and the factual situation which you have described is in my view conjectural.

Third, the statutory obligations of the four statutory colleges apparently involve a governmental function that Cornell performs for and under the supervision of the State University of New York. Having discussed this matter with Ms. Carolyn Pasley, Associate Counsel for the State University, it appears that Cornell is not generally required to transmit records generated from its administration of the statutory colleges to the State University system, other than financial records specifically required by §§5711, 5712, 5714 and 5715 of the Education Law. However, if Cornell transmits records of the type you are seeking, those records would in my view likely be available under the Freedom of Information Law, for it is undisputed that the State University system is an "agency" subject to the Freedom of Information Law.

Fourth, if you are unsuccessful regarding your request to Cornell, it is possible that some of the information you are seeking may be available from Cornell under other legislative directives, such as those to which Mr. Santoro alluded in paragraph three of his January 7, 1982 letter, a copy of which you enclosed for my review. It is noted that §5712(1) of the Education Law requires the New York State College of Agriculture and Life Sciences to disseminate

information by means of "publication of bulletins and reports". Additionally, to the extent that any of the statutory colleges of Cornell receive federal funding to conduct research and investigation, it is possible that records reflecting the results of those studies may be available to you under relevant federal statutes or 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

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Carolyn Pasley
Thomas Santoro

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-723
FOIL-AO-2364

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 1, 1982

Marilyn Adams
County Reporter
Times-Union
55 Exchange Street
Rochester, NY 14614

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. Adams:

I have received your letter of February 7. Please accept my apologies for the delay in response.

According to your letter, in which you requested an opinion regarding rights of access to a report of an advisory committee:

> "...the committee was named by County Manager Lucien A. Morin to decide how to spend $1 million on security measures in downtown Rochester. Once the committee had approved its recommendations, we could not obtain a copy until Morin had seen them. County Attorney Jack Doyle argued the committee was ad hoc, not standing, and its recommendations were not final agency policy".

Although you now have possession of the report in question, you have requested an advisory opinion in order to preclude similar situations from occurring in the future.

In my view, the issues that you have raised involve the provisions of both the Freedom of Information and Open Meetings Laws and the manner in which those provisions have been interpreted, and I would like to offer the following comments regarding the two statutes.

First, a decision rendered by the Appellate Division, Fourth Department, dealt with similar issues in conjunction with the meetings and records of entities created by the Mayor of the City of Syracuse [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. In terms of background, questions consistently arose under the Open Meetings Law as originally enacted concerning the scope of the Law with respect to committees, subcommittees and similar advisory bodies. However, in 1979, the definition of "public body" was altered to include entities that "conduct" public business, including committees, subcommittees and similar bodies. In Syracuse United Neighbors, the issues surrounded entities created by an executive, and the Court found that such entities fell within the definition of "public body" [see Open Meetings Law, §97(2)] and, therefore, are subject to the Open Meetings Law.

Based upon the facts provided in your letter, the committee designated by the County Manager would in my opinion be a "public body" subject to the Open Meetings Law. Further, as you are likely aware, the Open Meetings Law is based upon a presumption of openness and requires that the deliberative process of public bodies be conducted open to the public, except to the extent that an executive session may properly be called in conjunction with the provisions of §100(1)(a) through (h).

Consequently, although the County Attorney may have contended that the committee is ad hoc, as opposed to a standing committee, its status as an ad hoc committee is in my view of no moment; on the contrary, based upon the Syracuse United Neighbors decision and the facts that you presented, I believe that it is a public body required to comply with the Open Meetings Law in all respects.

A second issue raised in the Syracuse United Neighbors case dealt with minutes of the meetings of the bodies created by the Mayor. The Court found that the documents of the entities in question were records of an "agency" as defined by §86(3) of the Freedom of Information Law. Although minutes were prepared, the court determined that they were "clearly made without contemplation of public exposure" and therefore were remitted to the lower court for in camera review to determine the extent to which the contents should be redacted. Based upon the direction provided by the Appellate Division, it is in my view clear that minutes were required to have been compiled and made available by an advisory committee, such as the committee which is the subject of your inquiry.

In this regard, §101 of the Open Meetings Law concerns minutes of public bodies 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.
>
> [M]inutes shall be taken at executive sessions of any action that it 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".

I would conjecture that recommendations made by the committee in question would be reflective of material contained in motions, proposals, or resolutions. If that is so, even though the actions of the committee might be considered as recommendations, it appears that they would nonetheless be required to be contained within minutes. Further, the deliberations that led to the adoption of the recommendations would in my view have been required to be open to the public, except to the extent that an executive session could appropriately have been convened.

With respect to rights of access to the report, it would appear that only one ground for denial under the Freedom of Information Law would be applicable. However, that ground for denial could likely be cited as a basis for disclosure of the documentation in question, either in whole or in part. 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..."

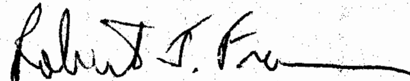
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

To the extent that the report contains "statistical or factual tabulations or data", I believe that it would be available, unless some other ground for denial could justifiably be cited. Moreover, while the recommendations adopted by the committee in question might not constitute the final determination by the County, they would likely reflect the committee's final determinations. In this regard, the Appellate Division, Fourth Department, appears to have adopted the advice of the Committee on Public Access to Records in terms of the scope of rights of access to "final determinations" under §87(2)(g)(iii). In brief, the Court found that final determinations would involve those determinations made "at each stage of an often mult-level administrative process" [see Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 182 (1979)].

In this instance, the decision-making process appears to exist through a process by which a body designated by the County Manager deliberated and determined courses of action recommended to the County Manager. Due to the requirements of openness discussed earlier in terms of the Open Meetings Law and the decision rendered in Miracle Mile, supra, I believe that the report in question, as I understand the situation, should 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: Jack Doyle
Lucien A. Morin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2365

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 2, 1982

Paul J. Baroncelli, Esq.

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. Baroncelli:

I have received your letter of February 8 and apologize for the delay in response.

Your inquiry concerns a denial of access to records by the Department of Civil Service. According to the Department's Records Access Officer, Anthony J. Costanzo, all records sought were made available, except those considered deniable under §87(2)(g) of the Freedom of Information Law regarding inter-agency and intra-agency materials.

I would like to offer the following comments with respect to your inquiry.

First, you requested that the Department of Civil Service provide copies of the records free of charge. In accordance with regulations promulgated by the Department of Civil Service [see 4 NYCRR 80.7(d)], charges for copying may be waived as a matter of discretion. Although the records sought involve a grievance in which you are a party, I am unaware of any statutory provision that would mandate a waiver of fees when an individual requests records pertaining to himself. Further, in conjunction with your request for an explanation of the Department's policy regarding waivers of fees, if no such policy exists in written form, the Freedom of Information Law would not require that a new record, an explanation of the policy, be prepared on your behalf [see Freedom of Information Law, §89(3)].

Second, you have raised questions regarding the existence of some of the records that you are seeking. In this regard, §89(3) of the Freedom of Information Law permits you to request that an agency certify that it does not have possession of a record or is unable to locate a record after having made a diligent search. In accordance with the Law, Civil Service regulations provide that such a certification may be requested free of charge. You might want to consider seeking such a certification in order to determine the existence of the records in which you are interested.

Third, as indicated to you by letter on July 20, 1981, certain records characterized as inter-agency or intra-agency materials may justifiably be withheld in whole or in part. To reiterate, §87(2)(g) of the Freedom of Information Law states that an agency may withhold records that:

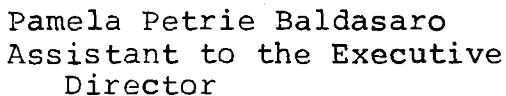
> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

Under the circumstances, it appears that your only course of action at this juncture involves the process that you have begun, appealing the denial. Under §89(4)(a) of the Freedom of Information Law, if a denial is upheld following an appeal, the reasons must be "fully explained" in writing. If the determination on appeal sustains the denial, you may seek judicial review by initiating a judicial 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



BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

cc: Anthony M. Costanzo
John J. Mooney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2366

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 2, 1982

Mr. Lloyd Sokolow
Attorney at Law
89 Columbia Street
Albany, NY 12210

<u>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.</u>

Dear Mr. Sokolow:

As you are aware, I have received your letter of February 5 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you submitted a request to the Board of Psychology at the State Education Department for:

> "...portions of records of applications for admission to the licensure examination in psychology which were approved by the Board for Psychology from applicants who were not from a program in psychology registered with the State Education Department..."

You indicated that the information in which you are interested involves transcripts and letters of support of applicants from university faculty, and that you are not interested in obtaining any information contained within the records that would identify applicants, faculty or the universities attended by applicants. Nevertheless, your request was denied. You have indicated that if you are granted access to the records in question, the number of cases would be approximately forty to sixty during the last five years and the total number of pages that might be photocopied would be something under two-hundred.

I would like to offer the following comments 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 State Education Department, are available, except to the extent that records or portions thereof fall within one or more categories of deniable information listed in §87(2)(a) through (h).

Second, §89(3) of the Freedom of Information Law states in part that an applicant must request records "reasonably described". Under the circumstances, in view of the specificity of the information that you are seeking, it would appear from my perspective that you have met the standard of reasonably describing the records sought. However, it should be noted that the capacity of an agency to locate information may be based in part upon the manner in which records are filed. If the Education Department can through its current filing system locate the records in which you are interested, I believe that you have met your responsibility of reasonably describing the records sought.

Third, it would appear that there is only one ground for denial that could appropriately be asserted with respect to the records in question. Specifically, §87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof which:

> "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) provides additional guidance regarding unwarranted invasions of personal privacy. Section 89(2)(a) states that:

> "[T]he committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details which it makes records available."

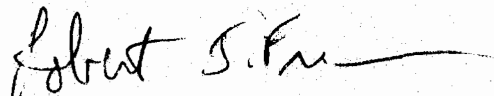
It is noted that the Committee on Public Access to Records for a number of reasons has not promulgated guidelines regarding the deletion of identifying details. For instance, when issues regarding privacy arise, often subjective judgments must of necessity be made. While one reasonable person might consider the disclosure of a particular record to be offensive, thereby resulting in an unwarranted invasion of personal privacy, an equally reasonable person might view disclosure of the same record as innocuous, thereby resulting in a permissible invasion of personal privacy. As such, the Committee believes that it cannot justifiably interject its subjective judgments regarding privacy. Moreover, there are virtually thousands of records containing personally identifying details and it would be all but impossible to prepare or issue guidelines with respect to all such records. In addition, often the persons in custody of particular records at an agency are in a more knowledgeable position to determine the effects of disclosure. Consequently, due to the absence of guidelines promulgated by the Committee, an agency, such as the State Education Department, "may delete identifying details when it makes records available."

Based upon your description of the records sought, it is my view that they should be made available after having deleted identifying details, if the State Education Department believes that disclosure of the identifying details would constitute an unwarranted invasion of personal privacy.

Lastly, assuming that my contentions are accurate and that portions of the records sought should be made available, it is possible that the process of reviewing and perhaps deleting portions of the records could involve a significant amount of time and effort. Nevertheless, I believe that an agency is required to undertake such a review [see Zanger v. Chinlund, 430 NYS 2d 1002 (1980); United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)]. As indicated earlier, the Freedom of Information Law is based upon a presumption of access, and §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, it is in my opinion clear that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. It is also clear in my view that an agency is required to review records sought in their entirety to determine the extent, if any, to which one or more of the grounds for denial may appropriately be 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: Judy Hall, Ph.D.
Gene Snay

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2367

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 2, 1982

Mrs. Elaine Trayer

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. Trayer:

I have received your letter of February 25, 1982.

You have requested information under the federal Freedom of Information Act (FOIA) with respect to Series E Savings Bonds redeemed prior to 1971. Specifically, you are interested in what information may exist with respect to the location of and rights of access to such bonds.

I would like to offer the following comments in response to your inquiry.

Please be advised that the Committee on Public Access to Records is responsible for providing advice under the New York Freedom of Information Law, which applies to records of state and local government. The information you are seeking would appear to be in the possession of a federal agency and therefore subject to the federal FOIA.

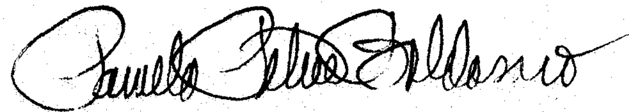
Nevertheless, on your behalf, I have contacted a representative of the Federal Reserve Bank in New York City. He has advised me that it is against federal law to copy any securities, such as Series E Savings Bonds. However, if you are able to provide specific information, such as the year and serial number of the particular bonds in which you are interested, it is suggested that you write to the following address for further information:

Bureau of Public Debt
200-3rd Street
Parkersburg, WV 26101

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-2368

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 2, 1982

Mr. Edward K. Byrne
77-D-93
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. Byrne:

I have received your letter of February 11. Please accept my apologies for the delay in response.

You have raised a series of issues regarding the implementation of the Freedom of Information Law by the Department of Correctional Services and the Division of Parole. Since you have not offered specific instances in which particular records have been withheld, I would like to offer the following general comments.

First, the Freedom of Information Law (see attached) 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).

Second, when making a request, the Law requires that an applicant for records submit a request in writing "reasonably describing" the records sought. I am aware that in some instances, requests have been made that are so broad that the agency officials in receipt of the request have been unable to determine the nature of information being sought. For example, a request for all records pertaining to oneself might not meet the standard that records be "reasonably described", for records concerning an individual may be broad in nature and kept in a variety of locations.

Third, a potentially useful tool in assisting you in narrowing the areas of records in which you are interested is a "subject matter list". In this regard, §87(3)(c) of the Freedom of Information Law requires each agency to prepare a list, in reasonable detail, by subject matter, of all of its records, whether or not the records are available. You might want to seek the subject matter lists of the two agencies that you identified.

Fourth, in terms of procedure, §89(1)(b) of the Freedom of Information Law requires the Committee to promulgate regulations which govern the procedural implementation of the Freedom of Information Law. In turn, §87(1) requires that each agency develop its own regulations in conformity with those of the Committee. The Department of Correctional Services has promulgated regulations, and §5.20 of those regulations pertains to the examination of records by inmates and their attorneys. I have enclosed a copy of those regulations for your consideration.

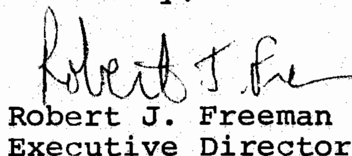
Lastly, your final comment concerns a portion of the Department of Correctional Services' regulations concerning the denial of a request. Unless, I am mistaken, you have misconstrued the language which, according to your letter, provides that:

> "[A] request to which no response is received within five (5) business days, by operation of Law, is construed as a denial of the request" (emphasis yours).

Section 89(3) of the Freedom of Information Law states in part that an agency is required to respond to a request within five business days of its receipt. Under the regulations promulgated by the Committee [see attached §1401.5 (d) and §1401.7(c)], if no response is given within five business days, the applicant may consider his or her request to have been denied and may appeal in accordance with §89(4)(a) of the Freedom of Information Law. Also enclosed is an explanatory pamphlet that may be useful to you.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2369

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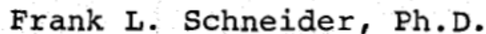
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 2, 1982

Frank L. Schneider, Ph.D.



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 Dr. Schneider:

I have received your letter of February 10. Please accept my apologies for the delay in response.

According to your letter, you requested records from the Village of Sands Point and, in a letter dated February 1, the Clerk indicated that he had forwarded your letter to the Village Attorney for response. As of February 10, you had received no response to your request.

I would like to offer the following comments regarding your inquiry.

First, the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed 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)].

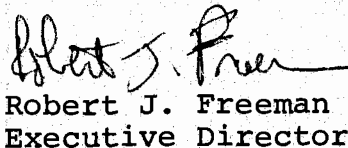
In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Under the circumstances, I believe that the letter addressed to you by the Clerk dated February 1 would constitute an acknowledgment of the receipt of a request. As such, from that date, I believe that Village officials would have ten business days to render a determination to grant or deny access.

Enclosed for your consideration are copies of the Freedom of Information Law and the regulations 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

Encs.

cc: Evan Stephens

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2320

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 3, 1982

Ms. Jane Marcham
The Ithaca Journal
Ithaca, NY 14850

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. Marcham:

I have received your letter of February 2. Please accept my apologies for the delay in response.

You have asked whether a mayor can "restrict city employees in any way" from seeking the advice of the Committee on Public Access to Records.

Your inquiry was precipitated by a memorandum issued to all City employees by Mayor Bill Shaw of the City of Ithaca entitled "Openness and Confidentiality in City Operation". Specifically, a paragraph in the memorandum states that:

> "...no employee is authorized to act contrary to their supervisor. Instead, their disagreement with a supervisor should be forwarded to the City Clerk's office for review of the question. If that review and clarification is not sufficient, then a second review by the Mayor and City Attorney is the final internal step for employees. Further review must be conducted, as prescribed by law, in the courts. In addition, an opinion by the State's Committee on Public Access to Records may by sought by a citizen at any time. Employees may also seek that opinion, but only after the internal review procedure stated above is exhausted."

I would like to offer the following comments regarding the Mayor's memorandum.

It is noted at the outset that the Mayor contacted this office for the purpose of engaging in a general discussion regarding the Freedom of Information Law and the Open Meetings Law prior to the issuance of the memorandum. In addition, due to the question that you raised, I contacted the Mayor on your behalf to discuss the language. quoted above. Although the specific language may be somewhat unclear, I concur with the intent of the Mayor as he expressed it during our telephone conversation.

In our discussion of the "restriction" imposed upon City employees, it was stated that it is intended to apply to situations in which an employee receives a request for records or information from a member of the public under the Freedom of Information Law. In such cases, the employee would be required to follow a specific administrative procedure prescribed in the memorandum prior to disclosure or contacting this office. That procedure, however, is limited to those situations in which an individual seeks to deal with a request while acting in the performance of his or her official duties.

In situations in which an employee has questions regarding information that is unrelated to the performance of his or her official duties (i.e., if an employee of a particular department seeks information for personal use from another department, and the request is unrelated to the performance of his or her official duties), that individual could seek the advice of the Committee at any time. Stated differently, the Mayor and I agreed that there is a distinction between situations in which questions arise in conjunction with the performance of one's official duties where the procedure should be followed, and those other situations in which a member of the public who happens to be an employee of City government seeks advice of the Committee in relation to an issue unrelated to the performance of his or her official duties.

In sum, I was assured by the Mayor that the policy as expressed in the memorandum is not intended to restrict an employee from seeking the advice of the Committee, so long as the advice is not sought in conjunction with the performance of his or her official duties. As such, I view the policy as an appropriate administrative mechanism.

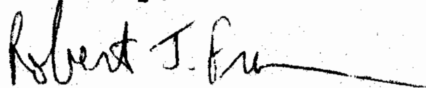
Lastly, I raised questions with the Mayor regarding the last paragraph of the memorandum, which states in part that:

> "[V]iolations of the Open Meetings Law or Freedom of Information Law are subject to criminal prosecution, employee discipline and/or removal from office in extreme instances. Moreover, failure to abide by a supervisor's directive may constitute insubordination."

In discussing the language quoted above with the Mayor, I contended that improper disclosures under the Freedom of Information Law and the Open Meetings Law could not in my view result in any criminal prosecution. Again, however, it was agreed that improper disclosures would likely be made outside the scope of one's official duties under the Freedom of Information Law or the Open Meetings Law and that such disclosures would involve other statutory prohibitions.

I hope that I 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 Shaw

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-729

FOIL-AO-2371

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 5, 1982

Honorable John R. Kuhl, Jr.
Member of the Assembly
18 Buell Street
P.O. Box 153
Bath, New York 14810

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 Assemblyman Kuhl:

I have received your letter of February 25, which reached this office on March 3. Your interest in the Freedom of Information and Open Meetings Laws is much appreciated.

According to your letter, you received an inquiry from a constituent regarding the status of a nonprofit corporation, the Steuben Rural Electric Coop, Inc., under the Freedom of Information and Open Meetings Laws.

In my opinion, based upon a review of the Rural Electric Cooperative Law, it appears that the Steuben Rural Electric Coop, Inc. is not subject to either of the two statutes.

With respect to the Freedom of Information Law, the scope of the Law is determined by means of the definition of "agency". That term is defined in §86(3) 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".

As I view the Rural Electric Cooperative Law, the corporation in question could not be considered a "governmental" entity and, as such, it would fall outside the scope of the Freedom of Information Law.

Similarly, with regard to the Open Meetings Law, the definition of "public body" determines which entities are subject to the Law. Section 97(2) 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".

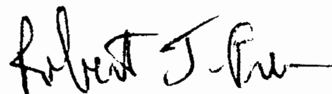
Once again, based upon a review of applicable provisions of law as well as the purposes of the corporation in question as stated in its certificate of incorporation, it does not appear that the Board of the corporation conducts public business or performs a governmental function. Therefore, I believe that the board of directors would likely fall outside the scope of the Open Meetings Law.

It is noted that similar advice has been given with respect to other better known public utilities. In those cases, it has been suggested that public utilities are private corporations and, therefore, fall outside the requirements of the Freedom of Information and Open Meetings Laws. However, often records relating to such corporations are available from government through the Public Service Commission.

I have contacted the Public Service Commission on your behalf to determine whether the Commission regulates the corporation that you identified. I was informed that the Commission does not engage in a regulatory function with regard to corporations subject to the Rural Electric Cooperative Law. Further, I know of no state agency that has a specific statutory relationship with corporations such as that which you identified.

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-AD-2372

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 5, 1982

Jonathan Slosser D.M.D.

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 Dr. Slosser:

I have received your letters of February 8 and 11 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 been involved in a series of attempts to gain access to records of the New York City Department of Housing Preservation and Development. In this regard, and in relation to your correspondence with the Department, you have raised the following questions:

> "1) Is the document in my possession a Subject Matter List as defined by State Statute?
>
> 2) Is a subject matter list a 'list' and not a document? Can an individual request a subject matter list pursuant to the FOL?
>
> 3) Why the Subject Matter Lists for the Division of Rent Control for 1979, 1980, and 1981, have not been sent to me? Do they exist? If they do not exist, who is responsible?
>
> 4) Why the Appeals Officer did not forward a copy of my appeal to the Committee on Public Access as required by State Statute?

> 5) Is the Division of Rent Control and the Department of Housing Preservation and Development presently in full compliance with the Freedom of Information Law?"

I would like to offer the following comments and observations regarding your inquiry.

The first question is whether the document in your possession, a copy of which you attached to your letter, is a "subject matter list". I direct your attention initially to §87(3)(c) of the Freedom of Information Law, which requires that each agency, such as the Department in question, shall maintain:

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

The list that you attached makes reference to a series of twelve categories of records. Since I am not familiar with all of the records of the Department and its Division of Rent Control, I can only conjecture as to the sufficiency of the list. If the list does not make reference to all records, by subject, in reasonable detail, I believe that the list would be insufficient and, therefore, fail to comply with §87(3) of the Freedom of Information Law. If the Division of Rent Control is similar to other agencies, it likely maintains possession of personnel records, payroll information, correspondence with the public and other agencies, vouchers, contracts, policies, administrative staff manuals, brochures, news releases, mailing lists and numerous other types of records. If indeed the Division maintains the kinds of records described above, as well as others, I would contend that the subject matter list attached to your letter is incomplete.

I would also like to point out that §89(1)(b)(iii) of the Freedom of Information Law requires that the Committee on Public Access to Records:

> "...promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article..."

As indicated previously, "paragraph (c) of subdivision three of section eighty-seven of this article" pertains to the subject matter list. Relative to the subject matter list, §1401.6 of the regulations promulgated by the Committee states that:

> "(a) Each agency shall maintain a reasonably detailed current list by subject matter of all records in its possession, whether or not records are available pursuant to subdivision two of section eighty-seven of the Public Officers Law.
>
> (b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.
>
> (c) The subject matter list shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list".

Based upon the provisions quoted above and in view of your difficulties in gaining access to records, it would appear that the Division's subject matter list might not be "sufficiently detailed to permit identification of the category of the record sought".

It is also noted that the City of New York, as required by §87(1) of the Freedom of Information Law, has promulgated regulations under the Freedom of Information Law in substantial compliance with those promulgated by the Committee. Therefore, if the subject matter list in question is insufficient under the Committee's regulations, I believe that it would also be insufficient under the "Uniform Rules and Regulations for all City Agencies".

Your second question is whether a subject matter list may be requested under the Freedom of Information Law. Your question was apparently precipitated by a contention that a "list" is not a "document".

In this regard, §89(3) of the Freedom of Information Law states in part that, as a general rule, an agency need not create a record in response to a request. The exceptions to that rule requiring the creation of records involve the direction given in §87(3), which, as stated earlier, in paragraph (c), requires the creation of a subject matter list.

Further, a "list" is in my view clearly a "document" or "record" as defined by §86(4) of the Freedom of Information Law. The cited provision 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 short, based upon the language quoted above, if a subject matter list or any other "information" exists, it is a "record" subject to rights of access granted by the Freedom of Information Law that may be requested by any person.

Your third question involves the existence of subject matter lists for previous years and the responsibility for the creation and maintenance of a subject matter list.

Once again, I direct your attention to the regulations promulgated by the Committee. Specifically, §1401.2 (a) requires the head or governing body of an agency to designate one or more "records access officers" "who shall have the duty of coordinating agency response to public requests for access to records". Further, §1401.2(b) of the regulations states in part that:

> "The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list;
>
> (2) Assist the requester in identifying requested records, if necessary..."

One of the difficulties that you encountered apparently dealt with the nature of records that you requested. As stated above, the designated records access officer is required to provide assistance in identifying records sought, if necessary. I would also like to point out that

an applicant for records need not identify records in detail or with great specificity when making a request; on the contrary, §89(3) of the Freedom of Information Law states that an applicant must request records "reasonably described".

Your fourth question involves the rationale for an apparent failure by the appeals officer to forward a copy of your appeal to this office. In this regard, §89(4)(a) of the Freedom of Information Law, which states that an applicant for records may appeal an initial denial, requires that:

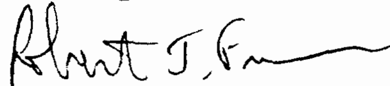
> "...each agency shall immediately forward to the committee on public access to records a copy of such appeal and the determination thereon".

All that I can suggest is that if agency officials did not make records available on the ground that your request was insufficient to determine the nature of the records sought, it is possible that they might not have considered their response as a denial, but rather as a request to you for more specificity regarding the records sought.

Lastly, as you are aware, an opinion from this office is advisory; the Committee has no authority to enforce the Freedom of Information Law or otherwise compel an agency to make records available. Nevertheless, in an effort to assist you as well as officials of the Department of Housing Preservation and Development, perhaps this advisory opinion will result in a review of the requirements of the Freedom of Information Law and the regulations that will be beneficial to you and others.

I hope that 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: Anthony Gliedman
Valerie Asciutto
Harry Michelson
Stephen Shapiro
Alfred Schmidt
Joseph Fiocca

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2323

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 5, 1982

The Honorable Donald E. Quick
Mayor, City of Kingston
Office of the Mayor
Kingston, New York 12401

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 Mayor Quick:

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

Your inquiry concerns a request made by a local newspaper for records regarding the Kingston Police Department, including "departmental orders and regulations..." and records indicating the identities of "each member of the Police force". You wrote further that it is your belief, as well as that of the City's Police Chief, that you need not release the Department's rules, regulations and similar materials under the Freedom of Information Law. Additionally, you point out that, in your view, "the reporter for the newspaper has been on a 'witch hunt' regarding [the] Police Department".

In my opinion, the records sought by the reporter are available in great measure, if no in toto 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 City of Kingston or its Police Department, are accessible, except to the extent that re-

cords or portions of records fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, although two grounds for denial might be relevant to the records in question, I do not believe that either could appropriately be asserted, unless there are unusual circumstances.

One potentially 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."

Some of the records involved in the request, such as general rules and regulations or statements of policy, for example, might not have been compiled for law enforcement purposes, but rather in the ordinary course of business. In such cases, I do not believe that §87(2)(e) could justifiably be cited as a basis for withholding. In other instances in which rules and regulations were compiled for law enforcement purposes, as stated in §87(2)(e)(iv), records reflective of routine criminal investigative techniques and procedures would fall outside the scope of the cited provision and, therefore, be available. From my perspective, only unusual or "non-routine" criminal investigative techniques or procedures could be withheld.

A second ground for denial of possible relevance might be §87(2)(g), which, due to its structure, could serve 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 provision quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, it would appear that the records in question could properly be characterized as "intra-agency" materials. However, it would also appear that rules, regulations and departmental orders could be characterized as "instructions to staff that affect the public" that would be accessible under §87(2)(g)(ii), or "final agency policy" that would be accessible under §87(2)(g)(iii).

Third, another area of the request apparently involves records identifying members of the Police force. In this regard, I direct your attention to §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..."

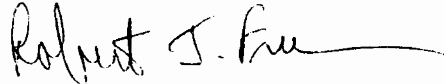
The only situation that I can envision in which the identity of a person employed by the Police Department might justifiably be deleted from the payroll record required to be compiled under §87(3)(b) would involve undercover agents or

informants. In those cases, I believe that the names of such individuals might justifiably be deleted under §87 (2)(f), which enables an agency to withhold records or portions thereof, when disclosure "would endanger the life or safety of any person".

Lastly, I do not believe that the reason for which a request is made (i.e., a "witch hunt") affects rights of access. As stated by the Appellate Division in Burke v. Yudelson (368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165), if a record is available under the Freedom of Information Law, it should be made equally available to "any person" without regard to status or interest.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: George Braden

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 731
FOIL-AO- 2374

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 5, 1982

John H. Cosgrove

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. Cosgrove:

I have received your letter of February 9, 1982, and assume that you received the copies of the correspondence that you requested.

However, I would like to offer the following comments regarding the other question raised.

Specifically, you noted that at a recent meeting of the Canaan Town Board, you observed that:

> "letters sent (sic) Mr. Klingler by me had never been read or noted and were not part of the town record. At subsequent meetings, however, he pulled one from his pocket and read a sentence or two".

The question is whether the letters or portions thereof read at the meeting constitute part of "the record".

In this regard, the Open Meetings Law provides direction concerning what may be considered as minimum requirements regarding the contents of minutes. Section 101(1) of the Open Meetings Law pertaining to minutes of open meetings states that:

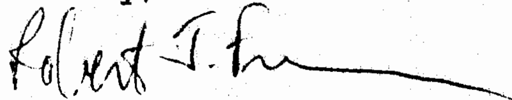
> "[M]inutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon".

In my view, the language quoted above does not require that minutes consist of a verbatim account of statements made at meetings. On the contrary, minutes are required to make reference only to those specific terms mentioned in §101(1). As such, I do not believe that reference to your letters must be included in minutes. If, however, the correspondence mentioned during the meeting formed the basis of a motion, proposal or resolution of the board, such a reference would in my opinion be required to be included in the minutes.

Further, as you may be aware, the Freedom of Information Law includes within its scope all records "kept, held, filed, produced or reproduced by, with or for an agency" [see Freedom of Information Law, §86(4)]. Therefore, in my view, the correspondence in possession of the Supervisor transmitted to him in his official capacity would be subject to rights of access granted by the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Richard C. Klingler

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2375

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STEPHEN PAWLINGA
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 8, 1982

John M. Stafford
81 C 600
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. Stafford:

I have received your recent letter in which you requested information regarding the addresses of particular agencies that you could use for the purpose of making requests for records.

The three agencies that you specified are the Federal Bureau of Investigation, the Drug Enforcement Administration and the New York State Police in the Buffalo area.

With respect to the FBI, you might write to the following address:

FOI Unit
Federal Bureau of Investigation
Washington, D.C. 20535

In the alternative, you might consult a local telephone directory for the purpose of transmitting a request to a regional office of the FBI.

To request records from the Drug Enforcement Administration, the address would be:

Drug Enforcement Administration
Room 200
FOI Unit
1405 I Street, N.W.
Washington, D.C. 20537

To address a request to the New York State Police, again, it is suggested that you review a local phone directory to determine the address of the State Police office nearest to you. It is also suggested that you direct an inquiry to the records access officer at the State Police at the following address:

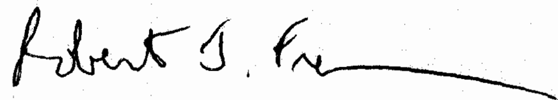
Division of State Police
State Office Building Campus
Public Security Building
Albany, NY 12226

I would like to point out that rights of access to records in possession of New York State and local government agencies, such as the State Police, are governed by the provisions of the New York State Freedom of Information Law. A different provision of law, the federal Freedom of Information Act, would be applicable to records in possession of federal agencies, such as the FBI and the Drug Enforcement Administration.

Enclosed for your consideration are copies of the New York State Freedom of Information Law, an explanatory pamphlet on the subject that may be useful to you, for it contains sample letters of request and appeal, and a reproduction of a federal publication entitled "Your Right to Federal 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-2376

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 8, 1982

Mr. John J. Gannon
General Counsel
Western Regional Off-Track
Betting Corporation
113 Main Street
Batavia, New York 14020

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. Gannon:

I have received your thoughtful letter of February 10 and appreciate your interest in compliance with the Freedom of Information Law. Please accept my apologies for the delay in response.

You have requested comments relative to a position taken with respect to two requests by Jay Gallagher of the Rochester Times-Union. Specifically, Mr. Gallagher requested telephone numbers called on mobile telephones that relate to OTB business, and telephone bills, including numbers called on OTB business, for private telephone lines of named OTB employees at OTB headquarters. In your letter, you expressed the concern that disclosure of all of the information sought would represent a "potential invasion of privacy of both the OTB employee placing the call, and the person receiving the call". You wrote further that it is your opinion that "the parties to the call enjoy the right of privacy and they alone are entitled to make the determination to waive or not to waive that right".

I would like to offer the following observations regarding the situation you have described.

First, as you indicated in your letter to Mr. Gallagher after having contacted this office, I am unaware of any judicial interpretations of the Freedom of Information Law that would provide a "direct precedent" for the purpose of responding to the request.

Second, when records are requested that identify individuals, as you have intimated, the central issue involves §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". It is also important to note that questions involving privacy are often perplexing, for it may be difficult to draw a line of demarcation between what might be considered an unwarranted invasion of personal privacy and a permissible invasion of personal privacy. In many cases, it has been suggested that subjective judgments regarding privacy must often of necessity be made. For instance, one reasonable person might view a record and suggest that, in his view, disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy. An equally reasonable person, however, might view the same record and believe that disclosure would be innocuous, thereby resulting in a permissible invasion of personal privacy. Further, §89(2)(a) of the Freedom of Information Law permits the Committee on Public Access to Records to "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 a number of reasons. Due to the issue raised above regarding the necessity of making subjective judgments regarding privacy, the Committee does not believe that it would be appropriate to impose its subjective judgments upon others regarding privacy. Moreover, agency officials in possession of records may be in the best and most knowledgeable position to gauge the effects of disclosing particular records. In addition, there are virtually thousands of different types of records that identify people, and as a consequence, it would be all but impossible to develop guidelines regarding each of those types of records.

Third, there may be a distinction with respect to the degree to which the privacy of public employees, as opposed to others, might justifiably be protected under the Freedom of Information Law. Although as noted earlier, the standard relative to privacy in the Freedom of Information Law is flexible, there is a significant amount of case law pertaining to privacy relative to public employees.

In brief, the courts have found that public employees enjoy a lesser degree of privacy than others, for they have a greater duty to be accountable than others. Moreover, it has been found in several cases that records relevant to the performance of one's official duties are available, for disclosure in such cases 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. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., October 30, 1980]. Conversely, if records are unrelated to the performance of one's official duties, disclosure might indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

With respect to records in possession of agencies that identify persons other than public employees, I do not believe that the courts have offered guidance as specific as that given with respect to public employees. In those cases, it would appear that determinations must be made on a case by case basis.

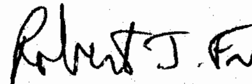
Fourth, you made reference to a "right" to privacy. In my view, there may be no such "right" in conjunction with the Freedom of Information Law. Stated differently, the Law is permissive; while an agency may withhold records falling within one or more grounds for denial, there is no requirement that records be withheld, unless there is a statutory provision that prohibits disclosure [see Freedom of Information Law, §87(1)(a)]. Therefore, although an agency may seek to protect privacy by withholding records, I do not believe that there is an obligation to do so.

Fifth, under the circumstances, if a personal call is made on an OTB phone, it would appear that the number called might be deleted from a record under §87(2)(b), for disclosure of the number might identify the individual to whom the call was placed. Obviously, that individual would have no control over a listing of his or her phone number found within the record in question. It is possible, however, that a court might find that the other information that you identified, such as the date, time and length of the call, might be available, for without reference to the number called, the remaining aspects of the record might not if disclosed constitute an unwarranted invasion of personal privacy. In terms of reimbursement by employees for

personal calls, it might be found that, unless the items specified in the previous sentence are disclosed, it might be unknown as to whether the appropriate amount of reimbursement has indeed been made. In short, I am not sure that a record indicating the mere use of an OTB telephone for personal use would constitute an unwarranted invasion of personal privacy. However, to the extent that the number of the person contacted is included within the record of a personal call, it might be argued that the phone number could justifiably 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

cc: Jay Gallagher

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2377

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 8, 1982

Mr. Antonio Soto
80-A-2979 9-3/H-3
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 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. Soto:

I have received your letter dated February 10, which reached this office on February 22. Please accept my apologies for the delay in response.

Your inquiry concerns your unsuccessful efforts to gain access to your criminal history record. You have requested advice regarding the means by which you can obtain such a record.

As you may be aware, §89(1)(b) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate general regulations designed to implement the procedural aspects of the Freedom of Information Law. In turn, §87(1) of the Freedom of Information Law requires each agency to develop regulations in conformity with those promulgated by the Committee.

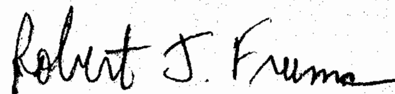
In this regard, the Department of Correctional Services has promulgated regulations under the Freedom of Information Law. With regard to your inquiry, §5.5(g) of the Department's regulations defines the term "inmate record" to include "the DCJS report", which is a criminal history record. Moreover, §5.20 concerns examination of inmate records by inmates and their attorneys and states that an inmate may request copies of records by forwarding the request to the facility superintendent or his designee.

In view of the foregoing, it is suggested that you submit a request for your "DCJS report" to the superintendent of the facility in which you are housed.

Enclosed is a copy of the regulations promulgated by the Department of Correctional Services 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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-732
FOIL-AO-2378

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 9, 1982

Joan M. Scariati
Trustee
Lindenhurst Public Schools
71 Bolton Street
North Lindenhurst, NY 11757

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. Scariati:

I have received your letter of February 11.

You have requested an advisory opinion with respect to rights of access to school board minutes and tape recordings of school board meetings. Specifically, you have requested advice regarding the propriety of a resolution adopted by the Lindenhurst Board of Education. As set forth in your correspondence, the resolution in question states:

> "[T]hat the Board of Education adopt a procedure whereby tapes and minutes of meetings may not be copied prior to the approval of the minutes of that meeting which make them official. Further, that only Board members and central office staff may listen to the tapes prior to the approval of the minutes for that meeting."

I would like to offer the following comments with respect to your inquiry.

First, a tape recording is in my view a "record" subject to rights of access granted by the Freedom of Information Law. Section 86(4) of the Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency 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 broad language quoted above, if a school board utilizes a tape recorder to create a record of its meetings, I believe that it would clearly constitute a "record" subject to the Freedom of Information Law.

Second, case law has held that tape recordings of open meetings are available [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978] and that notes taken at a meeting and later used as an aid in compiling minutes are also available [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. Consequently, if a tape recording exists, I believe that it is available to the public for either listening or reproduction.

Third, the resolution of the Lindenhurst School Board, as quoted above, reflects a policy of the Board to withhold copies of minutes and/or tape recordings on the ground that such documents are unapproved. In this regard, I direct your attention to §101(3) of the Open Meetings Law [see attached]. In brief, the cited provision states that minutes of open meetings must be compiled and made available within two weeks of such meetings. In my opinion, the minutes are available as soon as they are created, whether or not they have been approved.

Fourth, prior to the effective date of §101(3), which was 1979, the Committee transmitted a memorandum to all public bodies in anticipation of problems regarding unapproved minutes. For example, in many instances, a public body might not meet within two weeks and, therefore, might not be able to approve or make minutes official. Consequently, it has been suggested that in such instances, the clerk or whoever is responsible for preparing minutes do so within the appropriate time limits and mark the minutes as "unapproved", "non-final", "draft", for example. By so doing, a member of the public can learn generally what transpired at a meeting, and concurrently, notice is given to the effect that minutes are subject to change.

Lastly, as indicated above, rights of access to records and minutes are determined under the Freedom of Information and Open Meetings Laws. Since I am unaware of any authority that would enable a school board by means of a resolution to supersede rights of access granted under either the Freedom of Information Law or the Open Meetings Law, I believe that the resolution is of questionable legality.

I hope 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

Attachment

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2379

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 9, 1982

Eugene J. Corsale, IAO
Director
Saratoga County Real Property
Tax Services
Saratoga County Municipal Center
Ballston Spa, New York 12020

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. Corsale:

I have received your letter of February 17 and appreciate your interest in complying with the Freedom of Information Law. Please accept my apologies for the delay in response.

Your inquiry concerns rights of access to records in possession of assessors which indicate the manner in which assessments are determined. Specifically, you have asked whether such records are available, including:

> "...property physical inventory data - method of valuation used - comparable sales used and in relation to commercial properties, the income and expense statements of the commercial property owner..."

In response to your inquiry, 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. In Sears Roebuck, supra, the court found that the contents of a "Kardex" system used by assessors were available. The cards contained numerous types of information that were found to be available, including:

> "...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".

There may, however, be situations in which considerations of privacy, both personal and corporate, might arise. In this regard, §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". The cited provision might be relevant in situations in which individuals submit income tax information in order to seek an old-age exemption, for example. Records reflective of personal income or payment of state and federal income tax might be deniable due to confidentiality provisions found within the Tax Law applicable to income tax returns and reports submitted to the State Department of Taxation and Finance [see e.g., §697(3)]. Therefore, it might be argued that the Legislature determined that disclosure of records concerning income would constitute an improper or unwarranted invasion of personal privacy. I would like to point out, too, that 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 Kaufman 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 in my view whether a court would not 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 if disclosed.

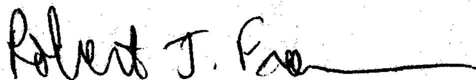
Lastly, there may be another ground for denial in the Freedom of Information Law of potential relevance. Specifically, §87(2)(d) states that an agency may withhold records or portions thereof that:

> "...are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In this regard, it is possible that certain income and expense statements regarding commercial property might in whole or in part cause substantial injury to the competitive position of a corporation if disclosed. The extent to which §87(2)(d) might be used as a basis for withholding would in my view be better known to you and to the corporations to which the statements relate.

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-734
FOIL-AO-2380

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 9, 1982

Mrs. Kathleen Jordan

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 Mrs. Jordan:

I have received your letter of February 10 in which you requested an advisory opinion.

You have written with respect to difficulties you have encountered in trying to obtain access to School Board minutes and tape recordings of School Board meetings. You have indicated that you were advised that only School Board members could listen to or obtain a copy of unapproved tape or minutes.

I would like to make the following comments with respect to your inquiry.

First, a tape recording is in my view a "record" subject to rights of access granted by the Freedom of Information Law. Section 86(4) of the Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency 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."

Second, case law has held that tape recordings of open meetings are available [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School District, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978] and that notes taken at a meeting and later used as an aid in compiling minutes are also available [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. Consequently, if a tape recording exists, I believe that it is available to the public for either listening or reproduction.

Third, you indicated in your correspondence that you have been unable to inspect and/or obtain a copy of Board minutes and tape recordings on the ground that such documents have not been approved by the School Board. With regard to tape recordings, it would appear that, since it is a verbatim account of a meeting, there is nothing to approve or alter. With respect to minutes, I direct your attention to §101(3) of the Open Meetings Law (see attached). In brief, the cited provision states that minutes of open meetings must be compiled and made available within two weeks of such meetings. In my opinion, the minutes are available as soon as they are created, whether or not they have been approved.

In terms of background, prior to the effective date of §101(3), October 1, 1979, the Committee transmitted a memorandum to all public bodies in anticipation of problems regarding unapproved minutes. For example, in many instances, a public body might not meet within two weeks and, therefore, might not be able to approve or make minutes official. Consequently, it has been suggested that in such cases, the clerk or whoever is responsible for preparing minutes should do so within the appropriate time limits and mark the minutes as "unapproved", "non-final", "draft", for example. By so doing, a member of the public can learn generally what transpired at a meeting, and concurrently, notice is given to the effect that minutes are subject to change.

Fifth, in my view, you are correct in your assertion that under the Freedom of Information Law you are entitled to either review and/or copy a tape recording of a school board meeting. 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 the 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]. Therefore, minutes and tapes of school board meetings should in my opinion be available

to you upon request regardless of whether you are a member of the public or a representative of the School Board.

Sixth, you have correctly noted that a school board cannot deny access to minutes and records for an indefinite period 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.

Lastly, with regard to the fees that can be charged in response to a request for copies of minutes and reproduction of tapes, §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."

Therefore, if the minutes are prepared on a sheet of paper that is no larger than nine by fourteen inches, the School Board could charge no more than twenty-five cents per photocopy. If the record to be copied is larger than nine by fourteen inches or is not subject to reproduction by photocopying, the School Board could assess a fee based upon the actual cost of reproduction.

Moreover, §1401.8(c)(3) of the regulations promulgated by the Committee, which have the force and effect of law, provide that the actual reproduction cost is "the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries". Therefore, as held in Zaleski, supra, the Board could not in my view charge for personnel costs in reproducing the tape recording.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Encs.

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 735

FOIL-AO- 2381

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

March 10, 1982

Edward M. Saltzman
Corporation Counsel
Village of Port Chester
315 Westchester Avenue
Port Chester, NY 10573

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. Saltzman:

As you are aware, your letter of February 22 has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

As Corporation Counsel of the Village of Port Chester, you have raised questions regarding the nature of records kept by the Village Zoning Board of Appeals. Specifically, you wrote that the Zoning Board of Appeals seeks to maintain tape recordings of its proceedings and prepare written minutes "showing the votes of all members on all matters decided by the Board". In conjunction with §7-712 of the Village Law, you have asked "what should be included in 'records of all examinations and official actions'". In addition, you indicated that you may seek to supply "more complete verbatim minutes at a cost of so much a page". You have asked whether such steps may be undertaken.

I would like to offer the following comments and observations regarding your inquiry.

First, as you know, §7-712(1) of the Village Law states in part that a zoning board of appeals:

> "...shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official actions".

In my view, the language quoted above should be read in conjunction with the Open Meetings Law, §101, as a basis for determining the minimum requirements of the contents of minutes. Section 101(1) of the Open Meetings Law pertaining to minutes of open meetings 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".

Again, I believe that the language quoted above contains what in effect would be minimum requirements regarding the contents of minutes of meetings of public bodies. In my view, it is clear that the requirement in the Open Meetings Law does not mandate that a verbatim transcript be created. Nevertheless, there is no provision of law with which I am familiar that would preclude a public body from preparing or creating a verbatim account of its proceedings.

Second, I would like to point out that the language of §7-712(1) is consistent with §87(3)(a) of the Freedom of Information Law regarding the creation of a record of votes. The cited provision states that each agency, including a zoning board of appeals, shall maintain:

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

Third, the Freedom of Information Law in §86(4) 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 breadth of the language quoted above, I believe that a tape recording of a meeting constitutes a "record" subject to rights of access under the Freedom of Information Law. Moreover, it has been held judicially that a tape recording of a meeting of a public body is accessible to the public [see 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 in Zaleski, supra, also found that a member of the public should have the capacity to listen to a tape recording at no charge and that, if a copy of a tape recording is requested, the agency must reproduce the tape recording on the basis of the actual cost of reproduction.

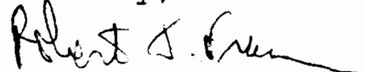
Lastly, if, as you indicated, "more complete verbatim minutes" are prepared, the fee for copies of such minutes would, as a general rule, be limited to twenty-five cents per photocopy. Here I direct your attention to §87(1)(b)(iii) of the Freedom of Information Law, which states that regulations promulgated by a public corporation, such as the Village of Port Chester, should contain reference to:

> "...the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is othersise prescribed by law".

In view of the foregoing, I believe that the Village could charge up to twenty-five cents per photocopy, unless another provision of law provides that a different fee may be assessed.

I hope that 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-2382

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

March 10, 1982

David A. B. Ballagh

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. Ballagh:

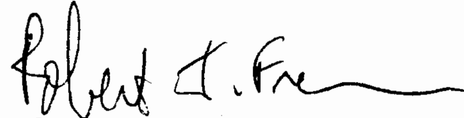
As you are aware, your letter addressed to Attorney General Abrams has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law.

Your inquiry pertains to rights of access to employee personnel records in the private sector. You have asked whether New York has enacted a statute providing rights of access to personnel records to such employees.

To the best of my knowledge, there is no New York State law or federal act that grants rights of access to records of employees of the private sector to personnel records pertaining to themselves. Although you made reference to the federal Privacy Act of 1974, I believe that the Privacy Act applies only to records in possession of federal agencies. As such, the federal Privacy Act does not in my view grant rights of access to employees of the private sector to personnel records. Further, while several states have enacted statutes concerning access to personnel records by both governmental and non-governmental employees, there is no such provision of which I am aware that applies to private sector employees 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-2383

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 10, 1982

Lawrence J. Zobel
City Attorney
City of Dunkirk
Department of Law
City Hall
Dunkirk, NY 14048

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. Zobel:

As you are aware, your letter of February 10 was transmitted to this office by James L. Kalteux, Associate Attorney for the Department of Audit and Control. The Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law.

You have requested an advisory opinion with respect to the following question:

> "[M]ay an elected Councilmember of a City have access on a carte blanche basis to records which are generally deniable to the general public under Freedom of Information Law?"

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 City of Dunkirk, 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. Therefore, to the extent that records could be withheld under one or more of these

categories for denial, it is assumed that those records would be generally "deniable to the general public" under the Freedom of Information Law.

Second, in my view, since there is virtually no case law on the subject of which I am aware, 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 city council, 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 might have a need to know in order to carry out his or her official duties.

Of course, it should be noted that there may be reasonable limitations that may be imposed upon public officers seeking information to perform their duties. For instance, some records may be exempted from disclosure by statutes that permit disclosure only under specified circumstances. In those situations, I do not believe that it would be appropriate to provide "carte blanche" or unrestricted access to records.

Lastly, situations have arisen concerning the status of local laws or ordinances, for example, that may grant rights of access to public officers that far exceed rights granted under the Freedom of Information Law [see e.g., Kilgallon v. City Council, City of Troy, 382 NYS 2d 271 (1976)]. As such, it is suggested that you might want to review provisions of the city charter or other provisions of local law that might be pertinent to your 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

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2384

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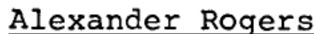
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 11, 1982



Alexander Rogers

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. Rogers:

I have received your letter of February 26 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, according to your letter and the correspondence attached to it, you have requested to inspect vouchers and bills in possession of the Town of Deerfield. The Town Clerk indicated that there may be more than two hundred bills and vouchers for the period specified within your request and, consequently, asked that you provide greater specificity with regard to the particular bills and vouchers in which you may be interested. The clerk apparently provided you with abstracts of bills and vouchers, which summarize such records and might be used as a basis for requesting particular records. You also raised questions regarding the fees for inspecting and copying records and asked whether, in my view, Town officials appear to be unwilling to comply with the Freedom of Information and Open Meetings Laws.

I would like to offer the following comments regarding your inquiry.

First, I have spoken with various officials of the Town of Deerfield and I believe that they are more than willing to comply with the Freedom of Information and Open Meetings Laws. The problem involves the time and effort necessary to locate the records in question. As I understand the situation, soon after bills and vouchers come

into the possession of the Town Clerk, they are forwarded to the Town Supervisor, who is the chief fiscal officer for the Town under §29 of the Town Law. Further, having spoken with the Town Clerk, I believe that an arrangement may be made in response to your requests whereby you can inspect bills and vouchers at meetings of the Town Board.

Second, with respect to rights of access to the records, they are in my view clearly available under the Freedom of Information Law, for none of the grounds for denial would in my opinion be applicable. Further, such records have long been available under §51 of the General Municipal Law.

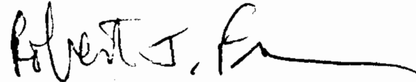
Third, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". From my perspective, it would appear that under judicial interpretations of the Freedom of Information Law, a request for bills and vouchers submitted within a particular period would likely "reasonably describe" the records sought [see e.g., Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754, (1977)]. However, by providing abstracts of bills and vouchers, it would appear that those records provide a useful tool for requesting specific bills and vouchers, for the abstracts may be employed to identify particular bills and vouchers, rather than all bills and vouchers submitted within a particular time period.

Fourth, with respect to fees, under the Freedom of Information Law [§87(1)(b)(iii)] and the regulations promulgated by the Committee [§1401.8], an agency generally cannot charge a fee for searching or inspecting records. The only fee envisioned by the Law and the regulations would involve a request for copies of records. In the case of records that may be photocopied, an agency may generally charge up to twenty-five cents per photocopy. If you merely wish to inspect records, I do not believe that any fee should be assessed.

Lastly, it is reiterated that, having spoken with various Town officials, I believe that efforts have been undertaken to make the records in which you are interested available to you at Town Board meetings. I am hopeful that those efforts will serve to solve the problem.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Gail Stappenbeck
Donald Youlen
Vincent Rossi

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2385

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 11, 1982

Mr. Vincent L. Morello
#80-C-443/D-46-1
Box 149
Attica, New York 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. Morello:

I have received your letter of January 7, which was received by this office on March 2. You have raised a number of questions concerning access to records pertaining to you.

I would like to offer the following comments and observations regarding your inquiry.

First, you indicated that you are interested in obtaining a copy of your presentence report. In this regard, a presentence report is generally confidential under §390.50(2) of the Criminal Procedure Law, which states that:

> "[N]ot less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination 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 would appear that a presentence report may be available only if the court chooses to grant access to it, and only under the circumstances described in §390.50. As such, it is suggested that you might want to discuss the issue further with your attorney.

A second area of inquiry involves your arrest record. If your arrest record is essentially a criminal history record, I believe that it would be considered the "DCJS" report to which reference is made in §5.5(b) of the regulations promulgated by the Department of Correctional Services. Further, you may request a copy of the DCJS report through your facility superintendent of his designee under §5.20 of the regulations of the Deparmtent of Correctional Services.

Lastly, it appears that, after having reviewed some aspects of the records pertaining to you, you believe there may be portions of those records that are inaccurate. Here I direct your attention to §§5.50 through 5.54 of the regulations of the Department of Correctional Services, which enable an individual to challenge the completeness or accuracy of certain records pertaining to him or her. I have enclosed a copy of the Department's regulations, which contain each of the provisions of the regulations previously cited.

I hope that I 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

OML-AO-737
FOIL-AO-2386

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 15, 1982

Jay M. Gubernick

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. Gubernick:

I have received your letter of February 24, in which you requested an advisory opinion regarding the Freedom of Information and Open Meetings Laws.

Specifically, you raised the following questions:

> "[W]hen correspondence is written or sent to the Town Supervisor, is he/she compelled by law to distribute copies of this correspondence to other Town Board members? When correspondence is written or sent and addressed to the Town Supervisor and Town Board members, is he/she compelled by law to distribute copies of this correspondence to other Town Board members? Finally, when correspondence is sent to the Supervisor or Supervisor and Town Board, is the Town Supervisor compelled to put this correspondence on the Town Board's agenda for open meeting?"

First, the questions that you raised cannot in my view be answered directly by means of the provisions of either the Freedom of Information Law or the Open Meetings Law, while certain aspects of those statutes might have a bearing upon the situations that you described, they provide no specific direction with respect to your inquiry.

Second, I am unaware of any provision of law that would "compel" a town supervisor to distribute correspondence addressed solely to the supervisor, or to the supervisor plus town board members, to town board members. Nevertheless, I do not believe that the absence of such a statutory direction would limit rights of access to records under the Freedom of Information Law.

In this regard, it is emphasized that §86(4) of the Freedom of Information Law defines "record" expansively to include:

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

Due to the breadth of the definition quoted above, correspondence addressed to the supervisor could not in my opinion be considered "personal property"; on the contrary, virtually any correspondence transmitted to a supervisor, members of a town board, or any combination thereof would in my view fall within the definition of "record" and, therefore, would fall within the scope of rights of access granted by the Freedom of Information Law.

Moreover, there is another provision of law which indicates that records addressed to a supervisor or to a supervisor plus town board members would not be in the legal custody of such individuals. Specifically, §30(1) of the Town Law states in relevant part that the town clerk of each town:

> "[S]hall have the custody of all the records, books and papers of the town. He shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting, and of all propositions adopted pursuant to this chapter".

Based upon the cited provision, a town clerk would in my view be the legal custodian of all town records, whether or not the records are in the clerk's physical custody.

I would also like to point out that the governing body of each public corporation, i.e., a town board, is required to adopt procedures governing the implementation of the Freedom of Information Law [see attached, Freedom of Information Law, §87(1)] in conformity with general regulations promulgated by the Committee on Public Access to Records pursuant to §89(1)(b)(iii) of the Freedom of Information Law. Under the Committee's regulations (see attached), a governing body must designate one or more "records access officers" responsible for "coordinating agency response to public requests for access to records" [see regulations, §1401.2(a)]. As such, if, for example, a town clerk has been designated as the records access officer, the clerk would likely have the duty of responding to a request for all town records, including those records in the physical custody of a town supervisor.

Third, with respect to your question concerning the distribution of correspondence addressed to a supervisor and town board members, all that I can suggest is that the recipients of such correspondence should carry out their duties reasonably. By means of example, hundreds of items of correspondence are addressed to the Committee on Public Access to Records each year, many of which merely involve requests for general information or publications. In those circumstances, responses are given by the Committee's staff and the correspondence is not distributed to members of the Committee. In situations in which it is reasonable to assume that members will have an interest in or a need to be aware of particular items of correspondence in order to carry out their official duties, the correspondence is distributed to the members. In short, a response to your question can in my opinion be based only upon judgment and reasonableness.

Fourth, there is no provision of law of which I am aware that would generally require that reference to correspondence received by a supervisor be placed on an agenda of a town board meeting. Further, while most public bodies create agendas prior to meetings, I am similarly unaware of any provision that specifically requires that an agenda be created or that a public body should be limited to discussion of items appearing in an agenda. Although the Open Meetings Law requires that notice of the

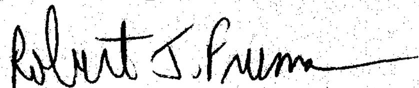
time and place of all meetings of public bodies be given to the news media and the public by means of posting (see attached Open Meetings Law, §99), there is nothing in the Open Meetings Law that requires that an agenda be created or made available prior to a meeting.

Lastly, each of your questions relates to your final question, whether a supervisor can "suppress or fail to disclose all correspondence to his office which relate to town business/matters". Without reiterating points previously made, all that I can suggest is that the Freedom of Information Law and the Open Meetings Law provide the vehicles by which the public can seek to ensure that government is accountable. Requests for records, even those solely in the physical custody of a particular town official, may be requested and deliberations of a town board must generally be conducted in public. It is emphasized that both the Freedom of Information Law and the Open Meetings Law are based upon presumptions of access. Stated differently, all records of an agency are available, except to the extent that records of portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law. Under the Open Meetings Law, deliberations of public bodies are presumed to be open, except to the extent that an executive session may properly be convened under §100(1)(a) through (h) of that statute.

Enclosed for your consideration is an explanatory pamphlet regarding 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-736
FOIL-AO-2387

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

March 15, 1982

Ruth Leverett
Executive Director
and Deputy Chairperson
Temporary Commission on
Dioxin Exposure
194 Washington Avenue
Fifth Floor
Albany, New York 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 Ms. Leverett:

I have received your letter of February 23, and the minutes appended to it, which reached this office on March 10. Your interest in complying with the Freedom of Information Law is much appreciated.

The question raised concerns a request for a copy of transcripts of testimony given by individuals who testified at a hearing of the Temporary Commission on Dioxin Exposure. In this regard, you wrote that the Commission on August 17 ruled that:

> "...all testimony received from veterans, their families or dependents or affected persons, if made available would not reveal the names and identities of such persons.
>
> On the foregoing basis, it was decided that if the minutes of meetings or other information were made available, any names and identification would be omitted.
>
> With the foregoing as guiding principle, all names of persons testifying at meetings of the Commission were omitted from the copies established for use".

The Commission has requested a "ruling" regarding the propriety of releasing the transcript.

I would like to offer the following comments and observations regarding the inquiry as expressed in your letter, as well as the minutes.

First, it is emphasized that neither the Committee nor its staff has the authority to issue what could be characterized as a "ruling". Section 89(1)(b)(i) of the Freedom of Information Law requires the Committee to render advisory opinions to agencies, such as the Commission. As such, any advice given by the Committee may but need not be accepted.

Second, it is assumed that the hearings held by the Commission were public hearings, and that the testimony at those hearings was given in public. If my assumption is correct, it would appear that transcripts of public hearings would be accessible under the Freedom of Information Law.

Third, 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.

Under the circumstances, it appears that only one of the grounds for denial would be relevant to rights of access to the transcripts. Specifically, §87(2)(b) states that an agency may withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". Further, §89(2)(b) lists five examples of unwarranted invasions of personal privacy, the first two of which include:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

From my perspective, the propriety of deleting reference to the identities of those who testified should be based upon whether or not those who testified identified themselves at the hearing. If such individuals indeed

identified themselves, it might be contended with justification that they waived whatever capacity to protect their privacy they might have with respect to the transcript. Presumably, if they identified themselves, any person in attendance, including a member of the news media, could have taken notes that refer to such individuals by name. If the individuals identified themselves, I believe that it would be difficult to justify a deletion of their names from the transcript. On the other hand, however, if those who testified did not publicly identify themselves, it would appear that their names or other identifying details pertaining to them could be deleted from the transcript on the basis of the provisions of the Freedom of Information Law concerning privacy that were quoted earlier.

One of the questions raised in the minutes involved the identities of those who may have requested copies of transcripts. In this regard, I would like to point out that the status of an applicant for records or the purpose for which a request is made should generally be irrelevant to rights of access. As stated in Burke v. Yudelson (368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165), if a record is accessible under the Freedom of Information Law, it should be made "equally available to any person, without regard to status or interest".

Lastly, having reviewed the minutes of the Commission meeting of August 17, I would like to comment with respect to the Open Meetings Law. Please be advised that the Committee is also authorized to provide advice under that statute.

The first page of the minutes refersto an executive session during which only Commission members were present. The minutes indicate that a "public session" was held after the executive session.

I would like to point out that the definition of "meeting" [see attached, §97(1), Open Meetings Law] has been interpreted expansively by the courts to include any gathering of a quorum of a public body [i.e., the Commission; see definition of "public body", §97(2)] for the purpose of discussing public business, whether or not there is an intent to take action [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)].

In addition, §97(3) of the Open Meetings Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, §100(1)

of the Law specifies the areas of discussion that may properly be considered during an executive session and prescribes a procedure that must be accomplished during an open meeting before a public body may conduct an executive session. The cited provision states in relevant part that:

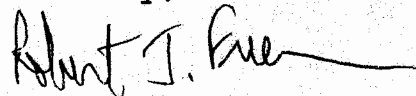
> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

As such, it is in my view clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof.

It is suggested that you might want to review the Open Meetings Law in order to ensure compliance by the Commission. I have enclosed a copy of an explanatory pamphlet regarding both the Open Meetings Law and the Freedom of Information Law that may be useful to you. Also, with respect to voting by members by telephone, I have enclosed a copy of an earlier advisory opinion that questions the propriety of telephone voting.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2388

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 15, 1982

Ms. Carol A. Crocca
Maurice E. Strobridge
Attorney and Counselor at Law
605 Mason Street
Post Office Box 7
Newark, New York 14513

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. Crocca:

I have received your letter of March 10 and appreciate your interest in compliance with the Freedom of Information Law.

You wrote that you were requested by the Village Attorney of Newark:

> "...to prepare guidelines for the village police department regarding public access to police department records and exemptions therefrom".

You have sought materials prepared by the Committee on the subject and asked how you may obtain copies of advisory opinions rendered by this office.

First, there are no specific guidelines or publications that have been prepared by the Committee regarding rights of access to police department records. From my perspective, guidelines might often be misleading, for, as you may be aware, the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law are flexible and rights of access are often dependent upon the specific contents of records or the time when a request is made.

By means of example, perhaps the most relevant provision regarding police department records 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 judical 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, if, for example, a police report regarding an ongoing investigation has been prepared for law enforcement purposes, and if premature disclosure would "interfere" with the investigation, the report could likely be withheld under §87(2)(e)(i). However, if the case is closed or a subject has been apprehended and convicted, the same record may become available, for the harmful effects of disclosure envisioned in §87(2)(e)(i) would essentially disappear.

In short, all that I can suggest is that each request must be considered individually, for, as noted earlier, rights of access and the capacity to withhold may vary depending upon the particular circumstances that may be present.

With respect to "exemptions", one area of police department records that may be exempt from disclosure [see Freedom of Information Law, §87(2)(a)] would involve police officers' personnel records, which are often exempt under §50-a of the Civil Rights Law.

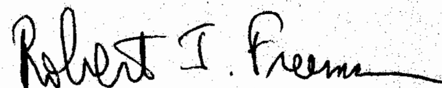
Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects of the Law, an explanatory pamphlet on the subject, an article that I prepared that seeks to provide a "common sense" view of the Freedom of Information and Open Meetings Law, and an index to advisory opinions rendered by this office under the Freedom of Information Law.

The index identifies advisory opinions by means of more than 380 "key phrases". By reviewing an index, you may find opinions in which you are particularly interested. You may request copies of the opinions free of charge by writing to this office and identifying the opinions either by number of by key phrase.

In addition, copies of all advisory opinions are sent to selected law libraries in the state. Those closest to you would be the Appellate Division, Fourth Department, library in Rochester and the Syracuse University Law School Library.

I hope that 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-2389

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STEPHEN PAWLINGA
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 16, 1982

Ramon R. Pina
78-A-3165
Drawer B
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. Pina:

I have received your letter of February 28 in which you sought to attempt to learn how you might "go about making the New York State Board of Parole comply with the Freedom of Information Law".

Specifically, you indicated that you have written to the Board of Parole on several occasions requesting a copy of its subject matter list. Nevertheless, you wrote that the Parole Board has, to date, failed to respond to your requests.

In an effort to provide advice to you and the Division of Parole, a copy of this response will be sent to that office.

First, as you are aware, §87(3)(c) of the Freedom of Information Law requires that each agency, including the Division of Parole, within which the Board of Parole functions, 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".

It is noted that the cited provision represents one of the few instances in the Freedom of Information Law in which an agency is required to create a record. Moreover, as indicated in the language quoted above, a subject matter

list is required to make reference to all categories of records in possession of an agency, whether or not the records are available. From my perspective, compliance with the requirements imposed by §87(3) would not in any way jeopardize the work of an agency, for the cited provision does not require disclosure of any particular records, but rather merely requires that reference be made to the types of records in possession of an agency.

Second, in terms of the alleged failure to respond to your requests, I would like to point out that the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, prescribe time limits within which requests for records must be answered. 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)].

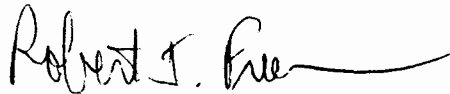
In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. Moreover, 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 intimated in the previous paragraph, if an agency fails to respond to a request, denies access to records, or does not perform a duty required to be performed (i.e., creating a subject matter list), a proceeding may be initiated 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: William Altschuller
Herman Graber
Edward Hammock

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL - AO - 2390

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M[illegible]O M. CUOMO
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 16, 1982

Mr. Harvey M. Elentuck

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. Elentuck:

I have received your correspondence on February 26 in which you asked that I review the materials and provide advice.

Your correspondence involves a series of requests directed to Community School District 24 and the responses to those requests by the District.

In all honesty, based upon a review of the materials, I am not sure of the manner in which you could be more specific in your requests. Further, I agree with the comment that you offered to the District to the effect that its answer was unresponsive to your requests.

It is noted that §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". The quoted standard is in my view flexible and dependent to some extent upon the manner in which an agency maintains its records. However, I believe that under judicial interpretations of the Law, if an agency can determine which records have been sought, the applicant has met his or her burden of "reasonably describing" the records requested [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)].

I would like to point out, too, that the Committee is required by §89(1) of the Freedom of Information Law promulgate general regulations regarding the procedural implementation of the Law. In turn, each agency is required to adopt its own regulations consistent with those of the Committee. One aspect of the Committee's regulations pertains to a so-called "subject matter list". Section 87(3)(c) of the Freedom of Information Law 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."

In turn, §1401.6 of the regulations provides in relevant part that:

> "(b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.
>
> (c) The subject matter list shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list."

In view of the foregoing, by reviewing the subject matter list, an applicant should be able to identify the category of the records sought.

In addition, the regulations require the designation of one or more "records access officers" who have the duty of "coordinating agency responses to public requests for access to records" [see regulations, §1401.2(a)]. Among the duties of a records access officer include assuring that agency personnel:

> "(1) Maintain an up-to-date subject matter list;
>
> (2) Assist the requester in identifying requested records, if necessary" [regulations, §1401.2(b)].

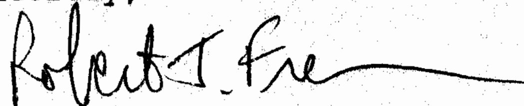
As such, if the nature of the records sought is unclear, I believe that it is the duty of the records access officer to assist an applicant in identifying the records sought, if necessary.

Lastly, in terms of the specific aspects of your request, your first area of inquiry involves records reflective of compliance with a specific provision of the Chancellor's regulations, which you quoted in your request. That regulation requires that an official record be kept. Nevertheless, the response to your inquiry requested a copy of reports pertaining to you. From my perspective, that response bore little relation to your request. The second area of inquiry resulted in a similar response in which the District sent you a letter rather than the records that you requested. The fourth item of request involves records pertaining to "[T]he inspection of J.H.S. 93 made by Mr. Anthony J. Sanfilippo on May 11, 1979." In response, however, it was requested that you be "more specific on this item". I do not know how you could have been more specific and, again, I believe that the records access officer would be responsible for assisting you in identifying the records in which you are interested. Similarly, the last area of your inquiry involves memoranda transmitted among specific individuals concerning your service, and you identified the file number within which such memoranda would exist. Nevertheless, in response, the Executive Assistant to the Community Superintendent asked "[W]hat specific memoranda" you were requesting "in regard to the individuals that you mentioned?" In my view, it appears that you provided as much identifying information as you could have given, for the individuals among whom the memoranda were transmitted were identified in conjunction with a particular file pertaining to you.

In short, I am not sure that I can suggest a method by which you could provide greater specificity in making a request. In order to communicate these sentiments to the District officials, copies of my response to you will be sent to the Community Superintendent and his Executive Assistant.

I hope that I 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: Anthony J. Sanfilippo
Stanley Kakalios

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2391

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 16, 1982

Robert Walker
81-A-5460
Box 51
Great Meadow
Correctional Facility
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. Walker:

I have received your letter of March 12, in which you requested records pertaining to you that might be in possession of 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 have possession of records generally, such as those in which you are interested. Nevertheless, I would like to offer the following comments regarding your inquiry.

First, §89(1) of the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural implementation of the Freedom of Information Law. In turn, §87(1) of the Law requires that agencies adopt regulations in conformity with those promulgated by the Committee.

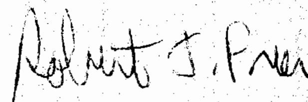
Second, the Department of Correctional Services, which likely maintains possession of the records in which you are interested, has promulgated regulations under the Freedom of Information Law. Several aspects of those regulations involve inmate records and rights of access on the part of inmates to records pertaining to them. I have enclosed a copy of those regulations for your consideration.

Third, the person designated to deal with requests for inmate records is the facility superintendent. As such, it is suggested that you resubmit a new request to the superintendent of the facility in which you are housed.

Lastly, when making a request, it is suggested that you supply as much information as possible in order that the person designated to respond to the request can locate the records in which you are interested.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2392

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 16, 1982

Dr. Douglas E. Lee, Ph.D.
75-A-1894
Greenhaven Correctional Facility
Stormville, New York 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 Dr. Lee:

I have received your letter of February 19. Please accept my apologies for the delay in response.

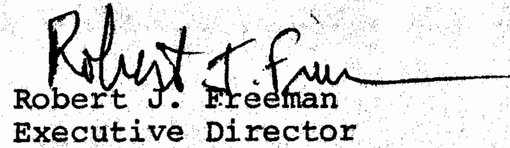
Your inquiry concerns amendments to the Freedom of Information Law regarding attorneys' fees and fees for copying.

I have enclosed a copy of the legislation to which you made reference, which was passed by the Assembly yesterday, but has not yet been considered by the Senate. Consequently, the provisions to which you made reference are not law as yet. I would also like to point out that similar legislation was carried by both the Senate and the Assembly last year, but was vetoed by the Governor. The chances of enactment this year in my view remain open to conjecture.

With respect to the example that you provided concerning suing a state agency on the basis of a denial of access, please note that the language of the legislation would, if enacted, enable a court to assess attorney fees against an "agency" under certain circumstances. As such, I do not believe that an individual would be responsible for payment of any attorneys' fees that might be assessed. Similarly, there is no provision regarding compensatory damages.

I hope that I 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-2393

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 17, 1982

Mr. Glen Cuffee
#80-A-203
Box 51
Comstock, NY 12821

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. Cuffee:

I have received your letter, which reached this office today, in which you requested records 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; the Committee does not have possession of records generally, such as those in which you are interested. As such, the records that you have requested cannot be made available by this office.

Nevertheless, I would like to offer the following observations with respect to your inquiry.

The request involves access to an arrest report pertaining to you. Specifically, the report that you are seeking was apparently prepared and filed by the arresting officers. In this regard, I believe that there may be two sources that may be cited for the purpose of seeking copies of the arrest report.

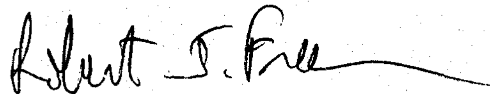
First, it is suggested that you direct a request to the precinct in which the arrest occurred. In the alternative, you might want to direct a request to the records access officer at the New York City Police Department, One Police Plaza, New York, NY 10038. In your request, you should provide as much specificity as possible, including dates, file designations, docket and indictment numbers and other similar information that would enable those in receipt of the request to locate the arrest report.

A second possible source would be the court in which the proceeding was conducted. Although the courts and court records are not subject to the Freedom of Information Law, as a general rule, court records are available upon payment of the appropriate fees for photocopying. Since the arrest report could be in possession of a court, you might want to request the records from the clerk of the court, also providing as much specificity as possible.

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 on the subject that may be particularly useful to you, for it contains sample letters of request and appeal.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2394

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 17, 1982

Charles J. Theophil

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. Theophil:

I have received your letter of March 5, addressed to the attention of Gilbert P. Smith, Chairman of the Committee. Please note that correspondence and requests for advice are routinely handled by the Committee's staff. As such, I would like to offer the following comments regarding your correspondence.

According to your letter, a request made under the Freedom of Information Law was denied on November 16, 1978. It appears that your appeal of December 8, 1978, was also denied. The information in question involves the status of a particular individual as an employee of New York City, and whether that individual had been granted a leave of absence.

Under the circumstances, since you requested the information some three and a half years ago, it is suggested that you submit a new request to the New York City Department of Personnel.

Section 89(4)(a) of the Freedom of Information Law provides that, following a determination on appeal, an applicant for records may seek judicial review of a denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. The statute of limitations for initiating such a proceeding is four months from the date of a final determination. As such, the time within which you could have initiated a judicial proceeding expired more than three years ago.

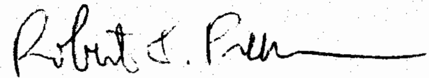
Perhaps the best method of determining the status of the individual in which you are interested would involve a review of a payroll listing. In this regard, §87(3)(b) of the Freedom of Information Law requires that each agency maintain:

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

By reviewing the payroll record required to be compiled under the Freedom of Information Law, you can determine whether a particular individual remains in the employ of an agency. If that individual's name does not appear on the list, I believe that you could safely assume that he is no longer employed by New York City.

I hope that 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: R. J. Cunningham
Arthur Friedman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2395

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 17, 1982

Ms. Ismael Gomez
Staff Attorney
Queens Legal Services Corp.
89-02 Sutphin Boulevard
Jamaica, New York 11435

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. Gomez:

I received your letter of March 15 today in which you requested copies of regulations promulgated by agencies subject to the Freedom of Information Law pursuant to §87(1)(b) of the Freedom of Information Law.

It is noted at the outset that the cited provision of the Public Officers Law does not require that agencies file their regulations with the Committee. As such, the Committee does not have possession of the records in which you are interested. Similarly, the Committee maintains no list of state agencies subject to the Freedom of Information Law.

However, I would like to offer the following observations and comments.

First, state agencies are required to publish their regulations in the New York Code of Rules and Regulations. By reviewing the New York Code of Rules and Regulations, you could likely locate the procedural regulations that have been adopted under the Freedom of Information Law by state agencies.

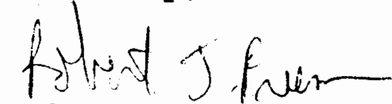
Second, as you may be aware, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations regarding the procedural implementation of the Law. Section 87(1) requires all agencies to promulgate regulations in conformity with those of the Committee. I have enclosed a copy of the Committee's regulations for your consideration.

Third, in order to assist you, I have enclosed a directory of state agencies published by the Department of State which provides the names, addresses and contact telephone numbers for virtually all state agencies.

Fourth, the Committee was required under Chapter 677 of the Laws of 1980 to implement legislation pertaining to personal privacy. In brief, the legislation required state agencies to submit to the Committee notices containing responses to a series of thirteen questions regarding each system of records maintained by an agency from which personal information could be retrieved. In this regard, the Committee prepared a general report regarding agencies' responses, a copy of which is enclosed, as well as a listing by agency of each system of records and responses to a series of seven survey questions identified in the report. The list of systems of records is voluminous and might not be of significant value to you, for it does not identify specific regulations that may have been adopted by agencies. If you are interested in the listing, however, I would be pleased to send it 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-2396

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 17, 1982

Thomas J. Gentile

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. Gentile:

I have received your letter of March 11, 1982, in which you requested an advisory opinion with respect to rights of access by an individual to his or her criminal history record.

Specifically, members of the union that you represent have attempted to obtain arrest and/or conviction records maintained by their local police departments. Their requests have become necessary as a routine security check for purposes of qualifying them for employment at a nuclear facility. Further, as I understand the situation, individuals cannot work at a nuclear site until a criminal history record (or absence thereof) has been reviewed. The correspondence attached to your letter indicates that requests have been denied by the City of Buffalo Department of Police and the Town of Seneca Department of Police.

I would like to offer the following comments with respect to your inquiry.

First, during a recent telephone conversation, you noted that your initial request for arrest records was directed to the State Division of Criminal Justice Services (DCJS). However, a representative of that office advised you to direct your request to local law enforcement agencies. Nevertheless, upon advising your members to submit requests, the members were advised by local law enforcement authorities to send their requests to DCJS.

In terms of the rationale for withholding, you wrote that:

> "[T]he agency is refusing, via Title 28, United States Code and the NYS Executive Law. The individual is not in need of a complete criminal history, rather, (s)he only needs local information".

Further, even though the applicants do not require complete criminal history information, they were in essence foreclosed from gaining access to any criminal history information maintained in relation to them by the local police departments.

In my opinion, the criminal history information that your members are seeking should be made available to them under the Freedom of Information Law.

Second, 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 police department or DCJS, 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). From my perspective, there are three possible grounds for denial that could be relevant to your inquiry. However, in my view, given the circumstances you described, none of these grounds for denial could 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..."

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. Although records reflective of an individual number of arrests might be characterized as "intra-agency" material of a police department, such records consist 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 under the Freedom of Information Law which may be 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 as set forth in subparagraphs (i) through (iv) of §87(2)(e) are based largely upon potentially harmful effects of disclosure. From my perspective, it is unclear that disclosure of previous arrests or convictions to the individual arrested 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. Further, it might be argued that the records in question were prepared in the ordinary course of business, and not for law enforcement purposes. Consequently, I do not believe that §87(2)(e) of the Law could be cited to justify a denial of access to the arrest records sought by your members.

The third ground for denial of possible 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 arrest records, in my opinion, significant privacy considerations do not arise when the subject of an arrest requests records pertaining to him or her. Moreover, §89(2)(c) of the Law states that disclosure would not constitute an unwarranted invasion of personal privacy:

> "...when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him".

Therefore, it does not appear that §87(2)(b) concerning unwarranted invasions of personal privacy could be cited as a basis for withholding when the subject of a record seeks records pertaining to himself or herself.

Fourth, the letter written by the City of Buffalo, Police Department, a copy of which you enclosed, made reference to Article 160 of the Criminal Procedure Law. Specifically, §160.50 of the Criminal Procedure Law states that "upon the termination of a criminal action or proceeding against a person in favor of such person", records of an arrest may be sealed. Nevertheless, §160.50(1)(d) directs that such records "shall be made available to the person accused or to such person's designated agent..." Therefore, I do not believe that Article 160 of the Criminal Procedure Law could generally be cited to deny access to the records in question.

Fifth, the applicants for arrest records were also advised by the local law enforcement agencies that DCJS regulations prohibit disclosure of these records. It is noted that the functions, powers and duties of DCJS are described in §837 of the Executive Law, and §837(8) states that the Division shall have the power to:

> "[A]dopt appropriate measures to assure the security and privacy of identification and information data..."

In my opinion, the language of §837(8) could not 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 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 a statute, such as the Freedom of Information Law. As a general rule, in the absence of a statutory exemption precluding disclosure of specific records, regulations cannot in my view abridge or in any way diminish rights granted by a statute [see e.g., Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405].

Sixth, it appears that the law enforcement agencies with whom you have been dealing have consistently referred to Title 28 of the Code of Federal Rules (C.F.R.). Part 20 of Title 28, C.F.R., entitled "Criminal Justice Information Services" sets forth regulations with respect to state and local criminal history record information systems. The Buffalo Police Department in its letter of denial states that:

> "these rules provide that the police department may disseminate the information or background check you have requested only to approved criminal justice agencies" (emphasis as in original).

Additionally, in its reference to Title 28 Regulations, the Town of West Seneca Police Department indicated that:

> "the above regulations limit the dissemination of criminal history record information to (a) criminal justice agencies; (b) individuals and agencies authorized by statute; or (c) individuals and agencies for the express purpose of research".

I disagree with the restrictive interpretations of the federal regulations offered by those law enforcement authorities. It is emphasized that §20.34 of Title 28, C.F.R., entitled "Individuals right to access criminal history record information", allows an individual to review his or her criminal history record.

Moreover, §20.30 of those regulations states that the provision regarding an individual's right of access applies "to any Department of Justice criminal history record information system that serves criminal justice agencies in two or more states and to Federal, state and local criminal justice agencies to the extent that they utilize the services of Department of Justice criminal history record information systems". Given the direction in the federal regulations, it appears that there is no overruling federal prohibition of access by an individual requesting criminal history information pertaining to himself or herself. Additionally, since you were advised by a representative of the DCJS to contact the local agencies for the information sought by your members, I can envision no conflict with federal regulations with respect to their capacity to release the information in question.

Seventh, I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" expansively to include:

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

In view of the breadth of the language quoted above, rights of access granted by the Freedom of Information Law would be applicable to any agency [see definition of "agency", §86(3)] that maintains the records sought. As such, if, for example, the records are maintained by a local law enforcement agency and DCJS, they would in my view be equally available from either of the agencies.

Lastly, §89(3) of the Freedom of Information Law states in part that, following a request for a record, an agency upon request "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". Consequently, an applicant may request a certification in writing to the effect that the records exist and are in possession of an agency, or that the records sought are not maintained by an agency or cannot be found after having made a diligent search.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Attachment

cc: Robert Schlanger
John J. Deppeler, Captain
James B. Cunningham, Commissioner

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2397

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 18, 1982

Mr. Edward K. Byrne
77-D-93
Box 149
Attica, New York 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. Byrne:

I have received your letter of March 8, in which you questioned the "constitutionality" of §1401.7(c) of the regulations promulgated by the Committee as well as Directive #2010 issued by the Department of Correctional Services.

In brief, you wrote that, in your view, it is the intent of the Freedom of Information Law to "compel" an agency to respond to a request and to require an agency to render a denial of access to records in writing.

I must admit that I am not familiar with the Directive of the Department of Correctional Services to which you made reference. Nevertheless, I believe that you may have misinterpreted the intent of the cited provision of the Committee's regulations. Section 1401.7(c) provides that:

> "[I]f an agency fails to respond to a request within five business days of receipt of a request as required in Section 1401.5(d) of this Part, such failure shall be deemed a denial of access by the agency."

Section 1401.5(d) of the 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."

As you may be aware, §89(3) of the Freedom of Information Law provides in relevant part that:

> "[E]ach entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request 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.."

The regulations promulgated by the Committee seek to conform and reasonably implement the language of the statute quoted above and provide applicants with a right to appeal when an agency fails to respond within specified time limits. For example, if an agency receives a request and acknowledges receipt of a request in writing, without the direction provided in the regulations, the time for determining to grant or deny access following an acknowledgment could be unduly lengthy and might involve months, rather than ten business days. That particular problem has arisen with respect to the federal Freedom of Information Act, under which agencies often acknowledge the receipt of a request but fail to grant or deny access until several months have transpired. Section 1401.7(c) was promulgated in order to enable an individual

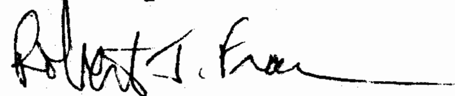
who has not received a response within a certain time period to consider that his or her request has been denied. In such cases, the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law and §1401.7 of the regulations.

It is also emphasized that §89(4)(a) of the Law requires that a denial on appeal must be "fully" explained in writing to an applicant. Therefore, a written reply is always required. Again, if, however, no written response is given by an agency, the Committee's regulations enable an applicant to challenge what may be considered a "constructive" denial of access. As such, the thrust of the regulations does not in my view diminish an individual's rights of access to records or procedural capacities; on the contrary, I believe that the regulations seek to compel agencies to respond to requests in writing within specified periods of time, while concurrently enabling an individual to seek review by an appeals officer when no response to an initial request is given within the time limits set forth in the regulations.

Lastly, I am aware of but one judicial determination that deals specifically with a failure to respond [see attached, Floyd v. McGuire, Sup. Ct., New York Cty., March 19, 1981, 437 NYS 2d 886]. In that case, an applicant for records did all that he could have done procedurally in terms of requesting records and appealing. The court found that since the appropriate procedural steps had been accomplished by the petitioner, he exhausted his administrative remedies, and, therefore, had standing to initiate an Article 78 proceeding under the Civil Practice Law and Rules.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2398

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 18, 1982

Vincent Casale
79-A-1497
Building #5
Box 367
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. Casale:

I have received your letter of March 8 to which you attached a copy of a request for a "probation report" prepared prior to sentencing.

In your letter to the Deputy Commissioner for Administrative Services at the Department of Correctional Services, you indicated your belief that the probation report should be made available to you.

Although you did not specifically request assistance, it would appear that the Department of Correctional Services cannot provide you with a copy of the report in question. It is assumed that the record characterized as the "probation" report is a "presentence" report.

In this regard, a presentence report is generally confidential under §390.50(2) of the Criminal Procedure Law, which states that:

> "[N]ot less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination 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 would appear that a presentence report may be available only if the court chooses to grant access to it, and only under the circumstances described in §390.50. As such, it is suggested that you might want to discuss the issue further with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Mark D. Corrigan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2399

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

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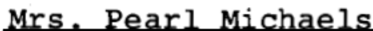
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 18, 1982

Mrs. Pearl Michaels


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 Mrs. Michaels:

As you are aware, your correspondence addressed to Gilbert P. Smith, Chairman of the Committee on Public Access to Records, has been forwarded to the office for response.

Your inquiry was precipitated by a request for a school safety plan, which apparently must be developed by New York City schools pursuant to a collective bargaining agreement. The question that you raised is whether safety plans must be prepared by schools in other jurisdictions.

I have made a number of inquiries on your behalf in order to determine whether so-called "safety plans" exist or are required to be created. In this regard, I have enclosed a portion of Part 155 of the regulations promulgated by the Commissioner of Education entitled "Educational facilities". Section 155.3 deals specifically with health and safety in existing educational facilities. The provisions of §155.3 are rather expansive and should provide you with an indication of safety rules that must be followed in educational facilities in New York. I would like to emphasize that §155.3 does not apply to facilities in school districts in cities having a population of 125,000 or more. As such, the cited provision would not be applicable to school facilities in New York City.

Having discussed the matter with the Office of Counsel of the New York State School Board Association, I was informed that New York City schools must generally operate within the safety requirements of the New York City Fire and Administrative Codes.

To obtain more specific information on the subject, it is suggested that you might want to write to:

Brian P. Walsh, Administrator
Educational Facilities and
Management Services
NYS Department of Education
Education Building
Albany, New York 12234

With regard to your inquiry directed to the New York City Board of Education under the Freedom of Information Law, it is possible that the problem in providing acccess to a safety plans involves compliance with contractual provisions. If, for example, a plan required to be created under the contract does not exist, the enforcement of the contract, rather than the provisions of the Freedom of Information Law, would be at issue. If, however, the issue deals with rights of access to a record containing a safety plan, it is suggested that such a record would be available under the Freedom of Information Law.

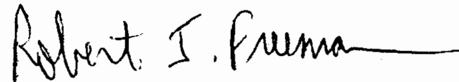
From my perspective, a safety plan adopted by an agency would likely constitute the policy of the agency and, therefore, would be accessible under §87(2)(g)(iii) of the Freedom of Information Law (see attached). In addition, the safety plan might also be characterized as "instructions to staff that affect the public" that would be available under §87(2)(g)(ii) of the Freedom of Information Law.

With respect to the time limits within which an agency must respond to a request, §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 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)].

I hope that I 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: Committee Members

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-739
FOIL-AO-2400

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 22, 1982

Mr. Orville J. Martin

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. Martin:

I have received your letter of March 2 and March 4.

You have requested an advisory opinion with respect to various questions you raised under both the Freedom of Information and Open Meetings Laws. Specifically, you made a request for a variety of records in possession of the Newark Central School District. Although it appears that you have been granted access to most of the records you sought, you are concerned that the School District may not be in procedural compliance with either the Freedom of Information Law or the Open Meetings Law.

I would like to offer the following comments with respect to your inquiry.

First, you enclosed a copy of a news article stating that the Newark Central School District School Board passed a motion:

> "...increasing the per-page copying charge for items given out under the Freedom of Information Act from 10 cents to 50 cents..."

Additionally, you were advised by the Superintendent of Schools, Edward G. McHale, Jr., in a letter dated February 26, that "[T]he increase in charge does not include costs, however, for research or compilation of data but does include normal clerical functions."

In this regard, as a general rule, the Freedom of Information Law authorizes an agency, such as a school district, to charge no more than twenty-five cents per photocopy unless a different fee is prescribed by some other provision of law. Section 87(1)(b)(iii) of the Law (see attached) states that agencies 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."

If a record is larger than nine by fourteen inches or is not subject to reproduction by photocopying, the School Board could assess a fee based upon the actual cost of reproduction.

However, from my perspective, the motion passed by the School Board conflicts with the provisions of the Freedom of Information Law quoted above. Since I am unaware of any authority that would enable a school board by means of a motion to supersede the direction given by a statute, such as the Freedom of Information Law, I believe that a fee of fifty cents per page as established by the Board violates the Freedom of Information Law.

Second, I agree with your misgivings regarding the clerical and administrative charges, which, according to the Superintendent, would constitute a portion of the total reproduction cost of $228.49. In a different letter from Superintendent McHale, dated February 10, 1982, he wrote that "[T]he information can be compiled for you and copied by us at the legally permitted rate for copying and labor costs." In my view, the costs envisioned by the Superintendent cannot be validly assessed. The only fee that may be charged, under the circumstances, is a fee for photocopying, which, as noted earlier, is limited to twenty-five cents per photocopy. Moreover, §1401.8(a) of the regulations promulgated by the Committee, which have the force and effect of law, provide that:

> "There shall be no fee charged for the following:
>
> (1) Inspection of records;

(2) Search for records; or

(3) Any certification pursuant to this Part."

Third, you also expressed concern relative to the time limits for response to requests under the Freedom of Information Law. In this regard, §89(3) of the 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)].

Fourth, you requested information regarding the availability of minutes. Here I direct your attention to §101(3) of the Open Meetings Law which states that:

"[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within

> two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

To comply with the cited provision, a public body such as a school board, must compile and make minutes available within two weeks of such meetings. You wrote that you unsuccessfully sought to obtain minutes of a February 18, 1982 School Board meeting during which the motion raising the photocopy fee to fifty cents per page was adopted. Under the provisions of the Open Meetings Law, those minutes should have been available to the public as of March 4.

I hope 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.

cc: School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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RT P. SMITH, Chairman

IVE DIRECTOR
RT J. FREEMAN

March 22, 1982

Fred M. Anderson

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. Anderson:

I have received your recent letter in which you indicated that the Attorney General's office suggested that you write to the Committee regarding access to records in New York.

You have requested a copy of the New York Freedom of Information Law and asked whether there is any agency that investigates failures to respond to requests made under the Law and whether New York State has enacted a "privacy act".

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 Law states that the Committee shall provide advice to any person having questions regarding rights of access to records [see §89(1)]. As such, if you have questions or problems concerning the implementation of the Freedom of Information Law by an agency of government in New York, you could write to this office and request an advisory opinion. As a general rule, when a person requests an advisory opinion, a copy of the opinion is forwarded to the agency involved in order that it may be given the same advice as the person who sought the opinion.

There is no statute in New York that could be characterized as a "privacy act". However, the Freedom of Information Law contains provisions regarding "unwarranted invasions of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. In addition, there are numerous other statutes that prohibit disclosure of records that identify individuals (i.e., tax, welfare, unemployment insurance, probation and other types of "personal" records).

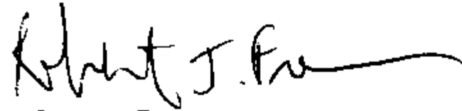
You intimated that requests may have been made but that no response to those requests had been given. In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. 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 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

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 17, 1982

JoAnne Silverstein

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. Silverstein:

I have received your letter of March 5 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you wrote that building plans and permits have been made available to you in both the Town of Islip and New York City, but that a village has withheld the same records. Your question is whether a village operates under any "special 'secrecy' privilege" with respect to the records in question.

I would like to offer the following comments regarding your inquiry.

First, having reviewed the Village Law, I am unaware of any provision that would remove building plans and permits from the scope of rights of access granted by the Freedom of Information Law or any other applicable provision of law.

Second, the documents in which you are interested in my view clearly fall within the definition of "record" appearing in §86(4) of the Freedom of Information Law. The cited provision 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 language quoted above, it is in my view clear that the Freedom of Information Law applies to building plans and permits.

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, 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 appearing in §87(2)(a) through (h) of the Law. Under the circumstances, it does not appear that any of the grounds for denial could appropriately be cited to withhold the records in which you are interested.

And fourth, §89(6) 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".

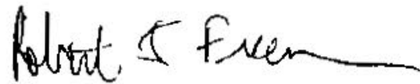
Therefore, if another provision of law grants access to certain records, nothing in the Freedom of Information Law could be cited as a basis for withholding those records. In this regard, §51 of the General Municipal Law has long provided that:

> "[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, and shall be open during all regular business hours..."

In view of the foregoing, the records that you are seeking should in my opinion be made available under the provisions of the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Mayor Schwartz

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 23, 1982

Frances C. Nugent
Town Clerk
Town of Rye
Office of Town Clerk
10 Pearl Street
Port Chester, NY 10573

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. Nugent:

As you are aware, I have received your letter of March 15, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, petitions were filed with the Supervisor of the Town of Rye regarding the proposed incorporation of an unincorporated area of the Town and the Village of Rye Brook. Requests to inspect the petitions were made, and, as a consequence, a form was prepared for signature and approval prior to granting access to them "in order to be able to determine who last viewed said petitions in case of mutilation, etc.". Your question concerns a request for the "request forms", which includes the signatures and addresses of those who sought to inspect and/or copy the petitions.

I would like to offer the following comments regarding 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 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, from my perspective, the only ground for denial of potential relevance is §87(2)(b), which states that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". Further, §89(2)(b) of the Law lists five among conceivable dozens of unwarranted invasions of personal privacy.

Having reviewed the request form, I believe that the portion of the form indicating the signature of an applicant, that person's name, address and telephone number, could likely be deleted from the form on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In my opinion, the identity of a person who requests a record and the reasons for making a request are largely irrelevant to rights of access. In an early landmark decision rendered under the Freedom of Information 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]. Stated differently, if a record is accessible under the Freedom of Information Law to one person, presumably it is equally accessible to any person requesting that record. Consequently, it is reiterated that the identity of an individual who requests records would in my view be irrelevant and could if disclosed result in an unwarranted invasion of personal privacy.

Further, one of the examples of an unwarranted invasion of personal privacy might be cited to bolster such a contention. Section 89(2)(b)(iv) states that an unwarranted invasion of personal privacy includes:

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

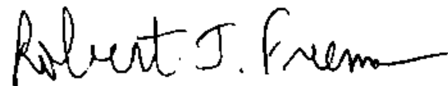
In my view, a home address, a telephone number, and perhaps even the reason for which a request is made, might be considered "information of a personal nature". Moreover, if there is a controversy that precipitated a series of requests, it might be argued that disclosure of identifying details could result in "personal hardship" to the person who made the request. In addition, as noted previously, if a record is accessible under the Freedom of Information Law, the identity of an applicant for records would not in my view be "relevant to the work of the agency".

For the reasons expressed above, it is my view that the signature, name, address and telephone number of those individuals who submitted requests could likely be deleted from the request form on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Lastly, it is noted that the Committee has never proposed that a particular form be used for the purpose of requesting records. The Committee has in fact suggested that a failure to complete a form prescribed by an agency could not validly constitute a basis for withholding records. On the contrary, in conjunction with §89(3) of the Freedom of Information Law, it has been advised that any request made in writing that "reasonably describes" the records sought should suffice. I would also like to point out that the request form attached to your letter includes space for an indication of the reason for which a request is made. Once again, based upon the language of the Freedom of Information Law and the decision rendered in Burke v. Yudelson, supra, it has been advised that, as a general rule, the reason for which a request is made is irrelevant to rights of access. Similarly, therefore, if, for example, an individual failed or refused to indicate his or her reason for seeking to inspect records, such refusal or failure could not in my view be cited as a basis for withholding.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Viola C. Nelson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 23, 1982

Dr. Charles R. Birx

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 Dr. Birx:

I have received your letter of March 4 concerning rights of access to records, as well as meetings of a zoning board of appeals.

It is noted at the outset that you requested two "rulings" from this office. Please be advised that the Committee on Public Access to Records is authorized to issue advisory opinions with respect to the Freedom of Information and Open Meetings Laws; it has no power to compel compliance with either of the two statutes.

The first area of inquiry concerns rights of access to a transcript prepared from a stenographic record taken during a meeting of the East Bloomfield Zoning Board of Appeals. Your remaining question deals with the manner in which the East Bloomfield Zoning Board of Appeals conducts its meetings.

I would like to offer the following comments 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 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, a transcript of a stenographic record is in my view a "record" subject to rights of access granted by the Freedom of Information Law. Section 86(4) of the Law defines "record" expansively to include:

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

In view of the breadth of the language quoted above, a transcript would in my opinion clearly constitute a "record" that falls within the scope of the Freedom of Information Law.

Third, in an analagous situation, it was held judicially that tape recordings of open meetings are available [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978] and that notes taken at a meeting and later used to compile minutes are also available [see Warder v. Board of Regents, 410 NYS 2d 743 (1978)]. From my perspective, if a tape recording of an open meeting is available, I believe a stenographic record of an open meeting would also be available to the public for inspection and/or photocopying.

Fourth, you indicated that several persons inquired whether or not a copy of the transcript would be made available at the Town Hall for review by any interested person. In this regard, please note that §30(1) of the Town Law requires that the town clerk "[S]hall have the custody of all the records, books and papers of the town". Therefore, in my opinion, once the transcript is prepared, the most likely repository for this transcript would be in the office of the town clerk. Further, it has been held judicially that records accessible under the Freedom of Information Law should be made equally available to "any person", regardless of the status or interest of the individual or group that may seek access to such records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165].

Fifth, with respect to the fees that may be charged in response to a request for copies of the transcript, §87(1)(b)(iii) states that:

> "...the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law".

Therefore, if a transcript has been prepared, in my opinion, you should be charged no more than a maximum of twenty-five cents per photocopy per page.

Sixth, according to your letter, the East Bloomfield Zoning Board of Appeals apparently met to deliberate during a recess of its public meeting. You wrote that:

> "[D]uring the recess all five board members retired to a small room, during the first meeting the door was closed to the public. After the recess the meeting was again called to order and the chairman, Mr. Donald Hudson, declared that it was the consensus of the board members that more information was needed and therefore the meeting was to be rescheduled for another date. However, no public discussion was presented by any of the board members indicating that they wanted more information or another meeting".

You have questioned the propriety of this procedure.

In this regard, it is important to point out that the openness of meetings of town zoning boards of appeals is governed, according to recent case law, not by the Open Meetings Law, but rather by §267 of the Town Law. A leading case in this area is <u>Orange County Publications v. Council of the City of Newburgh</u> [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. This decision dealt with two issues that arose with respect to the City of Newburgh. One of the issues pertained to the status of work sessions held by the Common Council. The other concerned closed deliberations of the Zoning Board of Appeals of the City of Newburgh. With regard to the latter, the Appellate Division held that the City of Newburgh's Zoning Board of Appeals is exempt from the Open Meetings Law to the extent that it deliberates in a quasi-judicial manner (see 60 AD 409 at 418). It is emphasized that the decision insofar as it applies to zoning boards of appeals dealt only with <u>city</u> zoning boards of appeals.

The focal point of the problem is §103(1) of the Open Meetings Law, which states that judicial or quasi-judicial proceedings are exempt from the Open Meetings Law. Stated differently, if a matter is exempt from the Open Meetings Law, its provisions simply do not apply.

Traditionally, zoning boards of appeals have been found to engage in quasi-judicial proceedings when they deliberate toward a determination. As such, it would appear initially that zoning boards may deliberate in private.

However, it is important to point out that there are distinctions between the requirements of openness of city zoning boards of appeals, as opposed to town and village zoning boards of appeals.

Specifically, §105(2) of the Open Meetings Law states that:

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

In this regard, both §§267(1) of the Town Law and 7-712 (1) of the Village Law have long provided that all meetings of town and village zoning boards of appeals "shall be open to the public". Since those provisions are apparently less restrictive than the Open Meetings Law, they remain in effect.

With respect to city zoning boards of appeals, there is no provision analagous to either §267 of the Town Law or §7-712 of the Village Law. As such, even though a city zoning board of appeals may engage in deliberations similar to those of their town and village counterparts, their deliberations are exempt from the Open Meetings Law to the extent that they may be considered "quasi-judicial".

Although there are several judicial determinations that deal with the capacity of town and village zoning boards of appeals to engage in closed sessions, there is but one decision that interpreted the issue directly and expansively. Specifically, Matter of Katz (Sup. Ct. Westchester County, NYLJ, June 25, 1979) held that a town zoning board of appeals cannot cite either the exemption

for quasi-judicial proceedings or close its deliberations under the provisions of the Open Meetings Law relative to the capacity to hold executive sessions. In essence, the court found that §267(1) of the Town Law is less restrictive than the Open Meetings Law, thereby negating the application of the Open Meetings Law to a town zoning board of appeals. As such, the cited provision of the Town Law, and not the Open Meetings Law, was considered to have been applicable. Further, as a consequence, the court found that the town zoning board of appeals could not enter into executive sessions based upon a literal interpretation of the language of the applicable Town Law provision.

In sum, although there is confusion regarding the deliberations of zoning boards of appeals, based upon §267 of the Town Law, as indicated in Katz, it appears that a town zoning board of appeals does not have the capacity to enter into an executive session or otherwise conduct public business behind closed doors.

I hope 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: Zoning Board of Appeals

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-741
FOIL-AO-2405

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 23, 1982

Raymond E. Steele
Supervisor
Town of German Flatts
14 West Main Street
Mohawk, NY 13407

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. Steele:

I have received your letter of March 11, in which you requested comments regarding the use of tape recorders at Town Board meetings, as well as rights of access to tape recordings.

According to your letter, the Superintendent of Highways for the Town of German Flatts is required to attend all regular Town Board meetings. He has expressed an interest in tape recording the meetings with his "personal cassette and tapes". The reason for his request to tape record the meetings is unknown. His tape recorder is apparently a portable, battery operated device.

You have asked whether a Town Board may restrict Board members or others from tape recording its meetings. In a related matter, you asked who determines when a tape recording of a meeting becomes a "matter of public record" and raised questions concerning the nature, if any, of the protection that a board might have with respect to persons who tape record meetings "for the sake of creating a mockery situation".

In view of a relatively recent judicial determination as well as an opinion of the Attorney General, I do not believe that a public body can justifiably prohibit any person from using a portable, battery operated cassette tape recorder at an open meeting of a public body.

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 ramains 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.

With respect to your second area of inquiry relative to rights of access to a tape recording of an open meeting, I would like to offer the following comments.

It is unclear whether the Superintendent of Highways seeks to use a tape recorder as an interested member of the public, or in the performance of his official duties. From my perspective, if a member of the public tape records a meeting, the tape recording remains the personal property of that individual. However, if a clerk, a board, or perhaps a superintendent of highways uses a tape recorder in the performance of their official duties, I believe that a tape recording would constitute a "record" subject to rights of access granted by the Freedom of Information Law.

I would like to point out that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

In view of the breadth of the definition quoted above, if a tape recording is prepared in the performance of one's duties, I would contend that it is produced for an agency and therefore would fall within the scope of the Freedom of Information Law.

Moreover, it has been held that a tape recording of an open meeting in possession of an agency is accessible under the Freedom of Information Law [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

Assuming that a tape recording is prepared by a public officer and falls within the scope of the Freedom of Information Law, based upon the definition of "record", I believe that it is available as soon as it exists.

With respect to the "protection" that a board might have with respect to persons who record a meeting, I can offer but one suggestion. If a member of the public records a meeting and if the tape recording falls outside the scope of the Freedom of Information Law, a method of ensuring that the tape recording is accurate and has not been altered would involve the use of a tape recorder by the Town. By so doing, the Town would have a tape recording in its possession.

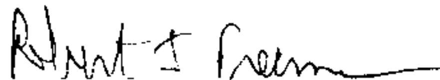
Your last question is whether a town supervisor as records access officer could:

> "...fix the forms or character of such tapes beforehand whether such tapes (Superintendent) be classified as Public Records?"

In all honesty, I am not sure that I understand your question. It appears that you are asking whether the tape recording in possession of the Superintendent of Highways could be characterized as a public record. If that is indeed your question, once again, I believe that the tape recording could not be characterized as "personal property" if the Superintendent seeks to create the tape recording as a public officer in the performance of his official duties. The closest situation to that described involved a finding by a court that personal notes taken as the basis for the creation of minutes constituted "records" subject to the Freedom of Information Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2406

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

March 24, 1982

Ms. Lorraine S. Koverda
Controller
Beacon City School District
Beacon High School
72 Fishkill Avenue
Beacon, New York 12508

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. Koverda:

I have received your letter of March 19 in which you requested guidance regarding the impact of the Freedom of Information Law on high school student activity funds.

It is noted at the outset that a copy of Part 172 of the regulations promulgated by the Commissioner of Education entitled "Extraclassroom Activity Funds" has been enclosed. Section 172.2 of the regulations requires that a board of education must make rules and regulations "for the establishment, conduct, operation, and maintenance of extraclassroom activities and for the safeguarding, accounting and audit of all moneys received." Section 172.3 specifies that the rules adopted by a board of education must include records and receipts of expenditures as well as reports to be made at least quarterly to the board of education. The cited provision also requires that "an independent and impartial audit of the accounts shall be made at least annually in conjunction with the audit of the district records." In view of the foregoing, the Commissioner's regulations provide substantial direction regarding the treatment of student activity funds.

With respect to the Freedom of Information Law, I would like to point out that §86(4) of the Law defines "record" to mean:

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

Due to the breadth of the language quoted above, the records described in the Commissioner's regulations are in my view subject to rights of access granted by the Freedom of Information Law.

In addition, I believe that such records would be accessible under the Freedom of Information Law. 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 records consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

In my opinion, the records in question could likely be characterized as "intra-agency materials". Nevertheless, it would appear that they would consist solely of statistical or factual information that would be available under §87(2)(g)(i) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2407

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 24, 1982

Joseph Fournier
77 A 3575
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. Fournier:

I have received your letter of March 11 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you asked whether Prisoners' Legal Services of New York is an "agency" that falls within the scope of the Freedom of Information Law.

In my opinion, Prisoners' Legal Services is not subject to the Freedom of Information Law. 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".

From my perspective, the definition of "agency" generally applies to governmental entities that perform a governmental function. Prisoners' Legal Services is a not-for-profit corporation. Moreover, I believe that, as its designation suggests, it provides services of a legal rather than a governmental nature. Therefore, I do not believe that Prisoners' Legal Services is in any way 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-743
FOIL-AO-2408

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 24, 1982

Mr. Frank J. Ryan
Town Attorney
Town of Cortlandt
The Amberlands
Route 9A and Baltic Place
Croton-on-Hudson, NY 10520

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. Ryan:

I have received your letter of March 11 and thank you for your interest in compliance with the Freedom of Information Law.

Your inquiry concerns a situation in which an executive session was held by the Town Board of the Town of Cortlandt concerning the Town's building inspector as well as pending litigation in which the Town is involved. The Town Clerk prepared what might be characterized as minutes of the discussion that transpired during the executive session, even though no action, vote, motion, or resolution was passed. Your question is whether the minutes should be made available to the public.

It is noted that you enclosed a copy of the minutes for my consideration. Although I will offer advice in the ensuing paragraphs, I have not read the minutes in question and have returned them to you. In all honesty, since the authority of the Committee and its staff involves providing advice, I do not believe that it would be appropriate to review the minutes in what might be considered as a quasi-judicial review for the purpose of determining rights of access. From my perspective, only a court could engage in such a review. As such, the following comments will not deal with particular aspects of the records in question, but rather with the requirements of applicable provisions of law.

It is emphasized at the outset that requirements concerning the compilation of minutes are found in §101 of the Open Meetings Law. Subdivision (1) concerns what may be characterized as the minimum requirements for the contents of minutes of open meetings. Subdivision (2) deals with the contents of minutes of executive sessions and states that:

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote 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."

Based upon the language quoted above, it has consistently been advised that minutes of executive session need not be prepared if no action is taken during an executive session. Therefore, it appears that the record that is the subject of your inquiry was not required to have been created.

Nevertheless, I believe that it would be subject to rights of access granted by the Freedom of Information Law.

Section 86(4) of the Freedom of Information Law defines "record" expansively 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."

Due to the breadth of the language quoted above, I believe that the minutes in question would constitute a "record" that falls within the scope of the Freedom of Information Law, for it is clearly kept by and was produced for an agency, the Town of Cortlandt.

Second, 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) of the Law.

Based upon your description of the minutes, it appears that there may be three grounds for denial of potential relevance.

The first basis for withholding of possible relevance is §87(2)(a), which states that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". In this regard, since the minutes apparently deal in part with a discussion of litigation in which the Town is involved, it is possible that those aspects of the minutes might fall within the scope of the attorney-client privilege. Since §4503 of the Civil Practice Law and Rules requires that communications made pursuant to an attorney-client relationship are privileged, communications between the Town Board and its attorney might be exempt from disclosure.

A second ground for denial of possible relevance is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". The extent to which the cited provision might justifiably be employed as a basis for withholding is, in my opinion, questionable. There have been several judicial determinations rendered under the Freedom of Information Law regarding the privacy of public employees (i.e., the building inspector). In brief, the courts have found that public employees enjoy a lesser degree of privacy than others, for they have a greater duty to be accountable than others. Further, it has been held in essence that records relevant to the performance of one's official duties are accessible, 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); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; 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 be withheld, for disclosure in such instances would indeed result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977]. As such, the applicability of §87(2)(b) is in my view conjectural.

The last ground for denial of possible relevance 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.

Under the circumstances, if, for example, the minutes are reflective of a rendition of recommendations, suggestions, impressions or the like, I believe that those aspects of the minutes could justifiably be withheld, for they would not be statistical or factual in nature. Further, as you indicated, no final policy or determination has apparently been adopted with respect to the building inspector. Also, if no action was taken, it would appear that "instructions to staff that affect the public" would not be included in the record in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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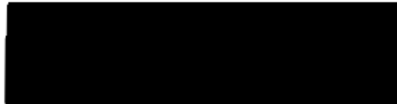
March 25, 1982



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 :

I have received your letter of March 15, as well as the correspondence attached to it, in which you sought assistance regarding a request made under the Freedom of Information Law to the Office of Court Administration (OCA).

More specifically, you attached to your letter correspondence with OCA in which you indicated that you had been declared ineligible for particular examinations. You wrote further that you were advised by OCA that it is the policy of OCA "not to reveal final ratings of individuals who have been determined not eligible". As such, you requested your test scores under the Freedom of Information Law on February 2. As of March 15, you had not yet received a response to your request.

I would like to offer the following comments regarding your inquiry.

First, there has been controversy regarding the application of the Freedom of Information Law to OCA. In this regard, the coverage of the Freedom of Information Law is determined in part by means of its definition of "agency" appearing in §86(3). The cited provision 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."

It is noted that the language quoted above excludes the "judiciary" from the provisions of the Freedom of Information Law and that §86(1) of the Law defines "judiciary" to include:

> "...the courts of the state, including any municipal or district court, whether or not of record."

It had been and may still be the view of OCA that it is not an "agency", but rather that it falls within the scope of the definition of "judiciary".

This office has long contended that OCA is the administrative arm of the court system and is not itself a court, but rather an agency subject to the Freedom of Information Law in all respects. Moreover, the Committee's advice was upheld and cited in Babigian v. Evans [427 NYS 2d 688 (1980)], in which it was found that OCA is not a "court" and is an "agency" subject to the Law.

Second, from my perspective, there may be a distinction between situations in which an individual requests test scores or ratings pertaining to him and a situation in which in individual requests test scores or ratings of others. Under rules promulgated by the Department of Civil Service, an "eligible list", which identifies persons who passed an examination and their scores, is available to the public. However, it has consistently been advised that records identifying those who may have failed examinations may justifiably be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. Stated differently, disclosure to a third party of the identity of a person who failed an examination might result in unnecessary embarrassment or perhaps personal hardship to such individuals.

If you have requested the results of examinations pertaining only to yourself, it is difficult to envision how the exception to rights of access identified above regarding privacy could justifiably be asserted.

Moreover, although an individual other than yourself seeking a failing test score pertaining to you might justifiably be denied access to the test score, §89(2)(c)(iii) states that, unless a different ground for denial is applicable, disclosure would not constitute an unwarranted invasion of personal privacy:

> "...when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

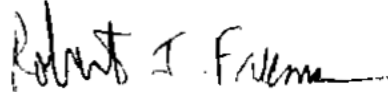
Therefore, if I interpret your request accurately, and if you are requesting test scores pertaining only to yourself, it would appear that records reflective of the test scores should be made available.

Lastly, an agency subject to the Freedom of Information Law is required to respond to requests withing time periods specified in the Freedom of Information Law and the regulations promulgated by the Committee. 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. 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: S. Michael Nadel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AD-2410

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 26, 1982

Troy White
75B1840
P.O. Box 338
Napanoch, NY 12458

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. White:

I have received your letter of March 24 in which you requested from this office records pertaining to you.

It appears that your request may be based upon a misinterpretation of 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. The Committee does not have possession of records generally, such as those in which you are interested. Therefore, the records that you are seeking cannot be made available by this office.

Nevertheless, I would like to offer the following comments and suggestions regarding your inquiry.

First, requests for records under the Freedom of Information Law should be directed to the specific agencies that maintain possession of records. For instance, if you believe that a particular police department or state agency maintains records concerning you, your requests should be sent directly to those agencies.

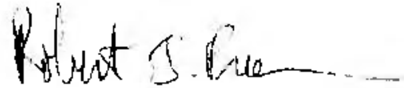
Second, under regulations promulgated by the Committee, each agency is required to designate one or more records access officers responsible for coordinating responses to requests for records. Therefore, when making a request to an agency, it should be addressed to the "records access officer".

Third, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". In my view, a request for records concerning yourself without more might not "reasonably describe" the records in which you are interested. If possible, when a request is made, you should provide as much detail as possible, including names, dates, file designations, docket or index numbers, and similar information that would enable a records access officer to locate the records sought.

Lastly, I have enclosed for your consideration copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects 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 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-2411

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ROBERT J. FREEMAN

March 26, 1982

Ms. Janet DeRosa
Toxics Researcher
New York Public Interest
Research Group, Inc.
5 Beekman Street
New York, New York 10038

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. DeRosa:

I have received your letters of March 17 and 23 in which you requested an advisory opinion under the Freedom of Information Law.

In terms of background, it appears that you have been attempting to gain access for approximately a year to the results of a survey regarding volatile halogenated organics (VHO) in bottled water conducted by the State Health Department. On March 10, the records access officer for the Department wrote that "confirmed" data would be available, but only after notification had been given to bottlers. Apparently you arranged to obtain copies of the confirmed data on March 25. Most recently, however, you were informed that unconfirmed test results regarding bottled water samples would be withheld under §87(2)(d) of the Freedom of Information Law.

According to your letter, the tests in question involve analyses of twenty-two bottled water products. You wrote that the procedure for the sampling process involves an analysis of two different samples taken at different times in order that a second sample analysis could serve as a confirmation of the first. The tests are the same for both analyses. As indicated in the previous paragraph, the Health Department has agreed to provide access to sixteen series of tests for those water products that have undergone two series of analyses.

However, copies of the analyses of products that have undergone one analysis are considered records maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of such enterprise, and, therefore, are being withheld under §87(2)(d) of the Freedom of Information Law. Your contention is that the completion of the testing of both samples would not alter the effect of disclosing the first analysis, for both sets of data are considered equally valid. Moreover, you informed me that, having reviewed some of the completed, confirmed analyses, the results of a second analysis might conceivably be more damaging than the first. Since the Health Department has agreed to make the analyses available to you after both samples have been tested, you questioned the rationale behind this inconsistency and contend that if the analyses are available when two samples have been tested, the results of one sample that has been tested should also be available.

I would like to offer the following comments regarding 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 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, of potential relevance is the definition of "record" appearing in §86(4) of the Law. The cited provision determines the scope of the definition of "record", which includes:

> "...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."

Due to the breadth of the language quoted above, it is clear in my view that the preliminary test results in which you are interested constitute "records" subject to rights of access granted by the Law.

Third, it would appear that only two of the grounds for denial would, under the circumstances, be applicable. Due to the structure of one of those grounds for denial, however, I believe that the test results in which you are interested would 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..."

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.

The other ground for denial is §87(2)(d), which was cited by the Health Department's records access officer as the basis for withholding the "unconfirmed" test results. The cited provision states that an agency may withhold records or portions thereof that:

> "are trade secrets or are maintained for the regulatio of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

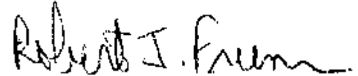
From my perspective, it does not appear that §87(2)(d) could justifiably be cited as a basis for withholding. If the confirmed data representing two sets of analyses are accessible, it is difficult to envision how disclosure of the first sample analysis would fall within the scope of the exception, particularly, if, as you intimated, the second set of test results may present different and perhaps more injurious results than the initial analysis. In short, if two samples

undergo the same tests, and if the test results are made available after the completion of both tests, I cannot understand how the results of the first test would in any way be less accessible under the Freedom of Information Law than the first and second when made available together. As such, if I understand the facts correctly, I do not believe that §87(2)(d) could validly be cited to withhold the records in question.

Lastly, while the confirmed test results will be made available to you, it is unclear whether the delay in making them available is based upon an effort to provide prior notification to the bottlers. In my opinion, if the records are available as of right under the Freedom of Information Law, notification to the bottlers would not serve as a condition precedent to disclosure.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Steve Krill
Barbara Thomas-Noble

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2412

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 29, 1982

Mr. Thomas Friel

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. Friel:

As you are aware, your correspondence 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 Freedom of Information Law.

It is noted at the outset that Ronald Glickman, Assistant Attorney General, suggested that the Suffolk County Water Authority, the subject of your inquiry, "does not appear to be an agency or department of the State of New York". In this regard, I believe that the Suffolk County Water Authority is an "agency" subject to the Freedom of Information Law in all respects.

Specifically, §1077(1) of the Public Authorities Law states in part that "The authority shall be a body corporate and politic, constituting a public benefit corporation". Section 66 of the General Construction Law includes a public benefit corporation within the definition of "public corporation". Since the definition of "agency" appearing in the Freedom of Information Law includes public corporations, I believe that the Suffolk County Water Authority is 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".

It is noted that the definition makes specific reference to public corporations, such as the Suffolk County Water Authority.

In all honesty, the copies of the correspondence are rather difficult to read. Consequently, I can offer the following general comments regarding the Freedom of Information Law.

First, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2) (a) through (h) of the Law.

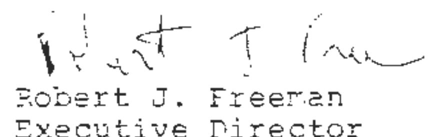
Second, §89(3) requires that an applicant request records "reasonably described". As such, when submitting a request, you should provide as much detail as possible in order that the person in receipt of the request may locate the records sought.

Third, §89(3) also provides in part that, as a general rule, an agency is not required to create records in response to a request. Therefore, if, for example, a request is made for information that does not exist in the form of a record or records, an agency would be under no obligation to prepare or create a record on behalf of an applicant.

Lastly, I have enclosed for your consideration copies of the Freedom of Information Law, regulations that 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: Suffolk County Water Authority
Ronald Glickman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2413

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 29, 1982

Gregory Jones
78 A 633
P.O. Box 338
Napanoch, NY 12458

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. Jones:

I have received your letter of March 24 in which you requested from this office records pertaining to you.

It appears that your request may be based upon a misinterpretation of 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. The Committee does not have possession of records generally, such as those in which you are interested. Therefore, the records that you are seeking cannot be made available by this office.

Nevertheless, I would like to offer the following comments and suggestions regarding your inquiry..

First, requests for records under the Freedom of Information Law should be directed to the specific agencies that maintain possession of records. For instance, if you believe that a particular police department or state agency maintains records concerning you, your requests should be sent directly to those agencies.

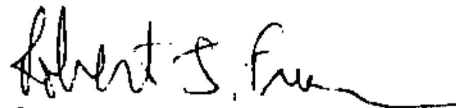
Second, under regulations promulgated by the Committee, each agency is required to designate one or more records access officers responsible for coordinating responses to requests for records. Therefore, when making a request to an agency, it should be addressed to the "records access officer".

Third, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". In my view, a request for records concerning yourself without more might not "reasonably describe" the records in which you are interested. If possible, when a request is made, you should provide as much detail as possible, including names, dates, file designations, docket or index numbers, and similar information that would enable a records access officer to locate the records sought.

Lastly, I have enclosed for your consideration copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects 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 regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-747
FOIL-AO-2414

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ROBERT J. FREEMAN

March 29, 1982

Mr. Jacob H. Kurkchee

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. Kurkchee:

I have received your letter of March 15 in which you submitted a series of questions regarding both the Freedom of Information and Open Meetings Laws.

I would like to offer the following comments and observations regarding each area of inquiry. The issues raised under the Freedom of Information Law will be dealt with initially.

First, you inquired with respect to a letter sent to you by the Superintendent of Schools of the Greece Central School District regarding fees for copies of records. Based upon the language of a letter from the Superintendent, you intimated that the fees that might be assessed would exceed those permitted under the Freedom of Information Law. Specifically, the Superintendent wrote that greater clarity in your request would be necessary to determine the nature of the records in which you are interested in order "to determine the extent of data and copying cost". I am not sure that the Superintendent's letter is reflective of an intent to charge for searching records or the cost of personnel time, for example. However, I would like to point out that §87(1)(b)(iii) of the Freedom of Information Law, which pertains to the regulations required to be adopted by all agencies, such as the School District, states that an agency's regulations should include reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law."

From my perspective, the language quoted above indicates that an agency may charge only a fee for photocopying with respect to records that are subject to conventional photocopying methods. In cases in which records are not subject to photocopying (i.e., computer tapes, tape recordings, etc.), an agency may assess a fee based upon the actual cost of reproduction.

It is also important to note that the Freedom of Information Law, §89(1)(b)(iii) requires the Committee to promulgate regulations regarding the procedural implementation of the Law. As noted earlier, §87(1) in turn requires that each agency promulgate regulations in conformity with those of the Committee. In this regard, I have enclosed a copy of the Committee's regulations, which in §1401.8(a) states that no fee shall be charged for searching for records. As such, if there is an intent to assess a fee for searching for records, I believe that such a fee would fail to comply with the Freedom of Information Law and the regulations promulgated by the Committee.

Second, you raised questions regarding the use of a form prescribed by the School District for the purpose of requesting records under the Freedom of Information Law. The form requires that an applicant certify:

> "...that the only purpose of examination is to gather information for personal use or as a member of the news media and that is will not be used for any private, commercial, fund raising or other purpose."

In addition, in response to a request that was not made on a form prescribed by the District, the Superintendent wrote that the District's form must be completed before records would be made available.

With respect to the certification required to be made on the District's form, I do not believe that it is now appropriate, although it may have been proper when the Freedom of Information Law originally went into effect in 1974. Under the Freedom of Information Law as originally enacted, there was a provision, §88(1)(g), pertaining to payroll information. That provision required the Comptroller to devise a form for the purpose of requesting payroll information. The form contained a certification similar to that appearing on the District's application. In my view, the language regarding the certification was intended to apply only to requests for payroll information. Moreover, I do not believe that the certification was ever necessary, for case law rendered prior to the passage of the Freedom of Information Law indicated that payroll information should be made available to any person [see e.g., Winston v. Mangan, 338 NYS 2d 654 (1972)].

Perhaps most importantly, the original Freedom of Information Law was repealed in 1977 and replaced by a new statute that became effective on January 1, 1978. The current Freedom of Information Law contains no requirement that a certification or a particular form be completed when submitting a request for records. In addition, it has been held judicially that if a record is accessible under the Freedom of Information Law, 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]. Consequently, I do not believe that the completion of the certification is necessary or required as a condition precedent to gaining access to records under the Freedom of Information Law.

With regard to the use of a form, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot validly be cited as a basis for withholding or delaying access to records. Section 89(3) of the Freedom of Information Law merely requires that a request be made in writing that "reasonably describes" the records sought. Therefore, in my view, any request made in writing that reasonably describes records should suffice. I believe, too, that the purpose of the Freedom of Information Law is to facilitate the process by which records are made available by government. A requirement that a specific form be used would in my opinion likely have the opposite effect in some cases. For instance, if this office required that a form be completed, a member of the public in Greece would be required to write to this office, request the form, have the form sent to Greece, require the applicant to complete it and return it to Albany. In short, such a procedure would simply involve an unnecessary amount of time.

Third, you questioned the propriety of the designation of the School District's attorney as appeals officer. In this regard, §89(4)(a) 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..."

Based upon the language quoted above, the School Board may in my view designate the person of its choice as appeals officer. Therefore, I do not believe that the designation of the attorney as appeals officer is in any way inappropriate.

Your remaining questions involve the interpretation of the Open Meetings Law.

First, you raised questions regarding the procedure under which the School Board enters into executive sessions. You wrote that "the subjects to be discussed are always identified as 'legal and contractual' matters. No further identification of intended subject matters is made."

As indicated in the District's policy regarding the grounds for entry into executive sessions, a public body is limited to the eight areas of discussion deemed appropriate for executive session appearing in §100(1)(a) through (h) of the Open Meetings Law. While some "legal and contractual" matters might properly be considered during executive sessions, I do not believe that all such matters would fall within the grounds for executive session appearing in the Open Meetings Law.

For instance, with respect to legal matters, §100(1)(d) of the Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". The quoted language is in my view limited. It has often been contended that a public body may enter into an executive session to discuss "possible" litigation. Nevertheless, it is the Committee's view that virtually any topic of discussion may involve possible litigation and that there must be an imminence or real threat of litigation to be considered "proposed" litigation. Moreover,

it was held recently by the Appellate Division that the purpose of §100(1)(d) is to enable a public body to discuss its litigation "strategy" behind closed doors [see Concerned Citizens to Review the Jefferson Mall, Matter of v. Town Board of the Town of Yorktown, 441 NYS 2d 292, (App. Div., 2nd Dept.), ___ NY ad ___ (motion for leave to appeal denied) (1981)]. Further, it was recently held that a public body cannot merely cite the language of §100(1)(d) as the basis for entry into an executive session. The court stated that:

> "It is insuffícent to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity, the pending, proposed or current litigation to be discussed during the executive session" (emphasis supplied by the court) [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44 at 46 (1981)].

Similarly, while some "contractual matters" may be discussed behind closed doors, I do not believe that all contractual matters may properly be considered during executive sessions. Often public bodies have entered into executive session to discuss "contract negotiations". The only provision in the Open Meetings Law, however, that deals specifically with "negotiations" is §100(1)(e), which permits a public body to enter into an executive session to discuss:

> "collective negotiations pursuant to article fourteen of the civil service law..."

Stated differently, a public body may enter into an executive session to discuss collective bargaining negotiations under the Taylor Law. As such, it is clear that not all contractual matters fall within §100(1)(e).

As you are aware, the introductory language of §100 (1) requires that a motion to enter into an executive session identify in general terms the subject or subjects to be considered. In my view, the identification of a subject as a "contractual matter" would not constitute a sufficient basis for entry into an executive session. I believe that such a recitation would be too broad and general.

Your next area of inquiry concerns the absence of minutes of executive sessions. You questioned the District's policy in relation to the direction provided by the Open Meetings Law . In this regard, §101(2) of the Open Meetings Law pertains to minutes of an executive session. It is noted that a public body may generally take action during a properly convened executive session, so long as the action does not involve the appropriation of public monies. Assuming that action is taken during an executive session, minutes reflective of that action must:

> "...consist of a record or summary of the final determination of such action, and the date and vote thereon..."

Therefore, if a public body merely deliberates during an executive session, but takes no action, minutes need not in my opinion be created.

It is also important to point out that the law concerning the capacity to take action during an executive session differs with respect to public bodies in general as opposed to school boards. 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. If my contentions are accurate, the School District would not be required to create minutes of executive sessions, for it could not vote during executive sessions, except as otherwise indicated.

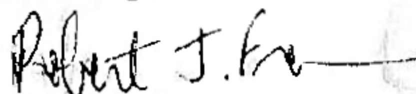
You have also raised questions concerning the incapacity of the public to know that matters discussed during an executive session are indeed those that may be legally considered in executive session. All I can suggest in this regard is that the Law, in my view, is based upon a assumption of good faith. Stated differently, often the public has no way of knowing whether a topic considered during an executive session is appropriate for discussion during an executive session or consistent with the subject matter identified in the motion to go into executive session. Perhaps the best way of ensuring compliance with the Law involves educating the public and members of public bodies with respect to the Law. Bo so doing, the public and government officials may become more familiar with the parameters of the Law.

Lastly, you wrote that you could not find "any justification" in the Open Meetings Law for discussion during an executive session of "roof repairs or other needed building repairs..." for school buildings. Based upon your description of the subject matter, I would agree that there may have been no basis for entry into an executive session.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, the Open Meetings Law and an explanatory pamphlet that deals with both statutes. In order to provide the School District with the same information, copies of the materials will be sent to the Superintendent of Schools for distribution among members of the School Board.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: David B. Robinson

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-748
FOIL-AO-2415

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 30, 1982

Harvey M. Elentuck

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. Elentuck:

I have received your letter of March 22 in which you described a series of events that relate to the provisions of both the Freedom of Information and Open Meetings Laws.

According to your correspondence, you are an employee of the New York City Board of Education and have sought to discuss problems encountered with various officials of the Board of Education and a community school board. In this regard, you wrote that you requested to meet with a particular community school board "in closed session". In response, the Board indicated that it was not its policy to meet with individual employees. You have asked whether you have the right to meet with the Board in a closed session.

From my perspective, only a public body, such as a community school board, can determine whether or not a closed meeting will be held. Further, in those situations, the capacity to conduct a closed meeting would be governed by the provisions of the Open Meetings Law.

It is noted that the Open Meetings Law contains a broad definition of "meeting" [see attached Open Meetings Law, §97(1)], which has been interpreted expansively by the courts. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, found that

the definition of "meeting" includes any situation in which a quorum of a public body convenes for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which a meeting 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)]. Further, §98(a) of the Law requires that all meetings of public bodies be open, except to the extent that an executive session may appropriately be convened pursuant to §100 of the Law. Section 100(1)(a) through (h) specifies and limits the areas of discussion that may appropriately be considered in executive session. It is also important to point out that §100(1) prescribes a procedure that must be followed by a public body before it may enter into an executive session.

In view of the foregoing, I do not believe that you would have a "right" to engage in a closed meeting with a community school board.

With respect to your request for records, I am not sure of the extent to which I can provide assistance. However, I would like to offer the following suggestions.

First, §89(3) of the Freedom of Information Law states in part that:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

Based upon the language quoted above, if, for example, you believe that records are required to exist, but that a contrary response has been given, you may request a certification in writing in conjunction with §89(3).

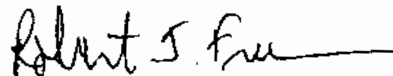
Second, assuming that you have appealed a denial of access to records and that the initial denial was affirmed, you may seek judicial review of a denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Third, several of the responses to your requests have been rather brief and have not specified a basis for withholding. For instance, in a letter to you dated January 7, Mr. Stanley Kakalios wrote with respect to one of your areas of request that the "records are exempt from public inspection". While the regulations promulgated by the Committee (see attached, §1401.7) indicate that an initial denial must be in writing, when an appeal is made and denied, §89(4)(a) of the Freedom of Information Law requires that the reasons for further denial be "fully explained" in writing. It is suggested that you might want to seek a more expansive explanation of various denials of access that you have encountered.

Lastly, in your letter to Lois Hickey of Community School Board #24, you cited various judicial determinations, including Sanna v. Lindenhurst Board of Education (Sup. Ct., Suffolk County, November 5, 1980). In this regard, you wrote that the court "held that determination or probationary teacher's employment at executive session was in violation of Open Meetings Law and was nullity". In my view, your statement is misleading. While the action of a school board may have been nullified by the court, the court's action in my opinion was based upon a failure on the part of a school board to follow the procedural requirements of the Open Meetings Law prior to entry into executive session.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Attachments

cc: Lois M. Hickey
Stanley Kakalios

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 31, 1982

Mr. Robert Walker
81-A-5460/D-8-21
Great Meadow Correctional Facility
Box 51
Comstock, New York 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. Walker:

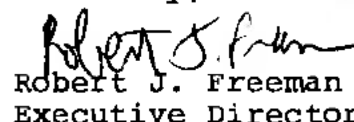
I have received your letter of March 24 in which you requested assistance regarding records sought under the Freedom of Information Law.

According to your letter, you have been seeking copies of institutional records pertaining to you that had been and may remain in possession of a social services unit at Rikers Island. Having requested the records from the Great Meadow Correctional Facility, you were informed that the information would likely be in possession of officials at Rikers Island. In view of the response to your request, all that I can suggest is that you submit a request for the records in which you are interested to the records access officer at the Rikers Island facility.

Once again, as noted in my earlier letter to you, §89 (3) of the Freedom of Information Law requires that an applicant submit a request "reasonably describing" the records sought. Therefore, when you submit a request to the Rikers Island facility, it is suggested that you include as much identifying detail as possible in order to enable officials at the facility to locate the records in which you are interested.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-749
FOIL-AO-2417

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

March 31, 1982

Mr. Richard Kessel

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. Kessel:

I have received your letter of March 26 in which you raised questions that involve the interpretation of both the Freedom of Information and Open Meetings Laws.

According to your letter, you are a member of the Board of Trustees of Nassau Community College, which held an executive session on March 25 "to decide the fate of the College's President". Although you opposed conducting an executive session to discuss the matter, you indicated that you understood that the Open Meetings Law contains a basis for entry into an executive session to discuss that issue [see attached, Open Meetings Law, §100(1)(f)]. Nevertheless, you stated that you were informed during the executive session that any vote on the matter would not be reported for a week. You contended, however, that, once the Trustees voted, you should be able to inform the public of the vote. It is also noted in your letter that, notwithstanding the direction given to you not to discuss the vote, a different member "leaked" the vote following the executive session.

In this regard, your first question is:

> "Once the Board takes a formal vote on the Presidency, do they have the right to hide that vote from the public? Furthermore, what portion of that session must now be made public"?

In my opinion, there is direction given by both the Freedom of Information Law and the Open Meetings Law to the effect that a vote taken by a public body must be made available.

Under the Freedom of Information Law, one of the few instances in which an agency must create a record involves the maintenance of a voting record of members of public bodies. Specifically, §87(3) of the Law states in relevant part that:

> "[E]ach agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

As such, it is in my view clear that in any instance in which a public body votes, a record of votes must be created indicating the manner in which each member voted. Further, I believe that the language quoted above essentially precludes secret ballot voting and requires that the manner in which members of public bodies vote must be recorded.

With respect to the Open Meetings Law, §101 contains direction with respect to the contents of minutes. It is noted that the Law permits a public body to vote during a properly convened executive session, unless the vote is to appropriate public monies, in which case action must be taken in public.

Under the circumstances, it appears that the Board of Trustees could appropriately have entered into an executive session, for §100(1)(f) states that a public body may go 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..."

Based upon the nature of the discussion, I would conjecture that the Board of Trustees considered the "employment history" of a particular person, the College President, and may have considered matters leading to the "dismissal or removal of a particular person..." Consequently, I believe that the matter under consideration could properly have been discussed during an executive session and that the Board of Trustees could have voted during the executive session.

With regard to minutes of an executive session, §101 (2) states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summay 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 view of the foregoing, in any instance in which a vote is taken during an executive session, minutes must be created consisting of a "record or summary of the final determination of such action, and the date and vote thereon". If indeed the Board of Trustees reached a determination and voted, minutes would have to be compiled in conjunction with §101(2) of the Open Meetings Law.

Subdivision (3) of §101 states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As such, if action is taken during an executive session, minutes reflective of that action must be prepared and made available within one week of the executive session.

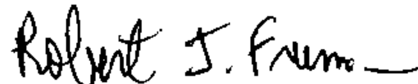
In view of the cited provisions of the Freedom of Information Law and the Open Meetings Law, I believe that there is a clear intent to disclose the results of action taken by public bodies. Moreover, due to the breadth of the definition of "record" [see Freedom of Information Law, §86(4), the record of votes required to be compiled under the Freedom of Information Law as well as the minutes of an executive session in my view become subject to the provisions of the Freedom of Information Law as soon as they exist.

A second area of inquiry concerns the capacity of the Board of Trustees to "vote on a Presidential Search Committee in executive session."

From my perspective, the focal point of your question is §100(1)(f) of the Open Meetings Law, which was quoted previously. It is important to emphasize that the cited provision permits a public body to discuss the areas identified in §100(1)(f) only when those discussions involve a "particular" person or corporation. If, for example, a board reviews the qualifications of particular individuals who might be appointed to a search committee, I believe that an executive session would be proper. However, if the board considered whether or not to create a search committee, I do not believe that any of the grounds for executive session could appropriately have been asserted. Stated differently, a discussion regarding the possibility and perhaps the eventual designation of a search committee would in my view constitute a matter of policy that would not at this juncture pertain to any "particular 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

Enc.

cc: Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2418

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 31, 1982

Joseph E. Cahill

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. Cahill:

I have received your letter of March 23.

You have written to request advice with respect to rights of access to a police blotter and duty roster maintained by the Fishkill Barracks of the New York State Police. Apparently you have written to various officials of the Division of State Police, but as yet, you have been unable to inspect and/or obtain photocopies of the records in which you are interested.

I would like to offer the following comments 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 State Police, 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 regard to the duty roster, one possible ground for denial under the Freedom of Information Law that may be relevant to your inquiry is §87(2)(e) of the Law (see attached), which states that an agency may withhold records or portions of records that:

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

The areas of denial set forth in the four subparagraphs quoted above are based largely upon potentially harmful effects of disclosure. From my perspective, it does not appear that disclosure of a duty roster 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. Additionally, it might justifiably be argued that a duty roster is prepared in the ordinary course of business and for administrative rather than law enforcement purposes. Consequently, I do not believe that §87(2)(e) of the Law could be cited as justification for withholding duty rosters.

A second possible ground for denial is §87(2)(f) of the Freedom of Information Law, which enables an agency to withhold records or portions thereof that:

> "...if disclosed would endanger the life or safety of any person..."

As a general matter, it is unlikely, in my view, that the disclosure of the name and title of a public employee could result in endangerment. However, it is conceivable that some responsibilities undertaken of troopers could on rare occasions result in a life threatening situation, if their identities are disclosed in relation to a particular set of facts. In that type of situation, the State Police could delete those portions of a record which if disclosed could result in endangerment.

It is emphasized that you requested the duty rosters in a format that would reflect work assignments by desk, car patrol and Bureau of Criminal Investigation (BCI). In this regard, it is important to point out that the Freedom of Information Law does not generally require an agency, such as the State Police, to create a record on behalf of an applicant [see Freedom of Information Law, §89(3)]. Therefore, if the State Police does not maintain records containing the information sought, it would not be required to prepare new records in response to your request.

Second, you wrote that you are seeking the Fishkill State Police Barracks' police blotter for January 24 and 25, 1970. Please be advised that the term "police blotter" is derived by means of custom and usage. Further, there is no specific definition of what constitutes a "police blotter" in any statute or regulation of which I am aware. As such, although many police departments maintain records characterized as police blotters, the contents of police blotters may vary from one police agency to another.

It is noted, however, that a judicial decision rendered under the Freedom of Information Law 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 event 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.

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)].

Lastly, it is suggested that you initiate a new request for the records under the Freedom of Information Law and direct your inquiry to the records access officer for the New York State Police. Your inquiry should be directed to:

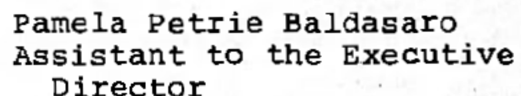
Francis P. Stainkamp
Records Access Officer
Division of State Police
State Office Building Campus
Public Security Building
Albany, New York 12226

In order to assist you, it is suggested that you review the sample letter on page 9 of the explanatory pamphlet I have enclosed.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss
Enclosures
cc: Francis P. Stainkamp
Raymond M. Rasmussen

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2419

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 1, 1982

Andrew Styles
77 A 4436
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. Styles:

I have received your recent letter in which you requested assistance in gaining access to records in possession of New York State courts.

Please be advised that the New York Freedom of Information Law does not include the courts or court records within its scope. In this regard, the coverage of the Law is determined in part by the definition of "agency" appearing in §86(3), which specifically excludes the "judiciary" (see attached, Freedom of Information Law). Further, §86(1) defines "judiciary" to mean the courts.

As such, it is clear that the Freedom of Information Law does not apply to court records.

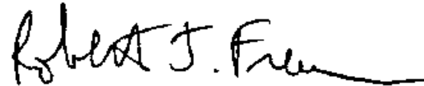
Nevertheless, there are several provisions appearing in various court acts and the Judiciary Law that grant substantial rights of access to court records. Perhaps the most general among those provisions is §255 of the Judiciary Law, a copy of which is attached.

It is suggested that you request records under §255 of the Judiciary Law from the clerks of the courts that may have records in which you are interested. Further, when making a request, it is recommended that you provide as much detail as possible, including names, dates, index and docket numbers, and similar information that would enable a clerk to locate the records that you are seeking.

Enclosed for your consideration is a pamphlet concerning the Freedom of Information Law which contains a brief reference to access to court 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-2420

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

April 1, 1982

Mr. Charles T. Greeney

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. Greeney:

I have received your letter of March 12, which reached this office today. You have requested information regarding the "NYS Privacy Act".

Please be advised that there is not as yet any "Privacy Act" that has been enacted in New York. As you are aware, however, there are 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)]. Moreover, there are numerous statutes that require the confidentiality of particular records that identify individuals. I have enclosed for your consideration a list that cites several of those statutes.

You wrote that you are interested "in any provision regarding the release of information concerning a private individual to news services by a local town government". In this regard, you asked which provision of the "Privacy Act" might involve criminal or civil penalties for such disclosures. I would like to point out that 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 or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

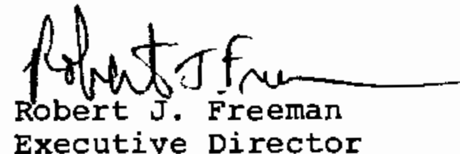
Moreover, the Freedom of Information Law is permissive. While an agency may deny access to certain records that fall within the scope of one or more grounds for denial, there is no requirement that such records must be withheld. The only exception to that general rule would involve a situation in which some other statute prohibited disclosure of certain records, in which case the records would be withheld under §87(2)(a) of the Freedom of Information Law concerning records that are "specifically exempted from disclosure by state or federal statute."

In view of the foregoing, it is possible that the records that may have precipitated your inquiry might have been accessible under the Freedom of Information Law. Further, even if they could have been denied, it is possible that they could nonetheless be disclosed.

Without more specific information regarding the particulars of the records, I do not believe that I can provide more specific advice at this juncture.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 2, 1982

Mr. Donald G. Smith
#68-C-63
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. Smith:

I have received your recent correspondence in which you indicated that you requested records from the Department of State on February 8, but that you received no response.

Apparently the records in which you are interested involve "a list of any Parole Officer, that has been promulgated by the Parole Board after the 1978-79 laws were passed, to issue Parole Warrants". You also indicated that you would like a copy of the names of Acting Supreme Court Justices as well as full time Justices in Onondaga County from 1976 to present. Your request was made under the Freedom of Information Act, 5 U.S.C. §552, and the Privacy Act, 5 U.S.C. §552-a.

I would like to offer the following comments regarding your inquiry.

First, records in possession of agencies of government in New York are governed by the provisions of the New York Freedom of Information Law, a copy of which is attached. The statutes that you cited, the federal Freedom of Information and Privacy Acts, apply only to records of federal agencies. As such, those Acts are not applicable to the information in which you are interested.

Second, I do not believe that either the Secretary of State or the Department of State has possession of or would be responsible for maintenance of the information that you are seeking. It is suggested that you write to the specific offices that have possession of the information sought.

Third, although your request regarding a "list" of parole officers who may issue parole warrants is somewhat unclear, it is suggested that you submit your request to the following address:

Records Access Officer
NYS Division of Parole
1450 Western Avenue
Albany, New York 12203

If any agency maintains such a list, I believe that the Division of Parole would be the most likely source. It is noted, too, 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..."

It is possible that the names of the parole officers in which you are interested could be identified by title in the payroll record described in §87(3)(b) of the Freedom of Information Law.

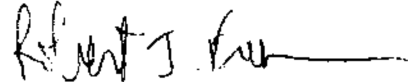
Fourth, it is important to point out that, as a general rule, an agency, such as the Division of Parole, is not required to create a record in response to a request. Therefore, if the list that you are seeking differs from the payroll record described above, and if no list containing the information sought regarding parole officers exists, the Division of Parole would not be required to create such a list on your behalf.

Fifth, the scope of the Freedom of Information Law is determined in part by the definition of "agency" appearing in §86(3) of the Freedom of Information Law. That definition specifically excludes the "judiciary", which is defined in §86(1) to mean the courts. Consequently, records in possession of the Onondaga County Supreme Court would fall outside the requirements of the Freedom of Information Law. Nevertheless, §255 of the Judiciary Law, a copy of which is attached, provides substantial rights of access to records in possession of a court clerk. Consequently,

it is suggested that you submit a request to the Clerk of the Supreme Court in Onondaga County for records regarding justices. In making such a request, it is recommended that you provide as much detail and specificity as possible.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

ST ATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2422

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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COMMITTEE MEMBERS

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 3, 1982

Mrs. Pearl Michaels

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 letter of March 26 in which you requested an advisory opinion with respect to a refusal by public school officials to accept registered mail.

Please be advised that the Committee on Public Access to Records has the authority to issue advisory opinions under the Freedom of Information and Open Meetings Laws. Consequently, it appears that your inquiry may fall outside the jurisdiction of the Committee. As such, it is suggested that you might want to contact the Board of Education to determine the extent to which any specific policies or procedures exist regarding the treatment of mail by employees of the Board of Education.

I would like to add, however, that if requests made under the Freedom of Information Law are sent to the appropriate official of a school district, I do not believe that such requests could be refused. As you know, the Freedom of Information Law requires the Committee to promulgate regulations governing the procedural implementation of the Law [see Freedom of Information Law, §89(1)(b)]. In turn, §87(1) of the Law requires each agency to promulgate regulations consistent with those of the Committee. In this regard, if you seek to request records under the Freedom of Information Law from the district identified in your correspondence, it is suggested that you address such requests as follows:

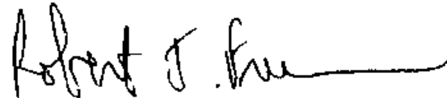
Records Access Officer
Community School District #19
2057 Linden Boulevard
Brooklyn, New York 11207

It is also suggested that on the outside of the envelope, you indicate that the contents include a "Freedom of Information Law request".

Since the duties of a records access officer involve coordinating an agency's response to requests, the records access officer would in my view be responsible for accepting any request made by mail (see attached regulations, §1401.2).

I regret that I cannot be of any greater 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-2423

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 4, 1982

Jacob J. Holeman
Major, JAGC
Command Judge Advocate
Department of Defense
Headquarters United States Military
Enlistment Processing Command
Fort Sheridan, IL 60037

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 Major Holeman:

As you are aware, your letter of March 29 addressed to Attorney General Robert 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.

In brief, you indicated that the U.S. Military Enlistment Processing Command is responsible for processing men and women for enlistment into the armed services. Part of the process includes a medical examination. Since some of the applicants for enlistment are minors, you indicated that it is not uncommon for parents or guardians of such individuals to request copies of medical examinations. According to your letter, the federal Privacy Act does not prohibit the release of such records to a minor's parents or guardian, unless the state where a processing station is located prohibits the release of such documentation. You have asked whether New York State law contains any prohibition regarding the release of medical information to the parents or guardians of minors.

I would like to offer the following comments regarding your inquiry.

First, New York has not yet enacted what may be characterized as a "privacy act". However, there is a broad Freedom of Information Law similar in structure to the federal Freedom of Information Act. Like the federal Act, the New York State Freedom of Information Law is based upon a presumption of access and states that all records of an agency [see attached Freedom of Information Law, definition of "agency", §86(3)] are available, except to the extent that records or portions thereof fall within one or more grounds for denial [see §87(2)(a) through (h)].

One of the grounds for denial enables an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Moreover, §89(2)(b) lists five examples of unwarranted invasions of personal privacy, the first of which involves medical histories.

It is noted, however, that the Freedom of Information Law is permissive. Stated differently, as a general rule, while an agency may withhold records falling within one or more of the grounds for denial, it is not required to do so. Therefore, while an agency may withhold records on the basis of the privacy provisions in the Freedom of Information Law, it need not.

The only instance in which records must be withheld would involve a situation in which a different statute prohibits disclosure. In those cases, the records could be withheld under §87(2)(a) of the Freedom of Information Law concerning records that are "specifically exempted from disclosure by state or federal statute".

There are a number of statutes that may be relevant to your inquiry and I would like to describe them briefly. In addition, copies of those statutes, and in one instance, rules appearing in the New York Code of Rules and Regulations, have been enclosed. The following consists of a summary of certain records and statutes in which you may be interested.

1. Medical records - §17 of the Public Health Law pertains to medical records generally; it does not provide direct rights of access to medical records to patients. On the contrary, a patient may designate the physician of his or her choice, who may obtain medical records from a hospital or another physician.

2. Education records - As you are likely aware, the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) requires educational institutions subject to the provisions of the Act to keep confidential all "education records" regarding minor students. Further, only a parent or guardian can waive confidentiality.

3. Venereal Disease - §2306 of the Public Health Law states that "all reports or information secured by a board of health or a health officer under the provisions of this article shall be confidential except in so far as necessary to carry out the provisions of this article."

4. Fetal death - Enclosed are copies of the appropriate provisions of the Public Health Law (§§4160 through 4164) concerning the records regarding fetal death, which may include abortions. Also enclosed is Part 35 of the rules promulgated by the New York State Department of Health regarding vital records. It is noted that no charge may be assessed regarding requests for certification and copying of birth, death and marriage records to an "applicant for enlistment in the U.S. Armed Services or the Merchant Marine".

5. Drug abuse - Article 33 of the Public Health Law concerns "controlled substances" and §3371 requires the confidentiality of certain records, including the identity of a particular patient. In addition, agencies involved in drug abuse services are bound by the confidentiality requirements appearing in 21 U.S.C. §1175.

6. Public assistance - Case records regarding persons in receipt of public assistance are generally confidential under §§136 and/or 372 of the Social Services Law. Those provisions may be of interest, for, medical histories are often contained within case records.

7. Mental hygiene - Patient records in possession of a state mental hygiene facility are confidential, except as otherwise specifically provided pursuant to §33.13 of the Mental Hygiene Law.

8. Presentence reports - Medical and psychological information may be contained within presentence reports, which are confidential under §390.50(2) of the Criminal Procedure Law.

9. Child abuse - Records regarding child abuse are confidential under §422 of the Social Services Law.

10. Vocational rehabilitation - Medical information may be contained within records regarding vocational rehabilitation; those records are generally confidential under §1007 of the Education Law.

11. Birth control - The only provision of which I am aware concerning birth control is found in §6811 of the Education Law, which lists specific misdemeanors. The Education Law is applicable, because the Board of Regents licenses various professions, including physicians and pharmacists. Enclosed is a copy of §6811(8) concerning the sale or distribution of contraceptive devices to minors under the age of sixteen years.

While the provisions cited above may have only an indirect bearing upon the questions that you raised, they may be of some utility to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: George Braden

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2424

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

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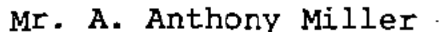
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 5, 1982

Mr. A. Anthony Miller


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. Miller:

As you are aware, your letter of March 24 and the correspondence attached to it have 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.

In terms of background, on February 19, you wrote to the Chief of Police of the Long Island State Park Police and requested under the Freedom of Information Law records reflective of "disciplinary charges brought against any member of your command since 1965 to date". You specified that you would be interested only in "sustained" cases. Your request was transmitted to the Office of Counsel of the Office of Parks and Recreation. In brief, the records were denied by means of a letter sent to you by Peter Appelbaum in which Mr. Appelbaum cited §50-a of the Civil Rights Law as the basis for withholding.

I would like to offer the following comments regarding 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 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 you are aware, in 1975 it was held that written reprimands regarding police officers were found to be available [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975)]. In Farrell, it was found that the reprimands constituted "final determinations" and that disclosure of the final determinations, even though they related to particular police officers, would if disclosed result in a permissible rather than an unwarranted invasion of personal privacy [see Freedom of Information Law, §87 (2)(b)].

Third, notwithstanding the decision rendered in Farrell, I believe that the provisions of §50-a of the Civil Rights Law must be viewed in conjunction with the Freedom of Information Law. Section 50-a of the Civil Rights Law states in part that:

> "1. All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law and such personnel records under the control of a sheriff's department or a department of correction of individuals employed as correction officers shall be considered confidential and not subject to inspection or review without the express written consent of such police officer or correction officer except as may be mandated by lawful court order."

The language quoted above requires that personnel records of police officers that are used to evaluate performance toward continued employment or promotion must be kept confidential, unless otherwise provided in the remaining portions of §50-a. In this regard, I direct your attention to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records or portions of records that:

> "are specifically exempted from disclosure by state or federal statute..."

In my opinion, to the extent that the records in which you are interested fall within the scope of the confidentiality requirements imposed by §50-a of the Civil Rights Law, the records may justifiably be withheld, for they would be specifically exempted from disclosure by state statute.

It is noted that §50-a of the Civil Rights Law was enacted after the Freedom of Information Law. Moreover, to the extent that it is applicable, I believe that it would supersede the provisions of the Freedom of Information Law. From my perspective, the Freedom of Information Law may be characterized as a statute of "general" application, for it pertains generally to rights of access to records in possession of agencies. Section 50-a of the Civil Rights Law may in my view be characterized as a "special" statute, for it pertains to a narrowly defined area of records. Further, I believe that a special statute prevails over a general statute. Therefore, despite the holding in Farrell, I believe that records subject to the provisions of §50-a of the Civil Rights Law could be withheld.

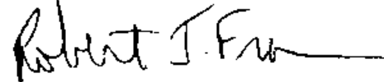
Fourth, I would like to emphasize that perhaps not all of the records in which you are interested could be withheld under §50-a of the Civil Rights Law. While charges against police officers might be sustained, perhaps not all such determinations could be considered personnel records used to evaluate performance toward continued employment or promotion. Moreover, as you intimated, the determinations rendered since 1965 may in many instances have been disclosed to the public, either prior to the enactment of §50-a of the Civil Rights Law, or following its enactment in conjunction with its remaining provisions.

As such, I believe that the Office of Parks and Recreation would be required to review each of the determinations in which you are interested in order to distinguish those which may justifiably be withheld under §50-a of the Civil Rights Law from those which might not fall within the scope of that provision.

It is also suggested that you appeal the denial to the Commissioner, in accordance with §463.4(c) of the regulations of the Office of Parks and Recreation. I have enclosed a copy of the cited provision of the regulations 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

Enc.

cc: Peter Appelbaum
Mario Cuomo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2425

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 6, 1982

Mr. John J. Sheehan
J.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 April 1 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, when you attempted to obtain a copy of a death certificate, you were informed that you could not obtain a copy unless you indicated your reason for the request. In this regard, you have contended that the Freedom of Information Law does not require that you state the reason for which a request is made.

I agree that the Freedom of Information Law does not generally require an applicant to state the reason for requesting records. As stated in Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], records accessible under the Freedom of Information Law should be made equally available to "any person, without regard to status or interest".

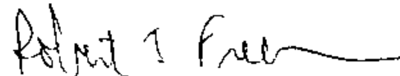
Nevertheless, rights of access to death certificates are not governed by the Freedom of Information Law, but rather by the provisions of the Public Health Law. Specifically, §4174 of the Public Health Law states in relevant part that the State Health Commissioner or any person authorized by him, such as a local registrar of vital records, shall:

> "(a) upon request, issue to any applicant either a certified copy or a certified transcript of the record of any death registered upon the provisions of this chapter, unless he is satisfied that the same does not appear to be necessary or required for judicial or other proper purposes...
>
> "(c) upon request, issue certification of birth or death unless in his judgment it does not appear to be necessary or required for a proper purpose..."

Since the provisions quoted above require disclosure upon a showing that the request is made for a "proper purpose", I believe that the Bureau of Vital Statistics of the City of Binghmaton may require you to complete an application in which the reason for making a request is stated.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Corporation Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2426

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 6, 1982

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

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 April 2 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, having interviewed officials of the Office of Court Administration (OCA), each court clerk for Criminal Term of State Supreme Court is required to prepare what is known as a "Form 153". You wrote that the form summarizes courtroom activity in statistical fashion and includes information regarding:

> "...the number of days a judge was available to preside over cases (judge days sat), the number of days a judge reported actually being on trial (trial days sat), the number of dispositions reached, and the number of trials presided over to the point of completed proof."

You wrote further that completed forms are forwarded to OCA, which enters the information in its computers.

In this regard, you have requested that OCA provide computer printouts of this information by judge. Officials of OCA have according to your correspondence informed you that the information in question can be made readily available in printout form.

Having discussed your request with Judge Evans and two of his deputies, Judge Evans apparently agreed to provide access to the first category of records that you requested in a letter dated March 31. Judge Evans, however, reserved decision regarding the remaining five areas of your request based upon what you characterized as "long-standing tradition of not releasing information by judge", "fears" that you might "misinterpret the data", and concern that providing access might make the tasks of administrators "more difficult".

The five remaining areas of your request involve:

> "- A listing, by judge, of the number of days each judge sat on the bench in the calendar years 1980, 1981 and the first three months of 1982.
>
> - A listing, by judge, of the number of trial days for each judge in the same periods.
>
> - A listing, by judge, of the number of dispositions reached in cases handled by each judge in the same time periods.
>
> - A listing, by judge, of the ratio between dispositions and number of days on the bench for each judge in the same time periods.
>
> - A listing, by judge, of the number of trials presided over to the point of completed proof for each judge in the same time periods."

I would like to offer the following observations regarding your inquiry.

First, questions have in the past arisen regarding the coverage of OCA by the Freedom of Information Law. The scope of the Freedom of Information Law is determined in part by §86(3) of the Law, which 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."

In turn, §86(1) of the Law defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

It has consistently been advised that OCA is not a court, but rather, as the administrative arm of the court system, an "agency" subject to the Freedom of Information Law in all respects. Further, in the only judicial determination of which I am aware concerning the status of OCA in relation to the Freedom of Information Law, it was found that OCA is subject to the Law. Specifically, in Babigian v. Evans [427 NYS 2d 688 (1980)], it was stated that:

> "In view of the legislative purpose to promote open government, the court is inclined to construe narrowly any section that would tend to exclude offices of government from the law. Public Officers Law §86 specifically refer to courts when it defines 'Judiciary'. The legislature did not include the administrative arm of the court. The Office of Court Administration does not exercise a judicial function, conduct civil or criminal trials, or determine pre-trial motions. Respondent is not a 'court'...
>
> "Accordingly, the court rejects respondent's contention that it is in all respects exempt from the provisions of the Freedom of Information Law."

Based upon the definitions of "agency" and "judiciary", and the holding in Babigian, supra, it is my view that OCA is required to comply with the Freedom of Information Law.

Second, another definition of relevance involves the scope of the term "record". 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, pamphelts, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the definition, which makes specific reference to computer tapes and discs, I believe that the information in which you are interested would be subject to rights of access granted by the Freedom of Information Law, for it is apparently stored in a computer in a manner that enables OCA to make a record, i.e., a printout, without preparing any new data.

It is emphasized that, as a general rule, an agency is not required to create a record in response to a request [see Freedom of Information Law, §89(3)]. Nevertheless, it appears that the information in which you are interested exists and that no new programming would be required in order to make the information available to you. If indeed the information could be made readily available in printout form without any additional programming, I believe that it would fall within the definition of "record" and, therefore, would be subject to rights of access granted by the Freedom of Information Law.

Third, 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.

In my view, two of the grounds for denial might be relevant.

The first is §87(2)(b), which enables an agency to withhold records or portions of records which if disclosed would result in "an unwarranted invasion of personal privacy". Although the information in question would identify particular judges, various judicial determinations indicate

that disclosure would likely result in a permissible rather than an unwarranted invasion of personal privacy. While the standard in §87(2)(b) is flexible and often requires the making of subjective judgments, a significant number of judicial determinations have been rendered regarding the privacy of public officers and employees. In brief, it has been held in essence that records that are relevant to the performance of one's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; 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 one's official duties may justifiably be withheld [see Matter of Wool, Sup. Ct., Nassau Cty., Nov. 22, 1977].

Under the circumstances, it appears that the information that you are requesting is relevant to the performance of the official duties of particular judges. If my analysis is accurate, I do not believe that §87(2)(b) could be cited as a basis for withholding. Moreover, it would also appear that any person could be present at various courtrooms for the purpose of preparing and tabulating the information in which you are interested.

The remaining ground for denial of possible 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..."

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 terms of your request, I believe that the information sought would constitute "statistical or factual tabulations or data" that are available. Consequently, I do not believe that §87(2)(g) could be cited as a basis for withholding and that the records in which you are interested must be made available.

As stated earlier, you indicated in your letter that there may exist a fear that you could misinterpret the data, that the information sought has not traditionally been disclosed, and that disclosure might make the tasks of the administrators more difficult. From my perspective, it is unlikely that those concerns have a bearing upon rights of access to records.

There have been several judicial determinations pertaining to what was characterized as the "governmental privilege" or "official information privilege". In those determinations, it would found that if an agency could demonstrate to a court that disclosure would, on balance, result in detriment to the public interest, the records could be withheld [see e.g., Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)]. Nevertheless, it appears that the Court of Appeals in 1979 may 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 legiti-

> mate 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).

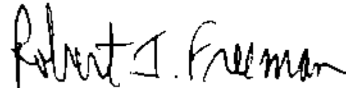
In view of the language quoted above, I believe that records may justifiably be withheld under the Freedom of Information Law only to the extent that one or more among the eight grounds for denial may appropriately be asserted. If none of the grounds for denial are applicable, the records must in my view be made available based upon the direction provided in Doolan, supra.

It is also important to note that it has been held that the status or interest of an applicant is, as a general rule, irrelevant to rights of access. As stated in Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], if records are accessible under the Freedom of Information Law, they should be made equally available "to any person, without regard to status or interest". Therefore, while the concerns expressed by OCA can be appreciated, I do not believe that they are determinative with respect to rights of access.

In sum, if my contentions that OCA is an "agency" subject to the Freedom of Information Law, that the information in which you are interested falls within the definition of "record", and that none of the grounds for denial could appropriately be asserted, the information must in my view be made available to you.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Judge Herbert Evans

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2427

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 6, 1982

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

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 Chief Inspector Brandon:

I have noticed of late that the Division of State Police has been transmitting copies of appeals and the ensuing determinations together, in a single package of correspondence, to the Committee.

It is respectfully requested that, as required by the Freedom of Information Law and the regulations promulgated by the Committee, appeals be forwarded to the Committee when you receive them and that determinations rendered pursuant to appeals be forwarded to this office when they are issued. By so doing, the Committee can better carry out its statutory duties.

As you are aware, §89(4)(a) of the Freedom of Information Law states in part that "each agency shall immediately forward to the committee on public access to records a copy of such appeal and the determination thereon." In addition, the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, provide in §1401.7 that:

> "(f) The agency shall transmit to the Committee on Public Access to Records copies of all appeals upon receipt of an appeal. Such copies shall be addressed to:

Committee on Public Access to Records
Department of State
162 Washington Avenue
Albany, New York 12231

(g) The person or body designated to hear appeals shall inform the appellant and the Committee on Public Access to Records of its determination in writing within seven business days of receipt of an appeal. The determination shall be transmitted to the Committee on Public Access to Records in the same manner as set forth in subdivision (f) of this section."

In view of the language quoted above, I believe that agencies are required to transmit to the Committee copies of appeals when the appeals are received by agencies, and later, copies of determinations when they are rendered.

I thank you in advance for your cooperation.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2428

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 7, 1982

George King
#80-A-3902
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. King:

I have received your letter of March 29 in which you requested advice regarding the Freedom of Information Law.

According to your letter, you requested certain materials relating to a superintendent's proceeding pertaining to you held at the Clinton Correctional Facility. You wrote further that you have submitted requests but that you have been denied access to those materials. You have asked for advice concerning the nature of appeal procedures that might be followed in an effort to obtain the records.

First, having reviewed our files, I have found a copy of a determination on appeal rendered by Ramon J. Rodriguez, Associate Commissioner and Counsel to the Department of Correctional Services, which denied evaluative materials contained within a "service unit folder". The date of that determination was February 9, 1982.

If your inquiry to this office concerns the records that were the subject of your appeal, the only additional step that may be taken would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. If, however, the records that are the subject of your inquiry differ from those dealt with in the determination on appeal, more specificity would be required to provide you with additional direction.

With respect to procedure, §89(1)(b) of the Freedom of Information Law requires the Committee to promulgate general regulations regarding the procedural implementation of the Freedom of Information Law. In turn, §87(1) requires agencies, such as the Department of Correctional Services, to promulgate regulations in conformity with those of the Committee. In this regard, I have enclosed for your consideration a copy of the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services. Please note that there are provisions that deal particularly with the examination of inmate records by inmates (see §§5.20 - 5.22).

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: Ramon J. Rodriguez

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2429

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 7, 1982

Mr. Edward K. Byrne
77-D-93
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. Byrne:

I have received your letter of March 24 in which you once again questioned the propriety of the regulations promulgated by the Committee.

Specifically, you have raised questions regarding the regulations insofar as they permit an appeal when an agency fails to provide a response in writing within the time periods designated in the Freedom of Information Law [§89(3)] and the regulations promulgated by the Committee [1401.5(d)]. It is your contention that if an agency fails to respond to a request, the Freedom of Information Law provides a "direct" appeal to the courts by means of initiation of an Article 78 proceeding.

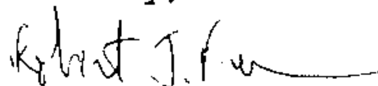
I disagree with your conclusion.

In order to initiate an Article 78 proceeding, a petitioner must exhaust his or her administrative remedies. As you are aware, following the denial of a request, an individual may appeal the denial to the head of an agency or whomever has been designated to determine appeals [see Freedom of Information Law, §89(4)(a)]. In my view, an Article 78 proceeding may be commenced only after an individual has appealed and been denied pursuant to a determination rendered on appeal. If no appeal is taken, administrative remedies would not be exhausted and, consequently, a judicial proceeding could in my opinion by commenced.

Lastly, I would like to point out that I have received a copy of a determination on appeal regarding a request that you made. In that determination, which is dated April 2, 1982, an initial denial was reversed and it was found that a commitment order that you requested would be made available 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:jm

cc: Ramon Rodriguez

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-751

FOIL-AO-2430

162 WASHINGTON AVENUE, ALBANY, NEW YORK : 2231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 13, 1982

Robert L. Mann

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. Mann:

I have received your correspondence of April 2 concerning a request directed to the Town of Saugerties under the Freedom of Information Law.

According to your letter, you are attempting to gain access to information regarding the use of vehicles under the control of the Saugerties Police Department for particular years. You also expressed the belief that "too much business appears to be conducted at meetings of a few members in a informal way and this is never documented". Your letter also refers to public participation at meetings of public bodies.

I would like to offer the following comments regarding your inquiry.

With respect to your request under the Freedom of Information Law, to the extent that records reflective of the information sought exists, I believe that they should be made available. 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 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, I do not believe that any of the grounds for denial listed in the Law could appropriately be cited to withhold the records in which you are interested. It is noted, too, that §87(2)(g) of the Freedom of Information Law requires that statistical or factual information found within inter-agency or intra-agency materials must be made available. As such, books of account, vouchers, ledgers, inventories and similar records containing the information sought would in my view be accessible. Another possible means for gaining information regarding police vehicles would involve a request for copies of insurance policies or contracts. It is possible that such documents would identify insured vehicles.

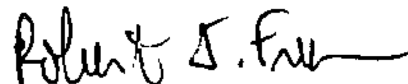
If records containing the information sought do not exist, I do not believe that the Town would be obligated to create or prepare such records on your behalf. Section 89(3) of the Freedom of Information Law states that, as a general rule, an agency is not required to create a record in response to a request.

I would also like to comment with respect to what you characterized as "meetings of a few members" in an informal way. If the "informal" gatherings are conducted by a quorum (a majority) of the members of a public body for the purpose of discussing public business, such gatherings would in my view fall within the scope of the Open Meetings Law. Section 97(1) of the Open Meetings Law defines "meeting" broadly. Further, the courts have expansively interpreted the definition and have held in essence that the term "meeting" includes any convening 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)]. It is noted that the decision cited above dealt with so-called "work sessions" and found that even informal gatherings held for the purpose of discussing public business constitute "meetings" subject to the Open Meetings Law in all respects.

Lastly, you raised questions regarding public participation. Here I would like to point out that the Open Meetings Law is silent with respect to public participation. Therefore, it has consistently been advised that a public body need not permit public participation at meetings. However, since there is no prohibition concerning public participation, it has also been advised that a public body may permit members of the public to speak, so long as the ability to do so is governed by reasonable rules that treat members of the public equally.

I hope that 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: Saugerties Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2431

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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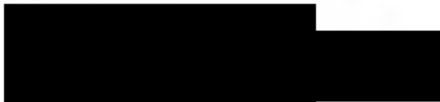
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 13, 1982



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

I have received your recent letter in which you requested assistance regarding your capacity to gain access to files pertaining to your stay at the Gowanda State Hospital. You indicated that you are particularly interested in gaining access to records regarding medication and shock treatments, as well as any diagnoses.

I would like to offer the following comments regarding 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 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, relevant to your inquiry is the first ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute".

In this regard, rights of access to clinical records pertaining to patients maintained by facilities under the control of the Office of Mental Health are governed by §33.13 of the Mental Hygiene Law. In brief, the cited provision, a copy of which is enclosed, requires that clinical records be kept confidential, except under specified circumstances described in §33.13.

One of the circumstances in which patient records may be disclosed would involve:

> "...the consent of the commissioner and the consent of the patient or of someone authorized to act on the patient's behalf, to:
>
> (i) physicians and providers of health, mental health, and social or welfare services involved in caring for, treating, or rehabilitating the patient, such information to be kept confidential and used solely for the benefit of the patient.
>
> (ii) other persons who have obtained such consent" [§33.13(c)(4)].

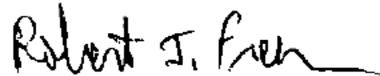
In view of the language quoted above, to obtain the records in which you are interested, I believe that you would require consent by the Commissioner of the Office of Mental Health. Consequently, it is suggested that you submit a request to the Office of the Commissioner at:

Office of Mental Health
44 Holland Avenue
Albany, NY 12229

It is also suggested that you provide as much detail as possible regarding your past and present circumstances.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2432

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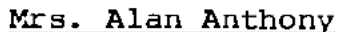
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 14, 1982

Mrs. Alan Anthony


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. Anthony:

I have received your recent correspondence concerning a request directed to the Town of Rose under the Freedom of Information Law.

Specifically, according to the correspondence attached to your letter, you requested a copy of a complaint involving your property sent to the Town Board by neighbors. Having made the request, the Town Supervisor indicated that the letter was on file in his office and that a copy would be made available to you. You have indicated, however, that it appears now that the letter has been lost. You have asked for assistance in obtaining a copy of the letter.

I would like to offer the following comments regarding 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 to the extent that records or portions thereof fall withon one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, it appears that there would be but one ground for denial that might be applicable with respect to a letter of complaint. As a general rule, it has been advised that the substance of a complaint is available, but that the name or other identifying details concerning

the person or persons who made the complaint could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to the Freedom of Information Law, §87(2)(b). Nevertheless, a copy of the minutes of a meeting held on May 14, 1982, identifies the individuals who submitted the letter of complaint to the Town. Since the names of the complainants have already been disclosed, I do not believe that there would be any basis for withholding the complaint. As such, it should in my view be available to you, if it exists.

Third, if the letter of complaint that you are seeking has indeed been lost, I cannot envision any way in which it could be made available. Further, §89(3) of the Freedom of Information Law states in part that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if the letter in question no longer exists, the Town would be under no obligation to reconstruct it.

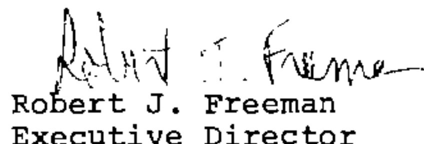
Lastly, §89(3) of the Freedom of Information Law states in part that:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

Based upon the language quoted above, it is suggested that you seek a certification from the Town to the effect that it does not have possession of the record in question or that the record cannot be found after having made a diligent search.

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: Town Supervisor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2433

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 14, 1982

Mrs. Anne J. Berman

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. Berman:

I have received a letter from Richard Philip Berman, Esq., in which he requested that an advisory opinion be transmitted to you.

In his letter, Mr. Berman described difficulties in his attempts to obtain records on your behalf from a public housing authority. It appears that he tried to obtain records under both the Freedom of Information Law and by means of discovery under Article 31 of the Civil Practice Law and Rules (CPLR).

Since it is the policy of this office not to prepare an advisory opinion after litigation has been commenced, Mr. Berman advised me in a subsequent letter of April 4, 1982, "that we are not in litigation with regard to this matter at this point in time..."

Having reviewed all the correspondence, I would like to offer the following comments.

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 public housing authority, 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.

One possible ground for denial that may be relevant under the circumstances is §87(2)(a) of the Law, which states that an agency may withhold records or portions thereof that "are specifically exempted from disclosure by state or federal statute". Therefore, the Freedom of Information Law must be read in conjunction with other statutes that might essentially nullify rights granted under the Freedom of Information Law.

Section 159 of the Public Housing Law, entitled "Disclosure of certain information prohibited", may apply in this instance. The cited provision requires in part that information obtained from public housing tenants:

> "...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".

Based upon the language quoted above, it appears that a request under the Freedom of Information Law for records identifying tenants living in buildings subject to the Public Housing Law could appropriately be withheld, unless specific direction is given to the contrary.

Another statute that exempts records from disclosure under §87(2)(a) is §3101 of the CPLR, which states in part that:

> "(a) There shall be full disclosure of all evidence material and necessary in the prosecution or defense of any action...
>
> (c) Attorney's work product. The work product of an attorney shall not be obtainable.
>
> (d) Materials prepared for litigation. The 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 litigation; and
>
> 2. any writing or anything created by or for a party or his agent in preparation for litigation".

As a general matter, the Committee has advised that if a record is accessible, it should be made equally available to any person, notwithstanding the status or interest of the applicant. As you are aware, this stance was confirmed by the holding in Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 156. In Burke, the applicant, who was involved in litigation with the City of Rochester, requested audits and similar records that were related to the litigation, but were prepared in the ordinary course of business. Under the circumstances, the court found that audits were available under the Freedom of Information Law and that the applicant's status as a litigant could not detract from his rights under the Freedom of Information Law. Consequently, the court found that accessible records, such as the audits, should be made available to the litigant.

In another case, Fitzpatrick v. County of Nassau, 372 NYS 2d 939 (1959), the request dealt with records that were prepared for litigation. As such, the court upheld the denial based upon the exemption from disclosure regarding material prepared for litigation found in §3101(d) of the CPLR. In this regard, it appears that some of the records sought may have been prepared for litigation or consist of the work product of an attorney. To that extend, I believe that §87(2)(a) of the Freedom of Information Law could properly be cited as a basis for withholding.

In his letter of April 4, Mr. Berman indicated that he also requested copies of "original inspection reports on 'Lefrak City' generaly (sic.) and have been refused reports out of hand, etc." The first ground for denial that may be relevant to the inspection reports he is seeking 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 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. Other aspects of inter-agency or intra-agency materials consisting of advice, recommendations, impressions and the like could in my view be withheld.

To the extent that these reports contain factual information, they would be available under §87(2)(g), unless a different ground for denial could justifiably be asserted. Conversely, to the extent that the inspection reports are reflective of advice, opinions, or recommendations, for example, those portions of the report could in my view be withheld.

Another possible ground for denial that may be applicable to inspection reports is §87(2)(b) of the Law, 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, it has consistently been advised that the names or other identifying details concerning complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy [see also Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979)]. Additionally, to the extent that the inspection reports would be reflective of tenant information subject to §159 of the Public Housing Law, it could in my opinion be withheld under §87(2)(a) of the Law, for, as noted earlier, §159 generally prohibits disclosure.

Lastly, since I am unfamiliar with the specific nature of all the records Mr. Berman is seeking, I cannot determine the extent to which the records he is requesting would be available under the Freedom of Information Law or deniable under Article 31 of the CPLR. In Mr. Berman's initial correspondence, he wrote that:

> "[W]e again demanded said documentation indicating that there could not exist an attorney-client relationship in this case and was promptly advised that we would be refused said papers on the grounds that same was in fact attorney product".

In this regard, please note that the Committee is authorized to advise only with respect to the Freedom of Information Law; it has no authority to advise relative to motions for discovery, for example.

I hope 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-2434

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 14, 1982

Ms. Myrna Luster

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. Luster:

I have received your letter of April 4 in which you raised questions regarding the Freedom of Information Law.

Specifically, you asked whether there is a statute of limitations for initiating a proceeding under Article 78 of the Civil Practice Law and Rules following a denial of access. You also asked for information regarding Article 78.

First, the statute of limitations for an Article 78 proceeding is four months. 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)].

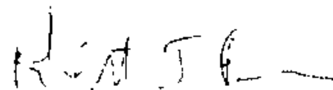
In conjunction with your question, the statute of limitations begins to run when an agency has rendered its final determination to deny access following an appeal.

I would also like to point out that, as a general rule, a member of the public who initiates a proceeding under Article 78 has the burden of proving that the agency acted unreasonably. Nevertheless, the Freedom of Information Law specifies in §89(4)(b) that the agency has the burden of proving that records in fact fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law. Moreover, it has been held by that state's highest court that an agency cannot merely assert a ground for denial and prevail; on the contrary, the agency must prove that the harmful effects of disclosure described in a 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) and Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979)].

Lastly, with respect to an Article 78 proceeding, I have enclosed copies of §§7801 through 7804 of the Civil Practice Law and Rules. There are various "form books" that contain model documents that might be used with respect to an Article 78 proceeding. There are none of which I am aware that pertain specifically to an Article 78 proceeding initiated under the Freedom of Information Law. However, I have enclosed copies of various forms 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
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2435

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 15, 1982

Joseph A. Farina

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. Farina:

I have received your letter of April 6 as well as the materials attached to it.

The materials describe a series of events leading to a complaint filed with the New York State Division of Human Rights regarding alleged employment discrimination. As I understand your inquiry, you are interested in precluding future dissemination of materials pertaining to you, as well as rights of access to records generally.

While I am not sure that I can provide you with substantial assistance, for it appears that the complaint that you have made represents the appropriate vehicle for challenging the action taken, I would like to offer the following comments.

First, with respect to rights of access to government records in New York, 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, New York State has not enacted a so-called "privacy act" that would restrict the disclosure of personal information to third parties. Moreover, the Freedom of Information Law is permissive. While an agency may withhold records falling within one or more of the grounds for denial, it is not generally required to do so. Therefore,

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", there is no requirement that records falling within the scope of that ground for denial must be withheld.

Third, there are a number of statutes that require that records be kept confidential or which prohibit disclosure except under specified circumstances. In such cases, §87(2)(a) of the Freedom of Information Law would be applicable, for it pertains to records that are "specifically exempted from disclosure by state or federal statute". If a statute prohibits disclosure, the permissive aspect of the Freedom of Information Law would in my view be of no application.

Fourth, it would appear that one provision of law of possible relevance might be §537 of the Labor Law entitled "Disclosures prohibited". The cited provision generally deals with records acquired from employers or employees regarding unemployment benefits. I have enclosed a copy of §537 of the Labor Law for your review. Please note that the capacity of the Department of Labor to withhold is broad.

Another potentially relevant provision is §297(8) of the Executive Law. Section 297 contains the procedure to be followed when a claim of unlawful discriminatory practice is made. Subdivision (8) 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".

Again, based upon the language quoted above, the extent to which information can be disseminated appears to be limited.

Fifth, with respect to procedure, as you may be aware, the regulations promulgated by the Committee under the Freedom of Information Law contain reference to the designation of a "records access officer" by an agency. In the future, when making requests, it is suggested that you direct your requests to the "records access officer".

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)].

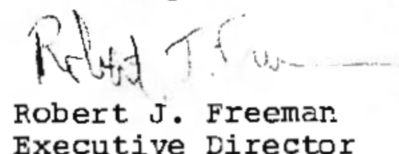
In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Lastly, the sample letter of request included among the materials attached to your letter makes reference to a waiver or reduction of fees for copying. In this regard, although there is a provision in the federal Freedom of Information Act regarding the waiver of fees, there is no similar provision in the New York Freedom of Information Law.

Enclosed for your consideration is a pamphlet entitled "The Freedom of Information and Open Meetings Laws... Opening the Door". The pamphlet 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

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2436

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 15, 1982

Douglas Dunbar
80-B-0334
Box A2
Cell 202
Green Haven Correctional Facility
Stormville, New York 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. Dunbar:

I have received your letter of April 12 in which you described a series of events leading to your incarceration and requested records pertaining to you in the "possession" of 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. 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 to make records available.

Nevertheless, I would like to offer the following suggestions.

First, to the extent that the records you are seeking exist, requests should be directed to the specific agencies maintaining possession of the records. For instance, if you believe that the records in question are in the possession of the Department of Correctional Services or the Division of Parole, your requests should be sent directly to designated officials of those agencies. Further, under the regulations promulgated by the Department of Correctional Services, if the records are in possession of the facility where you are now located, a request should be made to the facility superintendent.

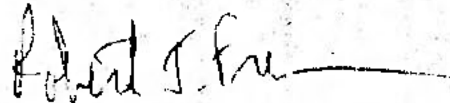
Douglas Dunbar
April 15, 1982
Page -2-

Second, §89(3) of the Freedom of Information Law requires that an applicant for records submit a request "reasonably describing" the records sought. Consequently, when making a request, it is suggested that you include as much detail as possible, including names, dates, file designations, index and docket numbers and similar information that would enable agency officials to locate the records.

Enclosed for your consideration are copies of the Freedom of Information Law, an explanatory pamphlet that may be useful to you, and the regulations promulgated by the Department of Correctional Services to which reference was made earlier.

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-2437

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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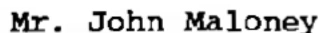
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 16, 1982

Mr. John Maloney


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. Maloney:

I have received your letter of April 8 which was addressed to the Chairman of the Committee, Gilbert P. Smith. Please be advised that the staff of the Committee has been directed to respond to all inquiries addressed to its members.

You have requested advice regarding the means by which records can be obtained from an investigative file that you believe is in the possession of the New York City Police Department. In particular, you are interested in gaining access to files created in response to a complaint you filed as the victim of a crime.

I would like to offer the following comments in response to your inquiry.

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).

From my perspective, there are three grounds for denial that may be relevant to your inquiry.

The first possible ground for denial is §87(2)(b) of the Law, 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 you have described, it is questionable whether disclosure of information which personally identifies you would result in an unwarranted invasion of your personal privacy. However, disclosure of records might identify third parties, such as witnesses or others. Therefore, it is possible that disclosure could result in an unwarranted invasion of personal privacy, unless the identifying details pertaining to others are deleted.

Another ground for denial that may be relevant is §87(2)(e) of the 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."

Since I am unfamiliar with the nature and progress of the investigation, I cannot advise specifically that disclosure would not interfere with a law enforcement investigation or judicial proceeding, deprive a person of a right to a fair trial, identify a confidential source, disclose confidential information, or reveal non-routine criminal investigative techniques or procedures. However, if the crime is still under investigation, §87(2)(e) might justifiably be cited to withhold the records sought.

The last possible ground for denial that could be applicable 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. Since I am not familiar with the exact contents of the investigative file, I am unable to advise you with greater specificity as to what records might be withheld under this provision.

Second, if you have not as yet filed a claim with the Crime Victims Compensation Board, it is suggested that you contact that office for further information at:

Crime Victims Compensation Board
875 Central Avenue
Albany, New York 12206

I hope 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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2438

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

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 19, 1982

Frank J. Estrada
Dreiser 311-C, SUNY
Stony Brook, NY 11794

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. Estrada:

I have received your letter of March 17, 1982. Please accept my apologies for the delay in response. I hope that you will understand that the delay has been due to the necessity of contacting a number of representatives of the Department of Motor Vehicles (DMV) on your behalf.

You requested advice in addition to that given in my earlier letter to you with respect to rights of access to copies of ten traffic summons tickets. Specifically, you corresponded with Mr. William Paley, the Chief Clerk - Records Access Officer of the Public Services Bureau of DMV, but it appears that some of the information you have received from Mr. Paley may conflict with advice contained in my earlier letter to you.

I would like to offer the following comments in order to eliminate any confusion that may have arisen.

First, as indicated above, I have engaged in various conversations with DMV representatives, all of whom have been most helpful. It appears that the conflict between my comments and those of Mr. Paley arose due to different means of computer access that must be used to determine whether the status of the summons ticket is "open" or "closed".

Representatives of DMV have informed me that there are two different methods by which summons information is computerized. When a summons is first issued, the computer file is considered to be "open" on that particular ticket until an adjudication is obtained in court or ninety days have expired. During this "open" time period, the summons ticket can be accessed from the computer by its number. Therefore, the comments contained in my previous correspondence were applicable to summons tickets accessible by number during the "open" period.

When a summons ticket has been adjudicated, it then becomes accessible from the computer only by means of the individual's name, date of birth and sex. If no adjudication occurs, the information is purged after ninety days and can no longer be obtained from the computer system. Consequently, the ticket summons is considered to be "closed" after either adjudication or purging of the information. Therefore, Mr. Paley's comments indicating that you would not be able to search without the name and date of birth applied to the summons information contained in the computer after the files were "closed".

Second, Mr. Paley made reference to the fees for searching and photocopying DMV records required by §202 of the Vehicle and Traffic Law. Section 202(2) and (3)(a) state that:

> "2. Fees for searches. The fee for a search shall be two dollars except, that a fee of one dollar shall be charged if the request for information is submitted in a form and manner which shall permit the request to be machine processed rather than manually processed by personnel of the department, and receipt and distribution costs are borne by the requester. The commissioner shall prescribe the form and procedure to be used in order for a request to be eligible to be processed for such one dollar fee. If certification of a search is requested, there shall be an additional fee of fifty cents.
>
> 3. a. Fees for copies of records and documents. The fees for copies of records and documents, other than accident reports, shall be one dollar per page. A page shall consist of either a single or double side of any

> document. The fee for a copy of an accident report shall be three dollars and fifty cents. If certification of a copy of a record or document is requested, there shall be an additional fee of fifty cents. The fee for a copy of any such record or document shall be in addition to any fee for the search or searches required to be made in conjunction with such request".

As you may be aware, §87(1)(b)(iii) of the Freedom of Information Law provides that an agency, such as the DMV, may assess a fee for copies not in excess of twenty-five cents per photocopy up to nine by fourteen inches, "except when a different fee is otherwise prescribed by law". Since §202 of the Vehicle and Traffic Law prescribes a higher fee by law, Mr. Paley has in my opinion appropriately advised you regarding the fees for searching, photocopying and certifying DMV records.

Lastly, it is suggested that you determine whether your request remains timely for a search of summons by ticket number.

I hope 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: Michael Derry
Duncan MacPherson
William Paley

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2439

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 19, 1982

Mr. Fred M. Anderson

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. Anderson:

I have received your letter of April 9 in which you indicated that you requested records from the Chief of Police in Albany, but that you had not yet received a response.

I would like to offer the following comments regarding your inquiry.

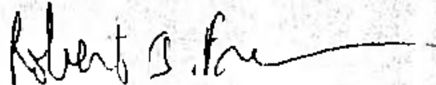
Your request of March 25 was directed to the Chief of Police of the "City and County of Albany". In this regard, the City of Albany maintains a police department and the County of Albany maintains a sheriff's department; the two departments are separate and are run by different units of government. Nevertheless, I have contacted the Police Department of the City of Albany to determine whether your request had been received by that office. I was informed today that the City of Albany Police Department indeed received your letter and responded to your request recently. I do not know of the nature of the response. However, if any portion of your request was denied, under §89(4)(a) of the Freedom of Information Law, you have the right to appeal the denial to a designated appeals person or body within thirty days of the denial.

If you have questions regarding the response to your request, this office could attempt to provide assistance on your behalf prior to your appeal.

When a denial is upheld by means of a determination rendered on appeal, an applicant may initiate 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-754
FOIL-AO-2440

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 19, 1982

Harvey M. Elentuck

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. Elentuck:

I have received your letter of April 10, as well as the materials attached to it.

Once again, you have raised questions regarding the means by which you, as a probationary teacher, were terminated. Specifically, you raised the following question:

> "[W]hen a New York City Community School District teacher is discontinued prior to the end of his probationary period, is it mandated that there must be a majority vote by the members of the Community School Board, and, if so, ought this vote be taken during executive session or at a public meeting?"

In my view, which is based upon a recent Appellate Division decision rendered in Sanna v. Lindenhurst [see attached, 85 AD 2d 157 (1982)], I believe that a community school board would be required to vote to terminate a probationary teacher during an open meeting.

As you may be aware, the Open Meetings Law states that a public body may vote during a properly convened executive session, so long as the vote does not involve the appropriation of public monies. However, §105(2) of the Open Meetings Law provides that:

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

In this regard, several judicial determinations cited in the Sanna decision interpreted §1708(3) of the Education Law to preclude a school board from voting during an executive session. Until the Sanna decision was rendered, there was no judicial determination of which I had been aware that construed §1708(3) of the Education Law in conjunction with the Open Meetings Law. However, Sanna in my opinion indicates that §1708(3) of the Education Law remains in effect and requires that a school board take action only during open meetings, except in the case of a tenure proceeding conducted under §3020-a of the Education Law. As such, I believe that a vote to terminate a probationary teacher must be conducted by a community school board during an open meeting.

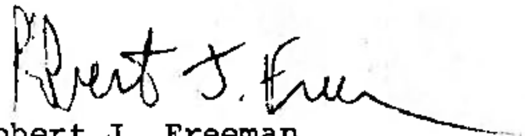
The second issue that you raised concerns two appeals that you have made following denials of access to records. According to your letter, the person designated to render determinations on appeal has not responded to your appeals. You have asked whether such a failure to respond means "that she is affirming the denial of access by virtue of the fact that she hasn't responded". As you may be aware, §89(4)(a) of the Freedom of Information Law states in 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".

There is only one decision of which I am aware that dealt with a failure to respond to an appeal within the time limits specified in the Law. In Floyd v. McGuire, 437 NYS 2d 886 (1981)], it was held 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.

I hope that 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: Lois Hickey

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2441

162 WASHINGTON AVENUE, ALBANY, NEW YORK 1 2231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 20, 1982

Ms. Lark J. Shlimbaum
Assistant Town Attorney
Town of Islip
Office of the Town Attorney
Town Hall
Islip, New York 11751

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. Shlimbaum:

I have received your letter of April 15 in which you requested an advisory opinion under the Freedom of Information Law. Your interest in complying with the Law is much appreciated.

According to your letter:

> "[T]he Town of Islip requires every application for a permit to engage in the solid waste business in the Town to be accompanied by a list of the name and address of each of the applicant's customers. The Town ordinance that requires this information also provides, 'that customer lists shall not be available for inspection or photocopying under the Freedom of Information Law.'"

You have asked whether in my view the statement contained in the ordinance is sufficient to withhold customer lists. Further, if the provision in the Town ordinance is insufficient to withhold the lists, you asked whether they could nonetheless be withheld under §87(2)(b) of the Freedom of Information Law.

I would like to offer the following comments regarding your inquiry.

First, I do not believe that the language that you quoted from the Town ordinance could effectively prohibit disclosure of customer lists. From my perspective, the only instance in which records cannot be disclosed would involve situations in which a statute enacted either by Congress or the State Legislature prohibits disclosure. In those cases, such records would fall within the scope of §87(2)(a) of the Freedom of Information Law concerning records that are "specifically exempted from disclosure by state or federal statute". Since an ordinance is not a "statute", I do not believe that the ordinance in question would effectively or legally prohibit disclosure of customer lists.

Nevertheless, as you intimated, it is possible that the lists in question could be withheld under §87(2)(b) of the Freedom of Information Law, which enables an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". It is noted that §89(2)(b) of the Freedom of Information Law lists a series of five examples of unwarranted invasions of personal privacy. Of relevance to your inquiry is §89(2)(b)(iii), which states that an unwarranted invasion of personal privacy includes the:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

Based upon the language quoted above, if a list is requested for "commercial or fund-raising purposes", I believe that it could justifiably be withheld.

I would like to point out, too, that §89(2)(b)(iii) in my view represents an exception to the general rule that the status or interest of an applicant is irrelevant to rights of access. As you may be aware, the Freedom of Information Law does not contain standards regarding the reasons for which records may be requested, and it has been held judicially 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]. However, inherent in the language of §89(2)(b)(iii) is a question regarding the purpose for which a request is made. Consequently, I believe

that the cited provision represents the only instance in the Freedom of Information Law in which an agency may inquire as to the purpose for which a request is made. Moreover, there is one decision of which I am aware which upholds the notion that an agency may inquire as to the reasons for which a request is made for a list of names and addresses [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (Sept. 5, 1980)].

There may be another ground for denial of possible application. Specifically, §87(2)(d) states that an agency may withhold records or portions thereof that:

> "are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In some instances it might be contended that a customer list constitutes a trade secret which if disclosed would "cause substantial injury to the competitive position" of a particular commercial enterprise. However, since I am not familiar with the specific nature of the records in question, the applicability of §87(2)(d) is in my view conjectural.

Lastly, you also wrote that:

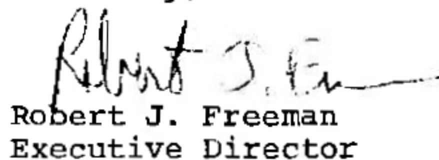
> "[T]he Town is considering requiring each person to whom a solid waste permit is issued to file additional information with the Town, including the fee charged for solid waste services, a description of the services and the number of collections per month."

In this regard, you asked whether access to the information described could be denied "by a direct prohibition as described above or under Public Officers §87(2)(b)". For the reasons expressed earlier, I do not believe that an ordinance could be construed as a "statute" that precludes disclosure. Further, it is my view that an ordinance would be invalid to the extent that it conflicts with a statute passed by the State Legislature and signed into law by the Governor, such as the Freedom of Information Law.

In addition, as you described the information, I cannot envision how disclosure could be construed to constitute an unwarranted invasion of personal privacy. Unless I am mistaken, a firm involved in the removal of solid waste makes known to its customers the fee assessed for its services, a description of its services and the number of collections per month. Stated differently, the information in question would likely be known or could be known to any member of the public who might be interested in employing the services of a firm engaged in solid waste removal. As such, it does not appear that §87(2)(b) could serve as a basis for withholding.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO - 2442

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 21, 1982

Mrs. Victoria Lawson

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. Lawson:

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

According to your letter, you are seeking various materials from the Greenburgh Central School District #7, including budgetary information, budget reports, financial, taxation and program information, internal audits and long-range financial plans. Further, you have requested from the District:

> "...FREE OF CHARGE COPIES OF ALL RECORDS RELATING TO SCHOOL BOARD PROPOSALS ON ALL FUNDS REQUIRED FOR THE ENSUING YEAR 1982-1983, several weeks prior to the official public hearing to enable voters to submit written comments, petitions, propositions on the proposed 1982-1983 budget "(emphasis yours).

Your inquiry concerns rights of access to the materials described above.

I would like to offer the following comments regarding your inquiry.

First, it is emphasized that the Freedom of Information Law is an access to records law. Stated differently, an agency, such as a school district, has no obligation to create or prepare records in response to a request, unless specific direction is given to the contrary [see Freedom of Information Law, §89(3)]. There may be aspects of your request that represent information that does not yet exist in the form of a record or records. To that extent, the District would not be required to create records on your behalf.

Second, to the extent that records exist, the Freedom of Information Law is based upon a presumption of access. As such, 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.

Third, there would appear to be one ground for denial in the Freedom of Information Law that would be applicable. However, that basis for withholding might be cited as a means of requiring that records be disclosed in whole or in part. 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 policy or determinations must be made available.

Under the circumstances, it is possible that many of the records that you identified consist in great measure of "statistical or factual tabulations or data" that must be made available. Moreover, it has been found that

projections of expenditures contained within so-called "budget worksheets" are accessible, even though the numerical figures appearing on such worksheets may be subject to change, acceptance or rejection [see Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754, (1977)]. Therefore, to the extent that the materials in which you are interested consist of statistical or factual information, I believe that they must be made available.

It is also possible that some of the records in which you are interested are accessible under §87(2)(g)(iii) on the ground that they constitute "final agency policy or determination". For instance, if a long-range plan has been adopted as the policy of the District, is would appear that such a plan would be available in its entirety.

Fourth, you requested that all accessible records be made available to you "free of charge". In this regard, §87(1)(b)(iii) of the Freedom of Information Law as a general rule permits an agency to assess a fee of up to twenty-five cents per photocopy. Consequently, if the District has adopted rules establishing fees for photocopying, it could assess fees based upon such rules with respect to the records that you are seeking.

Lastly, you requested the materials in question "several weeks prior to the official public hearing". In this regard, it is noted that the Education Law contains specific direction regarding the disclosure of "estimated expenses" for the ensuing year. Section 1716 of the Education Law states in part that a "detailed statement" concerning proposed expenditures for the ensuing year:

> "...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".

As such, a board of education is not required to prepare and make available a proposed budget prior to the time specified in §1716 of the Education Law. I have enclosed a copy of §1716 in its entirety 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:ss

cc: Greenburgh Central School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2443

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 21, 1982

Mr. Thomas Fitzsimmons

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. Fitzsimmons:

I have received your letter of April 18 in which you requested an advisory opinion under the Freedom of Information Law.

Your question is as follows:

> "[I]f a recording device is used to assist a town clerk in preparing the minutes of a Town Board meeting and these tapes are kept in the Town Clerks office after said minutes are prepared and approved by the Town Board, do they (the tapes) become public record and as such available under Freedom of Information Law to the general public."

In my opinion, tape recordings of open meetings are available to the public under the Freedom of Information Law for the following reasons.

First, §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including,

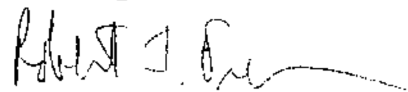
> but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the broad language quoted above, if a town clerk creates and uses tape recordings as an aid in preparation of the minutes of town board meetings, a tape recording would in my view clearly constitute a "record" subject to rights of access granted by the Freedom of Information Law.

Second, case law has held that tape recordings of open meetings are available [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978] and that notes taken at a meeting and later used as an aid in compiling minutes are also available [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. Consequently, if a tape recording exists, I believe that it is available to the public for either listening or reproduction.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 21, 1982

Mr. Antonio Soto
80-A-2979 9-3/H-3
Ossining Correctional Facility
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. Soto:

I have received your letter of April 12 in which you requested assistance regarding the use of the Freedom of Information Law.

According to your letter, you have unsuccessfully requested a copy of your "sentencing and/or pre-sentencing minutes" from the Superintendent of the Ossining Correctional Facility and Ramon J. Rodriguez, Counsel to the Department of Correctional Services. If I interpret your inquiry correctly, you are interested in obtaining copies of presentence reports and memoranda.

Assuming that my interpretation of your request is accurate, I do not believe that the Superintendent or Mr. Rodriguez have the authority to make a presentence report or memoranda available to you.

Further, I do not believe that the Freedom of Information Law confers rights of access with respect to such reports. The first ground for denial in the Law involves records that are "specifically exempted from disclosure by state or federal statute" [see attached, Freedom of Information Law, §87(2)(a)]. One such statute that exempts records from disclosure is §390.50 of the Criminal Procedure Law, entitled "Confidentiality of pre-sentence report and memoranda". Subdivisions (1) and (2) of the cited provision state that:

"1. In general. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, 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.

2. Pre-sentence report; disclosure; general principles. Not less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination 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 language quoted above, it would appear that the only situations in which presentence reports or memoranda could be disclosed would involve those instances in which a court permits disclosure. As such, it is suggested that you contact your attorney. Perhaps he or she could provide greater assistance than I.

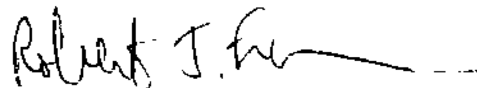
In addition, although you cited regulations of the Department of Correctional Services regarding rights of access to records by inmates, §5.23 of the regulations states that:

> "[N]otwithstanding anything herein to the contrary, any record, including probation records, youthful offender and juvenile delinquent records, drug and alcohol abuse and rehabilitation records, the confidentiality of which is provided by law, shall only be released in accordance with the law governing such records."

The language quoted above in my view preserves the confidentiality requirements found in the Criminal Procedure Law cited earlier.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Ramon J. Rodriguez

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2445

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 22, 1982

Mr. James D. Diamond
Executive Director
Common Cause
225 Lark Street
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. Diamond:

I have received your request for an advisory opinion regarding "a denial of a freedom of information request made to a New York State executive agency". According to your letter:

> "[A]t an open meeting of a commission, its members reviewed a draft of an annual report. The report, which is required by statutory law, contains statistical and factual tabulations and data".

You indicated further that in the letter of denial, it was noted that you could obtain a copy of the report when it is completed. Nevertheless, it is your contention that portions of the draft report consisting of "statistical or factual tabulations or data" should be made available now.

I would like to offer the following comments regarding 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 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 you intimated, it would appear that only one ground for denial listed in the Freedom of Information Law would be relevant to the draft report. 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 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 tabulations or data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, it appears that the report could properly be characterized as "intra-agency" material. Nevertheless, as you stated in your letter and as required §87(2)(g)(i), portions of intra-agency materials consisting of "statistical or factual tabulations or data" must be made available, unless some other ground for denial might appropriately be cited. Consequently, to the extent that the draft report consists of statistical or factual tabulations or data, it appears that the denial was improper and that it is accessible under the Freedom of Information Law.

I would also like to point out that there are judicial determinations pertaining to statistical or factual information found in records prepared prior to a final determination and which are subject to change. For instance, so-called "budget worksheets" containing various breakdowns of proposed expenditures which were subject to modification were found to constitute "statistical tabulations" accessible under the Freedom of Information Law [see Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754, (1977)].

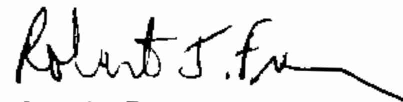
Similarly, working papers prepared by the Department of Audit and Control in conjunction with a municipal audit were found to be available to the extent that they contained statistical or factual information, even though the figures may have been considered as estimates [see Polansky v. Regan, 440 NYS 2d 356, 81 AD 2d 102 (1981)].

Third, it is emphasized that the language found within §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 or report might be both accessible and deniable in part. Further, it is my view that the quoted language from §87(2) indicates that an agency is required to review records sought in their entirety to determine which portions, if any, may justifiably be withheld in conjunction with one or more of the bases for withholding.

In sum, based upon the language of the Freedom of Information Law as well as its judicial interpretation, I do not believe that a draft report may necessarily be denied in its entirety on the ground that the report has not been completed. On the contrary, to the extent that a draft report contains information that is available under the cited provision of the Freedom of Information Law, I believe that it must be made accessible upon 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

cc: Louis J. Cotrona

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-759
FOIL-AO-2446

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 23, 1982

Bert Gault
Watertown Daily Times
260 Washington Street
Watertown, NY 13601

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. Gault:

I have received your letter of April 8 in which you requested an advisory opinion.

Attached to your correspondence are several news articles concerning the Jefferson County Industrial Development Agency (JCIDA) and its plans to restructure its committees under the Jefferson County Industries (JCI), a private not-for-profit corporation. JCIDA members are appointed by the county legislature pursuant to §856(2) of the General Municipal Law. JCI membership is apparently based upon provisions of the Not-for-Profit Corporation Law.

With respect to your first inquiry, you requested advice as to whether an executive session held by the JCIDA to discuss reorganization of its committees was conducted in compliance with the Open Meetings Law.

I would like to offer the following comments in response to your question.

As you were advised in an earlier opinion rendered by this office, an industrial development agency, such as the JCIDA, is a "public body" subject to the provisions of the Open Meetings Law. The enabling legislation for industrial development agencies is found in Article 18-a of the General Municipal Law. That Article authorizes industrial development agencies to advance the economic welfare of the state and conduct such public business

by means of a quorum of its members and also states in §856(1)(b) of the General Municipal Law that industrial development agencies are corporate governmental agencies constituting public benefit corporations. Since §66 of the General Construction Law defines a public corporation to include a public benefit corporation, an industrial development agency in my view clearly falls within the definition of "public body" appearing in §97(2) of the Open Meetings Law.

With regard to the executive session in question, I believe that there is but one ground for executive session that would be relevant to a discussion of "committee restructuring". 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..."

In my opinion, the language quoted above may be cited as the basis for entry into an executive session only to the extent that discussions pertain to a "particular person or corporation" and only in conjunction with the specific subjects set forth in §100(1)(f).

Therefore, to the extent that the discussion involved questions of policy in terms of restructuring the committees, I do not believe that any ground for executive session could appropriately have been cited to close the meeting. However, as indicated previously, to the extent that the discussion involved one or more of the subjects listed in §100(1)(f) in relation to a "particular person", the executive session was likely proper.

The second area of inquiry concerns the status of new committees that may be created by the JCIDA and the JCI vis-a-vis the Freedom of Information and Open Meetings Laws. In terms of background, as I understand the situation, the JCIDA has been performing its duties through three committees that it has designated. According to the news article attached to your letter, it appears that new committees will be created consisting of two members designated by JCIDA and three JCI. The question that arises under the Open Meetings Law is whether the three new committees as described above would be subject to the Open Meetings Law.

The focal point of the question is §97(2) of the Open Meetings Law, which 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".

If each of the conditions found in the definition are present, I believe that the committees in question would be subject to the Law. As such, I would like to review each of the components of the definition as follows.

First, the committee would be an entity consisting of at least two members.

Second, it is questionable whether the committee would require a quorum to conduct its business. It is possible that the by-laws of JCI, a not-for-profit corporation, specify that a committee can act only by means of a quorum. Further, if it is found that the committees perform their duties for government and conduct public business, they could carry out their duties only by means of a quorum as defined in §41 of the General Construction Law. The cited provision defines "quorum" as follows:

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

> power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting".

It is emphasized that the definition of "quorum" is not restricted to entities consisting of public officers, for it also refers to "persons" who may serve collectively as a body. From my perspective, if the committees in question operate under by-laws or the provisions of the Not-for-Profit Corporation Law that require a quorum, or if they function in conjunction with §41 of the General Construction Law, they would be permitted to conduct their business only by means of a quorum.

Third, a question arises as to whether the committees conduct "public" business. In this regard, as I understand it, by means of the committee system, it appears that matters now reach the governing body of the JCIDA for determination or review only after one or more of the committees has reviewed a particular matter of business. In my view, if the new committees engage in a similar function and review matters as a condition precedent to review and/or determination by JCI, they would clearly be conducting "public" business. Further, even if the procedure described above is not followed, it is possible, in view of the nature and duties of the committees, that it might be found that they conduct public business.

Fourth, to find that an entity is a public body, it must perform a "governmental function for the state or for an agency or department thereof, or for a public corporation..." As specified earlier, an industrial development agency is a public corporation. Therefore, if the restructured committees perform a function for JCIDA, I believe that they would be performing a "governmental function" for a public corporation. If each of the conditions described above can be met, the committees would in my opinion be required to comply with the Open Meetings Law.

Another aspect of your second question pertains to the status of the new committees under the Freedom of Information Law. Here I direct your attention to §86(3) of the Freedom of Information Law, which 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".

It is noted that while the definition of "public body" is not clearly restricted to governmental entities, the definition of "agency" does contain such a restriction. Therefore, although the committees in question might meet each of the requirements necessary to a finding that they are public bodies, they might nonetheless fall outside the definition of "agency" and, therefore, the Freedom of Information Law. If the committees in question are created by JCIDA, they would in my view fall within the requirements of the Freedom of Information Law. If, however, the committees are not governmental entities, their records might not be subject to the Freedom of Information Law.

I would like to point out that there is a precedent for finding that a not-for-profit corporation and its records fall within the scope of the Freedom of Information Law. In Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)], the Court of Appeals, the state's highest court, found that a volunteer fire company, a not-for-profit corporation that performs its duties by means of a contractual relationship with one or more municipalities, is an "agency" subject to the Freedom of Information Law. Nevertheless, the direction given by the Court of Appeals was not sufficiently specific to reach an unqualified conclusion that the committees in question are covered by the Freedom of Information Law.

Finally, the definition of record appearing in §86(4) of the Freedom of Information Law may be of relevance, whether or not the newly created committees are subject to that statute. "Record" is defined to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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, if, for example, the committees submit or forward records to JCIDA, those records in my view become subject to rights of access granted by the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Jefferson County Industries
Jefferson County Industrial Development Agency

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-758
FOIL-AO-2447

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 23, 1982

Ms. Tricia Crisafulli
Watertown Daily Times
Carthage Bureau
P.O. Box 583
Carthage, NY 13619

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. Crisafulli:

I have received your letter in which you requested an advisory opinion under both the Open Meetings and Freedom of Information Laws.

Your inquiry concerns meetings of a "special committee" designated by a school board and budget recommendations made by a superintendent of schools.

Specifically, with regard to your first question, you indicated that three members of the Carthage Central School Board designated as a committee by the Board met with three residents of the community to discuss the closing of an elementary school. Although no action was taken at the meeting in question, you wrote that the media was not notified. In this regard, you have asked whether "such committee or 'informal' meetings" are open to the public.

I would like to offer the following comments regarding the situation that you described.

First, it is emphasized that the definition of "meeting" appearing in §97(1) of the Open Meetings Law (see attached) is broad and has been interpreted expansively by the courts. Perhaps the leading decision regarding the definition is Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947

(1978)], in which the Court of Appeals, the state's highest court, found that the definition encompasses any gathering of a quorum of a public body held for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. It is also noted that the Court of Appeals' decision affirmed a determination by the Appellate Division which found specifically that "informal" conferences, agenda sessions or work sessions, during which there might have been no intent to take action, fell within the framework of the Open Meetings Law.

Second, also of relevance is the definition of "public body" appearing in §97(2) of the Law. In terms of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in §97(2) of the Open Meetings Law. Perhaps the leading case on the subject involved a situation in which a school board designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that the advisory committees in question which had no capacity to take final action fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body".

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §97(2) 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 simi-law body of such public body."

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies".

In view of the amendments to the definition of "pubic body", I believe that virtually any entity designated or created to serve as a body by a school board would fall within the requirements of the Open Meetings Law.

Third, with respect to notice, public bodies, including committees, are required to give notice to the news media and the public prior to all meetings. Section 99(1) of the Open Meetings Law concerns 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 in the same manner as described in §99(1) "to the extent practicable" at a reasonable time prior to such meetings.

In your remaining inquiry you wrote that:

> "...in preparing preliminary school budget figures, the superintendent presents members of the board of education written reports on topics such as possible administrative and teaching staff reductions."

You wrote that although the Board discusses portions of the reports, the full contents have not been disclosed. Further, when you asked for copies of the records, the Superintendent apparently indicated that:

> "...the board considers these reports 'study memos' and does not wish to make them public."

You have asked whether the reports or sections of the reports are available to the public.

Here I direct your attention to the Freedom of Information Law (see attached). In this regard, it is important to note that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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, there would appear to be but one ground for denial that would be relevant to the records in question. 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..."

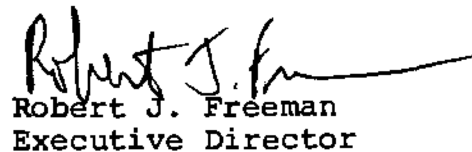
It it noted that the language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public or final agency policy or determinations must be made available.

Under the circumstances, memoranda or reports transmitted to a school board by a superintendent could in my view be characterized as "intra-agency" materials. Nevertheless, it is likely that the records in question consist at least in part of "statistical or factual tabulations or data" that should be made available. It is also noted that it has been held that so-called "budget worksheets" containing numerical breakdowns of proposed budget figures which were subject to modification are available on the ground that they consist of "statistical tabulations" [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 448, aff'd with no opinion, 43 NY 2d 754 (1977)].

Lastly, I have enclosed a copy of §1716 of the Education Law, which requires that a detailed budget proposal be made available to the public at times specified in that statute.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2448

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 26, 1982

Philip Grantham
81 A 2347, 11-3, F4
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 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. Grantham:

I have received your letter of April 22 in which you requested assistance with respect to your capacity to obtain a copy of your presentence report.

You have indicated that your requests to the Department of Probation, the judge that sentenced you and your attorney have been "futile", for your efforts in obtaining a copy of the presentence report have to date been unsuccessful. In this regard, you indicated that your attorney stated that only the sentencing judge could grant your request. I concur with the advice given to you by your attorney.

I do not believe that the Freedom of Information Law confers rights of access with respect to such reports. The first ground for denial in the Law involves records that are "specifically exempted from disclosure by state or federal statute" [see attached, Freedom of Information Law, §87(2)(a)]. One such statute that exempts records from disclosure is §390.50 of the Criminal Procedure Law, entitled "Confidentiality of pre-sentence report and memoranda". Subdivisions (1) and (2) of the cited provision state that:

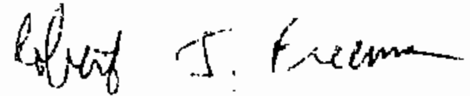
"1. In general. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence 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.

2. Pre-sentence report; disclosure; general principles. Not less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination 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 language quoted above, it would appear that the only situations in which presentence reports or memoranda could be disclosed would involve those instances in which a court permits disclosure. As such, it is suggested that you contact your attorney. Perhaps she could provide greater assistance 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2444

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

April 26, 1982

Steven G. Dworsky
Legislator
District #1
City of Troy
Rensselaer County Legislature
85 23rd Street
Troy, New York 12180

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. Dworsky:

I have received your letter of April 19 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, as a county legislator, you have sought to request records under the Freedom of Information Law in the performance of your official duties from the Rensselaer County Chief Fiscal Officer and the Clerk of the County Legislature. You have written, however, that you were advised by the Legislative Access Officer, Mr. Bossidy, and the Executive Department Access Officer, Mr. Casey, that you will be charged twenty-five cents per copy for the information sought. You indicated further that you consider yourself to have been "...forced to use the Freedom of Information Law due to a cumbersome and restrictive procedure arbitrarily imposed upon a legislator requesting information". A memorandum containing the procedure is attached to your letter.

You have asked for an opinion as to whether a Rensselaer County legislator seeking information in the performance of his official duties must pay a fee for copies of records, as well as comments regarding the procedure created with respect to requests by County Legislators.

In my view, since there is virtually no case law on the subject, I believe that an answer based upon reasonableness must be given.

From my perspective, when a public officer seeks information while acting in his or her capacity as a public officer, that person should not be required to follow the procedures generally applicable to the public under the Freedom of Information Law. In such a situation, a member of a county legislative body, for example, would not be requesting information as a member of the public based upon his or her "right to know", but rather as a representative of government who has a need to know in order to carry out his or her official duties.

Of course, it should be noted that there may be reasonable limitations that may be imposed upon public officers seeking information to perform their duties. For instance, some records may be exempted from disclosure by statutes that permit disclosure only under specified circumstances. In those situations, I do not believe that it would be appropriate to provide unrestricted access to records. However, as a general rule, when a public officer seeks information in the performance of his or her duties, I do not believe that it would be necessary or appropriate to require such an individual to file forms prescribed for making a request under the Freedom of Information Law, for instance, or follow formalized procedures generally applicable to the public.

With respect to the procedure adopted with respect to requests for information made by county legislators, I believe that there are several questions that might be raised regarding its propriety.

First, neither your letter nor the memorandum containing the procedure, which was addressed to the County Executive by the Chairman of the County Legislature, specifies the manner in which the procedure was established. It is unclear whether the procedure was suggested solely by the Chairman of the County Legislature or whether the Legislature itself has acted with regard to the procedure. Unless such broad authority has been conferred upon the Chairman, it is in my view questionable whether the Chairman has the capacity to make rules binding upon all members of the County Legislature unilaterally. It is recommended

that you review the provisions of §153 of the County Law, entitled "Rules of procedure". The cited provision might have a bearing upon the legal effect of the procedure, particularly if it was adopted without review by the County Legislature as a whole.

Second, the procedure involves a greater number of steps than a request made by a member of the public under the Freedom of Information Law and the regulations promulgated by the Committee. Under the procedure, it appears that nine steps must be completed, including, first, a "special request" sent to the Clerk of the Legislature by a legislator; second, transmission of the request by the Clerk of the Legislature to the Committee Chairman; third, consolidation of requests by the Committee Chairman "into a general request"; fourth, submission by the Committee Chairman to the Chairman of the Legislature; fifth, review by the Chairman of the Legislature of requests by Committee Chairmen; sixth, transmission of such requests by the Chairman of the Legislature to the County Executive; seventh, accession of records by the County Executive from department heads; eighth, return of the records by the County Executive to the Chairman of the Legislature; and ninth, transmission by the Chairman of the Legislature "through channels to the respective legislators".

In contrast, under §1401 of the Committee's regulations, which govern the procedural aspects of the Freedom of Information Law, a member of the public generally directs a request for records to a designated "records access officer". The records access officer is required to respond to a request within five business days of the receipt of a request. If access is denied in writing or due to a failure to respond within the appropriate time limits (see regulations, §§1401.5 and 1401.7), a member of the public may appeal to the head or governing body of the agency. That person or body is required to render a determination on appeal within seven business days of the receipt of an appeal.

The memorandum sent to the County Executive by the Chairman of the County Legislature contains no mechanism by which a legislator may appeal a denial of access. Moreover, there is no indication that a request must be answered within particular time limits. As such, it is possible that the procedure applicable to members of the County Legislature may provide members of the Legislature fewer rights than a member of the public who seeks to request records under the Freedom of Information Law.

In sum, as intimated at the outset, since there is no decisional law of which I am aware that provides specific direction with regard to your inquiry, it is suggested that reasonableness should serve as the basis for dealing with the situation that you described.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: William C. Walsh, Chairman of the Legislature
Honorable William J. Murphy, Rensselaer County Executive

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2450

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

April 26, 1982

Mrs. Jane Sayah

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. Sayah:

I have received your letter of April 19 in which you requested advice regarding rights of access to town records.

Specifically, you wrote that you are interested in viewing records of account of the Town of Altona and in knowing whether audits have recently been performed with respect to town finances.

I would like to offer 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 a town, 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, in my view, only one ground for denial could be applicable under the circumstances you have described. 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 would consist of statistical or factual information that is available under §87(2)(g)(i).

Third, the Freedom of Information Law preserves rights of access granted by other statutory provisions. Section 89(6) of the Law states that:

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

Therefore, if records are available under some other provision of law or by means of judicial determinations, nothing in the Freedom of Information Law can be cited to limit those rights of access. In this regard, §30 of the General Municipal Law states in relevant part that:

> "...every municipal corporation and school, fire, improvement and special district shall annually make a report of its financial condition to the comptroller".

Additionally, either §29(10) or (§10-a) of the Town Law would require the supervisor to make an annual financial report available to the town clerk within a specified period of time. Depending upon whether §29 subparagraph (10) or (10-a) of the Town Law is followed, a certified copy of this report must be published in the official town newspaper.

On the basis of the statutory direction described above, I believe that records reflective of an annual financial report prepared by the supervisor are available not only under the Freedom of Information Law, but also under §30 of the General Municipal Law and §29(10) and (10-a) of the Town Law.

Lastly, you requested advice regarding the audit requirements that must be followed when a newly-elected supervisor begins a term. Since questions regarding audit procedures required by the Department of Audit and Control are outside the jurisdiction of the Committee, it is suggested that you contact Mr. John Hasselwander, Director of Municipal Examinations at the Department of Audit and Control, which is located at:

Alfred E. Smith Office Building
Albany, New York 12236

I have been advised by a representative of the Department of Audit and Control that Mr. Hasselwander can advise you with respect to state audit procedures that must be followed by a town.

Also enclosed for your review is a copy of an explanatory pamphlet on the Freedom of Information Law which may be helpful to you.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosure

cc: Cecil Gero

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2451

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 27, 1982

Mr. Nick Fox
Evening Press/Sun Bulletin
P.O. Box 27
Owego, New York 13827

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. Fox:

As you are aware, I have received your letter of April 19 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you are interested in obtaining complaint records of the Tioga County Sheriff's Department on a regular basis. You indicated in your correspondence that you have discussed the matter with Sheriff J. Raymond Ayers, but that he denied your oral requests of March 30 and April 5. Sheriff Ayers, however, indicated that he would discuss your request with other County officials. Most recently, you submitted a written request dated April 19 to Carl Saddlemire, Records Access Officer of Tioga County, with respect to the complaint records.

I would like to offer the following comments regarding 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 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, although you have characterized the records sought as "complaint records", it appears that you may be referring to information that may generally be found within a "police blotter". It is noted that the term "police blotter" is derived from custom and usage and that there is no definition of the term of which I am aware appearing in any statutory provision of law. Nevertheless, the Appellate Division, Third Department, determined in 1977 the scope of what constitutes a police blotter and found that it is available. In Sheehan v. City of Binghamton, [59 AD 2d 808 (1977)], the Court found that a police blotter is a log or diary in which any event reported by or to a police department or other law enforcement agency is recorded. It was specified that a police blotter merely contains a summary of events or occurrences, that it contains no investigative information and, therefore, is accessible under the Freedom of Information Law. While the nature of the records sought are not entirely clear, once again, it appears that they may consist in substance of what traditionally may be considered to be found in a police blotter.

I would also like to point out that the Freedom of Information Law as it now appears represents a significantly different statute from the Freedom of Information Law as originally enacted. When the Law initially became effective in 1974, it listed categories of accessible records. The problem that often arose was that, unless an applicant could conform a request to one or more of the categories of accessible records, that person had no rights of access. However, one of the categories of accessible records under the original Freedom of Information Law involved "police blotters and booking records", which were available under §88(1)(f). From my perspective, while the current Law makes no specific reference to police blotters and booking records, it is intended to preserve and broaden the scope of rights of access granted under the original Law. To reiterate, the Law currently requires that all records of an agency, such as Tioga County, be made available, except those records or portions thereof falling within one or more among eight grounds for denial.

Third, with regard to the amended Law generally, there may be several provisions that relate to your inquiry. It is noted that most of the grounds for denial appearing in the amended Freedom of Information Law are based upon potentially harmful effects of disclosure. Unless disclosure of records would result in significant harm either to an individual or a governmental process, it is likely that records must be made available.

Perhaps the most relevant is §87(2)(e), which states that an agency may withhold records or portions thereof that:

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

The language quoted above permits an agency, including a sheriff's department, to withhold records compiled for law enforcement purposes only under specified conditions. For instance, disclosure of a police blotter or booking record would not in my view likely interfere with an investigation or deprive a person of a right to a fair trial, for it is merely a summary of events. If such a record contains reference to a confidential informant, that portion of the record could be deleted. The remainder, however, would likely be required to be made available.

Another ground for denial that could arise in rare instances is §87(2)(f), which states that an agency may withhold records or portions of records when disclosure would "endanger the life or safety of any person". Again, that provision likely would arise most often if a record identifies a confidential informant, for if the identity of such an individual is disclosed, it is conceivable that his or her life or safety could be placed in jeopardy.

Also of possible relevance in terms of a basis for disclosing 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 emphasized that the language quoted above contains what in effect is a double negative. Although the Law states that inter-agency and intra-agency materials may be withheld, it also provides that portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. It is likely that the information in which you are interested is found within "intra-agency" materials developed by the Sheriff's Department. However, the information in question likely consists of factual information which is available under §87(2)(g)(i).

Fourth, while it appears that your inquiry pertains ongoing access to recent complaints, it may be important to note that §160.50 of the Criminal Procedure Law requires that records in some instances be sealed. In brief, the cited provision pertains to situations in which criminal charges made against an individual have been dismissed in his or her favor. In those situations, the records pertaining to the arrest are often sealed.

Fifth, it is important to point out that the Freedom of Information Law places the burden of proof in a judicial challenge to a denial of access upon government. If a judicial challenge to a denial of access is initiated, the agency has the burden of proving that the records withheld fall within one or more of the grounds for denial appearing in the Law. Further, the Court of Appeals, the state's highest court, has held that an agency cannot merely assert a ground for denial and prevail; on the contrary, the agency must demonstrate that the harmful effects of disclosure described in the grounds for denial would indeed rise [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)].

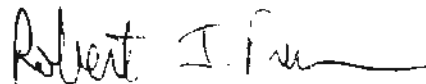
Lastly, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can 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 desigtated 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)].

Since your request is apparently the first of its kind directed to Tioga County, copies of this opinion will be sent to the Records Access Officer and the Sheriff in an effort to provide advice in good faith to those officials with respect 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: Carl Saddlemire, Records Access Officer
J. Raymond Ayers, Sheriff

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2452

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 27, 1982

Mr. John A. Costa
Town Attorney
Town of Clarkstown
Office of the Town Attorney
10 Maple Avenue
New City, NY 10956/5099

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. Costa:

I have received your letter of April 19, as well as the materials attached to it.

You have indicated in your correspondence that Theodore R. Dusanenko, Supervisor of the Town of Clarkstown, requested your opinion as Town Attorney regarding the authority to withhold a list containing the names, salaries, rank and period of employment for all Clarkstown police officers. Subsequently, Mr. Dusanenko contacted this office. I advised him that the Freedom of Information Law requires each agency to maintain a current list of all employees, including all police and/or law enforcement officers, identifying the employees by name, public office address, title and salary.

Since there appears to be confusion with respect to the release of payroll information concerning police officers, I would like to offer the following comments in response to your inquiry.

First, as intimated above, §87(3)(b) of the Freedom of Information 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..."

The language set forth above represents one of three instances in the Freedom of Information Law in which an agency is required to create a record. Further, to comply with this provision, an agency must in my view maintain on a continual basis the payroll record described in §87 (3)(b).

In reviewing the attachments to your letter, you included a copy of a Town resolution dated 10/9/74, which sets forth rules and regulations entitled "Public Inspection and Copying of Such Town Records as are Subject to Public Inspection by Law". It is possible that some of the confusion with respect to inclusion of information identifiable to police officers arose due to the language of the original Freedom of Information Law. Section 88 (1)(g) of the original Law authorized an agency to except from the payroll names and addresses of law enforcement officers. However, when the Freedom of Information Law as amended in 1977, the reference to law enforcement employees was deleted and §87(3)(b) as set forth above became the effective provision. Therefore, it appears that the Town has been operating under rules and regulations reflective of sections of the original Freedom of Information Law which have since been amended.

Second, 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. From my perspective, there is but one ground for denial that might conceivably be cited to withhold portions of a payroll listing.

Specifically, §87(2)(f) provides that an agency may withhold records or portions thereof which "if disclosed would endanger the life or safety of any person." As a general matter, it is unlikely that the disclosure of the name and title of a public employee could result in endangerment. However, in the rare situation in which an employee may be hired as an "undercover" agent, for example, it is possible that disclosure of his or her identity might result in endangering his or her safety. Even in that type of situation, since §87(2) enables an agency to withhold "portions" of records, the Department could in my view delete only those portions of a record which could result in endangerment. For instance, all identifying details regarding an agent might be deleted, while the remainder of the record would be accessible.

Third, with respect to privacy, it is true that §87 (2)(b) of the Freedom of Information Law permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". However, payroll information had been found by the courts to be available long before the enactment of the Freedom of Information Law. Further, there have been interpretations of the Freedom of Information Law indicating that payroll information is clearly available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976), Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, as a general rule, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees 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); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980]. As stated prior to the enactment of the Freedom of Information Law, payroll records

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection." [Winston v. Mangan, 338 NYS 2d 656, 664 (1972)].

Fourth, in your memorandum to the Town Supervisor and Councilmen you indicated that "the Town Supervisor is the official who certifies that payroll and, therefore, a policy decision regarding the release of the requested information is his to make". 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 Supervisor is the only designated records access officer, he or

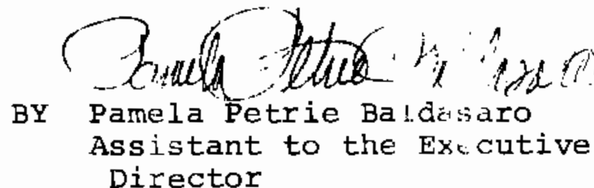
she would be responsible for processing all requests made under the Freedom of Information Law within the appropriate time limits [see Freedom of Information Law, §89(3) and regulations, §1401.5]. However, if more than one records access officer has been designated, perhaps by department, those individuals would have the duty of responding to requests with respect to records within their respective areas of responsibility. Consequently, with respect to compliance under the Freedom of Information Law, the records access officer need not necessarily be someone with authority to certify a payroll. It is also noted that, under the Freedom of Information Law as originally enacted, §88(1)(f) required the designation of a "fiscal officer" responsible for making payroll records available. In addition, the cited provision required the State Comptroller to promulgate a specific form for the purpose of requesting payroll records. However, when the amendments to the Freedom of Information Law became effective, the requirements of designating a fiscal officer and using a prescribed form were removed. Moreover, the regulations promulgated by the Committee were altered to conform to the amended Law and removed references to the designation of a fiscal officer and that person's responsibilities regarding payroll records.

Lastly, in order to assist your office with future requests under the Law, I am enclosing an amended copy of the Freedom of Information Law, an explanatory pamphlet on the subject, regulations promulgated by the Committee and model regulations which are designed to assist agencies in complying 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
Executive Director



BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Enc.

cc: Theodore R. Dusanenko
Len Maniace

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2453

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STEPHEN PAWLINGA
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 28, 1982

Mr. Irvin Quinn
81-B-1597
Ossining Correctional Facility
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. Quinn:

I have received your letter of April 22 in which you requested "...all available information...relevant under F.O.I. Act dealing with the Courts providing access to sentencing minutes and Dept. of Corr. Services providing same."

I would like to offer the following comments regarding your inquiry.

First, it is emphasized that the scope of the Freedom of Information Law is determined in part by §86(3) of the Law (see attached), which 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."

It is noted that the language quoted above specifically excludes the "judiciary", which is defined in §86(1) to mean the courts. As such, the courts and court records are not subject to the Freedom of Information Law.

Second, there are, however, various provisions of law pertaining to court records. In this regard, enclosed for your consideration is a copy of §255 of the Judiciary Law, which is generally applicable to clerks of courts and their records. In addition, I have enclosed a copy of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law. Please note that those regulations make specific reference to inmate records. Therefore, they might be useful to you.

Lastly, if you have a particular interest in gaining access to "sentencing minutes", it is suggested that you consult your attorney or a representative of Prisoners' Legal Services or a similar organization.

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-2454

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 29, 1982

Donald S. Youlen
Supervisor
Town of Deerfield
656 Hewey Street
Utica, NY 13502

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. Youlen:

I have received your letter of October 22, as well as a copy of a newsletter published by the Deerfield Town Board, which constitutes the minutes of the Town Board and is sent to every home in the Town.

Once again, your inquiry pertains to requests made by Alexander Rogers, a resident of the Town. Mr. Rogers apparently requested to review all of the Town's bills, and an arrangement was suggested whereby he could inspect the bills at Town Board meetings. Nevertheless, you wrote that Mr. Rogers stated that he does not want to look at the bills. Your question involves the extent to which the Town is required to respond to Mr. Roger's requests.

I would like to offer the following comments regarding your inquiry.

First, as you are aware, in a letter addressed to Mr. Rogers dated March 11, I advised him that I had spoken with various Town officials and stated the belief that those officials were more than willing to comply with the Freedom of Information Law and the Open Meetings Law. Having reviewed the newsletter attached to your correspondence, I continue to believe that the Town seeks to comply with both of those statutes.

Second, there are no specific guidelines or rules of which I am aware that could be used to draw a line between what might be considered inconvenience as opposed to harassment. As stated in Sorley v. Lister [218 NYS 2d 215 (1961)], "mere inconvenience" resulting from inspection from records "cannot be equated with public detriment". Further, based upon Sorley, it would appear that determining whether requests result in "mere inconvenience" or harassment could only be decided on a case by case basis.

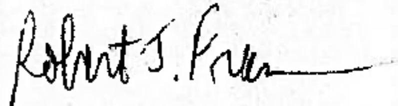
Third, while it is reiterated that the Town has in my view made good faith efforts to make records available to Mr. Rogers, an alternative suggestion might accommodate him without undue hardship to the Town. Specifically, if an individual cannot or chooses not to attend a meeting of the Town Board, perhaps the bills and other records to be reviewed at a particular meeting could be available in a single package for specified times before and after the meetings.

Fourth, if an individual continually requests records, which are located for that individual by an agency, but the individual chooses not to inspect them, perhaps review of records initially sought by the requester should serve as a condition to reviewing records sought in ensuing requests.

Lastly, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for responses to requests. From my perspective, when a request is received, the agency is not required to respond immediately. In my view, 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)].

I hope that 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-2455

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 3, 1982

Ms. Sarah L. Johnson
Environmental Director
Hudson River Sloop Clearwater, Inc.
112 Market Street
Poughkeepsie, New York 12601

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. Johnson:

I have received your letter of April 27 as well as the correspondence attached to it in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns records denied by the Department of Transportation involving water sample test results, geological reports and other related information regarding the Department of Transportation's investigation of ground water contamination in the area of Lake Carmel by a petroleum fuel through an oil spill.

In response to your request to the Department, Joseph R. Stellato, Director of Waterways Maintenance, wrote on April 15, 1982 that the alleged pollution "is under investigation" by both the Department and the Attorney General and that "It is the Department's policy not to disclose investigative information in matters which may result in litigation and/or claims against the Oil Spill fund." Mr. Stellato indicated that some of the locations where tests had been taken would be retested and that when those tests are completed, the Departments of Transportation and Environmental Conservation would review the results and "provide them with a reasonable explanation of the results". It is noted that although Mr. Stellato's letter indicates that the testing is part of an investigation, you enclosed a letter sent to you by Anthony Cazzari, Supervisor of the Town of Kent, in which he wrote on February 26 that:

> "[T]he New York State Department of Transportation conducted a survey and found 32 wells had traces of oil. Two years later, the D.O.T. stated there was no longer any more oil in the wells therefore the problem did not come under their jurisdiction."

Consequently, Mr. Cazzari indicated that the Town Board requested that the State Department of Health continue testing of water in the area of Lake Carmel.

I would like to offer the following comments regarding 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 Department of Transportation, 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, from my perspective, there is likely only one ground for denial that might be applicable with respect to the records that you are seeking. However, that provision might also be cited as a basis for requiring disclosure. 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.

Under the circumstances, it would appear that test results and similar information would constitute "statistical or factual tabulations or data" that must be made available under §87(2)(g)(i). To the extent that memoranda or other correspondence contain advice, recommendations, suggestions and the like, I believe that those portions of inter-agency or intra-agency materials may justifiably be withheld. Nevertheless, it appears that the focal point of your inquiry involves the test results.

Third, once again, Mr. Stellato wrote that it is the Department's policy to withhold investigative materials that may result in litigation and/or claims against the Oil Spill Fund. In my view, to the extent that the policy operates to diminish rights of access granted by the Freedom of Information Law, it would be of no effect. Moreover, the policy might indeed conflict with the direction provided by the Freedom of Information Law.

There is a basis for withholding with respect to materials prepared during an investigation. Nevertheless, that provision is restricted to records "compiled for law enforcement purposes". Moreover, the provision pertaining to records compiled for law enforcement purposes enables an agency to withhold records only to the extent that specific harm described in the Law would arise. In this regard, §87(2)(e) states that an agency may withhold 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 only provision that is apparently relevant would be §87 (2)(e)(i), which enables an agency to withhold records compiled for law enforcement purposes to the extent that disclosure would "interfere" with an investigation. It is questionable in my opinion whether §87(2)(e) could be cited as a basis for withholding. Mr. Stellato's letter to you indicates that:

> "[A]ll residents were notified of the results of any and all tests of water samples taken at their wells by or for the Department."

In this regard, if the records that you are seeking have already been made available to a substantial number of members of the public, it is difficult to envision how disclosure could "interfere" with an investigation at this juncture. Moreover, if the statement made in the letter sent to you by Mr. Cazzari of the Town of Kent is accurate, it would appear that the investigation by the Department of Transportation has terminated. If that is so, it does not appear that §87(2)(e) could be cited as a basis for withholding.

Lastly, the fact that records might relate to eventual litigation or claims against an agency would not alone in my view constitute an appropriate basis for withholding. It is noted that §3101 of the Civil Practice Law and Rules makes confidential "material prepared for litigation". When materials are indeed prepared for litigation, they may be withheld under §87(2)(a) of the Freedom of Information Law concerning records that are "specifically exempted from disclosure by state or federal statute". In this instance, however, it would appear that the records in question may have been prepared in the ordinary course of business or perhaps for multiple purposes, one of which might involve use in ensuing litigation. In this regard, it has been held that material prepared solely for litigation is deniable, but that materials prepared for multiple purposes would not fall within the cited exemption appearing the Civil Practice Law and Rules or the Freedom of Information Law [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234]. In addition, in a situation in which an audit that had possible relevance to litigation was denied, it was found that the audit was accessible under the Freedom of Information Law and that it should

be made available to any person, without regard to status or interest, including a litigant [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. As such, notwithstanding the policy of the Department of Transportation as expressed by Mr. Stellato, it is possible that the records in question might be accessible as of right under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony Cazzari
Joseph R. Stellato

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2456

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

May 3, 1982

Victoria V. Lawson

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. Lawson:

I have received your letter of April 24, which, once again, pertains to the process by which the budget is adopted by the Board of Education of Greenburgh Central School District #7.

You have raised a number of points regarding the requirements of the Education Law regarding a school district's budget with respect to public hearings and the completed budget. You have asked for a clarification of those provisions.

In all honesty, I believe that the provisions of the Education Law that you cited are clear in terms of their requirements and that I could not offer additional clarification. Moreover, the Committee is not authorized to give legal advice generally; on the contrary, this office is permitted to advise only with respect to the two statutes within the scope of its jurisdiction, the Freedom of Information Law and the Open Meetings Law.

The only point that you raised that bears upon either of the statutes within the scope of the Committee's jurisdiction involves fees for copying. In this regard, you wrote that:

> "[I] believe that all pertinent materials relating to budgets, sales, taxes, zoning, planning, construction -- subject to duly advertised public hearings and/or voter approval at the polls -- are required to be made available to the public FREE OF CHARGE prior to the hearing or the vote...to assist voters to intelligently exercise the francise..." (emphasis yours).

I would like to offer the following comments regarding your contention.

First, as a general rule, an agency, such as a school district, may charge fees for copies of records accessible under the Freedom of Information Law, including the materials that you described.

Second, §89(1)(b) of the Freedom of Information Law requires the Committee to promulgate general regulations of a procedural nature. In turn, §87(1) requires agencies to adopt their own regulations consistent with the general regulations of the Committee. Such regulations are required to include reference to:

> "...the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law" [see Freedom of Information Law, §87(1)(b)(iii)].

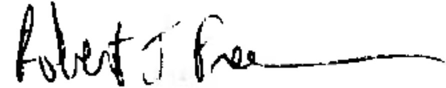
In view of the direction described above, it is suggested that you attempt to review the rules and regulations adopted by the Greenburgh Central School District with respect to fees for copies. If a fee has been established in conjunction with §87(1), I believe that you may be required to pay the fees for copies envisioned by those rules and regulations.

Third, if, for example, the school district prepares copies of its estimated expenses for the ensuing year pursuant to §1716 of the Education Law in substantial quantities for the purpose of broad distribution to residents of the District, it is possible that there may be an

intent to make such records available free of charge. In this regard, all that I can suggest is that if such records are generally made available free of charge to interested members of the public, you should be accorded the same treatment. However, if members of the public are charged fees for photocopying, I do not believe that you could require that the records in question be made available to you free of charge.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-762
FOIL-AO-2457

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

May 4, 1982

Mrs. Carol Mailloux

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. Mailloux:

I have received your letter of April 21 in which you requested an advisory opinion.

Specifically, you have raised three questions regarding the application and interpretation of both the Freedom of Information and Open Meetings Laws to school district boards of education.

I would like to offer the following comments regarding your questions.

Your first inquiry concerns the sufficiency of a notice of a meeting that was enclosed with your correspondence. The notice, which was apparently published in a local newspaper, stated that:

> "[T]here will be a special executive meeting of the Lindenhurst Board of Education on Tuesday, April 20, from 7:00 to 8:30 p.m. at the Lindenhurst Senior High School".

Section 99 of the Open Meetings Law requires that notice be given prior to every meeting of a public body. Section 99(1) pertains to notice of meetings scheduled at least a week in advance and requires that notice of the time and place of such meetings be given to the news media (at

least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. As such, it is in my view clear that notice must be given to the news media and the public by means of posting before all meetings, whether they are regularly scheduled, considered special meetings, or otherwise. Therefore, if notice of the meeting in question was also posted in a designated, public location, it appears that the requirements of the Open Meetings Law were met.

Also, with respect to the notice, it appears that the scheduled "executive meeting" might have referred to an "executive session". In this regard, as noted in an advisory opinion dated March 25 sent to you, a motion to enter into an executive session must be made 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 public body [see Sanna v. Lindenhurst Board of Education, 85 AD 2d 157 (1982)]. Therefore, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of a meeting during which the public may be excluded. It is also clear that, as a general rule, a public body cannot convene a closed or executive session without first having convened an open meeting. In addition, if the procedure prescribed by §100(1) is appropriately followed, in a technical sense, it cannot be determined in advance of a meeting that an executive session will indeed be held, for it cannot be known in advance whether a motion to enter into an executive session will indeed be carried by a majority of the total membership of a public body (see Doolittle v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981). Consequently, from my perspective, a notice given in advance of a scheduled meeting indicating that an executive session will be held would not in my view comply with the Open Meetings Law, whether or not the topic for discussion in executive session is indicated.

Second, you have questioned the propriety of an executive session held for "...discussion of a school closing---not the sale---but the closing of a school..." As you may be aware, the Open Meetings Law contains eight grounds for entry into a closed or executive session. In my view, a meeting of a public body, such as a school board, is presumed to be open unless and until one or more bases for entry into executive session arise and the public body follows the procedure steps for entry set forth in §100(1) of the Law.

The issue of school closings being discussed during executive sessions has arisen on numerous occasions. In my opinion, such a discussion as you described would not likely fall within any of the eight bases for entry into executive session listed in the Law.

Lastly, you asked for information regarding the duties of the Committee on Public Access to Records. Section 89(1)(b) of the Freedom of Information Law sets forth the Committee's statutory responsibilities under that statute. The cited provision states that the Committee shall:

> "i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article;
>
> ii. furnish to any person advisory opinions or other appropriate information regarding this article;
>
> iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;
>
> iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties; and
>
> v. report on its activities and findings, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth".

Similarly, §104 of the Open Meetings Law provides that under that statute, the Committee shall:

> "1. 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; and
>
> 2. review the implementation and operation of this article and report thereon not later than February first of each year to the legislature together with such recommendations as the committee deems advisable".

Although the Committee does not have the authority to render determinations that are binding in nature, it is authorized, as indicated above, to advise. Therefore, 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 frequency by New York State courts, and two of the four Appellate Divisions in the State have held that an opinion of the Committee should generally be upheld unless it is unreasonable.

I hope 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-2458

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

May 5, 1982

Lawrence Gideon

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. Gideon:

As you are aware, your letter addressed to Attorney General Abrams of April 21 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.

According to your letter, you are a member of the Dansville Board of Education and believe that you have been denied access to information needed to make "objective decisions" as a member of the Board. You wrote further that:

> "...the superintendent, with school board backing, has instructed the employees in the Dansville School District to give me no information. The only information I have access to is what comes through the superintendent of schools".

In this regard, you have asked initially how the Freedom of Information Law might apply to your efforts to gain access to records of the School District.

I would like to offer the following comments regarding this area of inquiry.

First, 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.

Second, §89(1)(b) of the Freedom of Information Law requires the Committee to promulgate general regulations regarding the procedural implementation of the Freedom of Information Law. In turn, §87(1) of the Law requires that each agency, including a school district, adopt regulations consistent with those of the Committee. It is suggested that you request and review the regulations adopted by the School District under the Freedom of Information Law in order to determine the procedure under which you may request and obtain records, as well as the procedure under which a denial of access to records may be appealed.

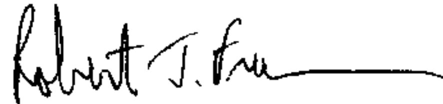
Third, from my perspective, requests made under the Freedom of Information Law are generally made by members of the public who are asserting their "right to know". When a member of a governing body requests information, that person often seeks the information in the performance of his or her official duties. Such a request might not be based upon a "right to know", but rather on the basis of a need to know to carry out one's official duties. In this regard, I have enclosed a copy of a judicial determination regarding a request by a member of a school board for information that was denied by the remaining members of the board [see attached, Gustin v. Joiner, 95 Misc., 2d 138 (1978)]. Since the decision involves the interpretation of the Education Law, I do not believe that it would be appropriate to comment with respect to its scope. Nevertheless, the decision may give you useful guidance with respect to your right to gain access to school district records as a member of the school board.

Your other area of inquiry concerns your capacity to ask School District employees questions without permission from the Superintendent or the Board of Education. Once again, the issue that you raised does not involve the Freedom of Information Law and therefore is outside the scope of the Committee's jurisdiction. It is suggested that it might be worthwhile to contact the Office of Counsel at the State Education Department in order to obtain a response to your question.

Lastly, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee to which reference was made earlier, and an explanatory pamphlet that may be useful to you.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Dansville School Board

Enclosures

ATE OF IEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2459

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 6, 1982

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 :

I have received your letter of May 3 in which you requested copies of your records from this office. Specifically, you indicated that you are interested in obtaining records concerning your stay at St. Clare's Hospital pursuant to §2024.19 of the regulations promulgated by the Office of Drug Abuse Services.

I would like to offer the following comments regarding your request.

First, 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 an agency subject to the Freedom of Information Law to make records available.

Second, the scope of the Freedom of Information Law is determined in part by the definition of "agency", for rights of access are limited to records of agencies. 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".

In view of the language quoted above, the Freedom of Information Law applies generally to "governmental" entities. Therefore, if St. Clare's Hospital is a private facility, the Freedom of Information Law would not be applicable.

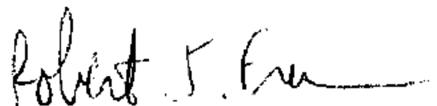
Third, the provision that you cited as a "statute", §2024.19, was a provision within regulations, and it has been replaced by a new provision. Section 2024 now appears in volume fourteen of the New York Code of Rules and Regulations as §1060.5. Further, the Office of Drug Abuse Services is now known as the Division of Substance Abuse Services. In addition, the provision that you cited pertains to the procedures by which an individual can request records from the Division of Substance Abuse Services; it is not in my view applicable to rights of access to records of a hospital, such as St. Clare's Hospital.

Fourth, the regulations in question are based upon provisions of the Mental Hygiene Law. In this regard, §33.13 of the Mental Hygiene Law requires that patient records be kept confidential, except under circumstances specified in that statute. As such, even if St. Clare's Hospital was a facility of the New York State Office of Mental Health, and I believe that it is not, it does not appear that you would have rights of access to records pertaining to you.

Lastly, I have enclosed a copy of §17 of the Public Health Law concerning medical records. In brief, although that statute does not confer rights of access upon a patient with respect to medical records pertaining him, it does enable a competent patient to designate the physician of his or her choice to request and obtain medical records from another physician or hospital maintaining medical records regarding that individual.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

7O1L-AO-2460

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 6, 1982

Ernest Merritt #79A3996
Auburn Correctional Facility
P.O. Box 618:135 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. Merritt:

I have received your letter of April 26 in which you raised questions regarding the interpretation of the Freedom of Information Law in conjunction with other provisions of law.

As I understand your inquiry, you are particularly interested in learning of the relationship between the Freedom of Information Law and other provisions, such as §3101 of the Civil Practice Law and Rules and §240.00 of the Criminal Procedure Law regarding discovery. You focused upon §1401.1(d) of the regulations promulgated by the Committee, which states that:

> "[A]ny conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records".

From my perspective, the language quoted above is consistent with the general direction provided by the Freedom of Information Law, i.e., that the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

In addition, it is noted that several judicial determinations have stressed that the grounds for denial should be construed narrowly [see Polansky v. Regan, 440 NYS 2d 356, 81 AD 2d 102 (1981); Fink v. Lefkowitz, 63 AD 2d 610 (1978), modified in 47 NY 2d 567 (1979)]. Further, it appears that the cited provision of the Committee's regulations quoted above is intended to give affect to §89(6) of the Freedom of Information Law, which 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".

From my perspective, the language quoted above is intended to preserve rights of access to records granted by other provisions of law or by means of judicial determinations, notwithstanding the provisions of the Freedom of Information Law.

Your second area of inquiry appears to involve the scope of §87(2)(a) of the Freedom of Information Law concerning records that are "specifically exempted from disclosure by statute". In my view, which is based upon the holding in Zuckerman v. NYS Board of Parole [385 NYS 2d 811, 53 AD 2d 405], §87(2)(a) is intended to apply to particular records that are exempt from disclosure pursuant to statute. It does not in my view apply to statutes which, for instance, permit an agency to establish rules regarding the "privacy" of records, for statutes of that nature would not deal with particular records or "specifically exempt" particular records from disclosure.

There are several judicial determinations concerning the interpretation of the Freedom of Information Law in conjunction with Article 31 of the Civil Practice Law and Rules. Those decisions are not necessarily consistent. However, in order to provide you with additional resources, I have enclosed a summary of judicial determinations rendered under the Freedom of Information Law from 1974 through December, 1981.

Lastly, you have raised a number of issues regarding specific provisions of the Criminal Procedure Law as well as the U.S. Constitution. In this regard, in all honesty, I have minimal expertise regarding those provisions. It is suggested that you might want to discuss those issues with an attorney. Perhaps you could meet with a representative of Prisoners' Legal Services or a similar organization that could provide assistance to a much greater degree 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:ss

ST TE OF NEW YORK

CC MMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2461

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

May 7, 1982

Mr. Bernard McKean

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. McKean:

As you may be aware, your letter of April 29 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 Freedom of Information Law.

As requested, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject.

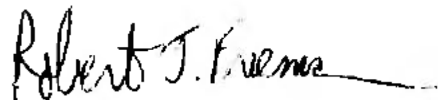
Although your letter is not completely clear, it appears that you are attempting to obtain records regarding a workers' compensation case. If that is so, it is suggested that you direct a request for records to the Workers' Compensation Board, 100 Broadway, Albany, NY 12241.

It is noted that the Freedom of Information Law requires that a request "reasonably describe" the records sought. Therefore, when making a request, as much detail as possible should be provided, including dates, names, file designations, a description of the type of case that might have been heard and similar information that would enable the agency to locate the records in which you are interested. I would like to point out that the enclosed pamphlet contains a sample letter of request that may be helpful in making a request.

Lastly, the Freedom of Information Law permits an agency to charge a fee for photocopying records. Again, it is suggested that you review the sample letter of request found in that pamphlet for guidance in this regard.

I hope that 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-2462

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 7, 1982

Mr. James Thomas
#78-A-3550
Great Meadow Annex Correctional Facility
P. O. Box 51
Comstock, New York 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. Thomas:

I have received your letter of April 30 in which you requested advice regarding access to medical records pertaining to you which are apparently in possession of the Director of Health Services of the Department of Correctional Services.

I would like to offer the following observations regarding your inquiry.

First, I have enclosed for your consideration a copy of the regulations promulgated by the Department of Correctional Services containing the procedure by which records may be requested. It is noted that §5.20 of the regulations pertains to the examination of inmate records by an inmate or his attorney and that §5.24 involves medical records. In this regard, I direct your attention to §5.24(a)(9) which states that an inmate medical record may be made available to:

> "attorneys representing inmates in proceedings in which the inmate's commitment pursuant to section 402 of the Correction Law is in issue, and attorneys representing inmates in other matters, only upon written request, when accompanied by an authorization signed by the person whose record is desired, or by someone authorized to act on his behalf..."

Based upon the provision quoted above, it is suggested that you might want to request that an attorney representing you submit a written request for your medical records based upon a signed authorization.

Second, I have engaged in several discussion 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)].

Third, enclosed is a copy of §17 of the Public Health Law, which states in brief that a physician designated by a patient may request and obtain medical records concerning that patient from another physician or hospital. I am, however, unaware of the extent to which §17 of the Public Health Law might be applicable to your situation and to inmate medical records generally.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: John Sheridan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 7, 1982

Mr. Martus Granirer
President
West Branch Conservation Association
100 South Mountain Road
New City, New York 10956

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. Granirer:

As you are aware, I have received your recent letter in which you raised a series of questions regarding the Freedom of Information Law.

According to your letter, you are interested in reviewing records of the Rockland County Park Commission. Specifically, on February 24 you submitted a request for records to the Administrative Assistant to the Commission, who apparently informed you that you would be required:

> "...to wait three weeks because the files were in the house of the Chairman of the Commission who was then in Florida. He said that he, the Administrative Assistant, had no access himself until the Chairman returned."

On March 31, you apparently submitted another request in which you asked for "...all Park Commission records for the past four years..." as well as other information. In response, you were informed in a letter dated April 5 that you could "have the records at twenty-five cents a sheet if you could be more specific about which documents" you would be interested in obtaining. You replied that you merely wanted to inspect the records and that you are not interested in obtaining copies.

Based upon the series of events that you described, you have raised a number of issues, which I will seek to address in the ensuing paragraphs.

First, you have asked whether you are entitled to inspect records of the Park Commission without having to pay for copies. In this regard, although an agency may assess fees for copying pursuant to §87(1)(b)(iii) of the Freedom of Information Law, I do not believe that any fee may be assessed to inspect accessible records. In addition, the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, indicate that "there shall be no fee charged for... inspection of records" [see attached regulations, §1401. 8(a)(1)]. As such, I believe that accessible records are required to be made available for inspection at no cost.

Your second question is whether, if there is no subject matter list regarding records of the Park Commission, a request for access to "all records of the past four years" is adequately specific "to require that access be granted". In this regard, as you are aware, §87(3)(c) of the Freedom of Information Law requires that each agency maintain a "subject matter list". The cited provision states that each agency shall maintain:

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

In view of the foregoing, I believe that agencies, such as Rockland County and its Park Commission, are required to maintain a subject matter list that makes reference, by category, in reasonable detail, to the records in their possession. Moreover, §1401.6(b) of the regulations promulgated by the Committee states that:

> "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought."

As such, I believe that an agency, such as Rockland County, is responsible for maintaining a subject matter list in a manner that permits an applicant to identify categories of records in which he or she might be interested.

If there is no subject matter list, I believe that County officials would have the responsibility of assisting you in identifying the records sought. I would like to point out that §89(3) of the Freedom of Information Law states in part that an applicant must request records "reasonably described". In all honesty, without greater knowledge of the scope and content of the records of the Park Commission, I could not advise that a request for all the records of the Park Commission, which apparently comprise of three drawers of files, would meet the standard set forth in the Law. Nevertheless, the Committee's regulations require the designation of one or more records access officers who are responsible for coordinating an agency's response to requests for records. Section 1401.(2)(b) of the regulations indicates that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (2) Assist the requester in identifying requested records, if necessary..."

Therefore, even if a request for "all records" is so broad that the standard of reasonably describing the records sought is not met, the designated records access officer would in my view have the duty of assisting you in "identifying requested records, if necessary".

Your third area of inquiry is related to the second. You have asked whether, if there is a subject matter list regarding the Park Commission records, "a request for each item on the list received or dated within the last four years [is] a proper procedure for obtaining access to those records?" Here I would like to point out that the subject matter list is not in my view required to constitute an index that identifies each and every record of an agency. On the contrary, as specified earlier, the subject matter list is required to indicate the categories of records in possession of an agency. Further, as stated previously, the subject matter list should be sufficiently detailed to enable the identification of categories of records in possession of an agency. Consequently, if there is a subject matter list, it would appear that you should have the capacity to request records on the basis of the categories of records appearing in the list. Again, however, if necessary, the designated records access officer should be able to assist you in specifying the records in which you are interested.

Your fourth area of inquiry involves your contention that the quantity of records requested cannot serve as a basis for a denial of access. You also wrote that it is your view that:

> "...only a lack of sufficient clarity of identification could justify a denial of access when none of the exceptions of Public Officers Law section 87.2 apply" (emphasis yours).

I am in general agreement with your contentions. From my perspective, the Freedom of Information Law contains no restriction regarding the quantity of records that may be requested. Moreover, judicial interpretations of the Freedom of Information Law indicate that the size of a request or a shortage of manpower to reply to a request could not serve as a valid basis for withholding, for denials based upon such contentions would "thwart the very purpose of the Freedom of Information Law" [see e.g., United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)].

With respect to the clarity of a request, it is reiterated that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". In my view, if a request does not reasonably describe records sought and the agency cannot determine the nature of the records sought, a response to that effect by an agency would not constitute a "denial". In such a case, the agency would not in my opinion be asserting that records may be withheld, but rather that agency officials cannot determine the nature of the records requested.

Fifth, you have asked whether it is possible for Park Commission records to be kept "in the private house of a commissioner and in no public place". Your question cannot be answered by means of the provisions of the Freedom of Information Law and it would be beyond the scope of the Committee's jurisdiction to advise with respect to the site where records are kept. However, I would like to point out that §1401.3 of the regulations promulgated by the Committee states that:

> "[E]ach agency shall designate the locations where records shall be available for public inspection and copying."

In addition, when a request is made, an agency is in my opinion required to respond to the request within time limits specified in the Law and the regulations, regardless of where records might be kept.

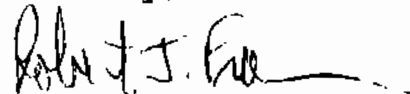
With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant 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)].

Lastly, in your letter, you indicated that the Rockland County Attorney wrote to this office to seek an advisory opinion with respect to your request. As of the date of this letter, I have not received any communication on the matter from the County Attorney. Moreover, although I contacted the County Attorney's office to determine whether any communication had been sent to this office, no response has yet been received.

I hope that I 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: Park Commission
County Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 2464

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 7, 1982

Martin J. Kerins
Town Attorney
Town of Brookhaven
Office of the Town Attorney
475 East Main Street
Patchogue, New York 11772

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. Kerins:

As you are aware, I have received your letter of April 27 in which you requested an advisory opinion regarding an "apparent conflict between the Freedom of Information Law and the provisions of the Civil Rights Act".

In terms of background, attached to your letter is correspondence between yourself and the United States Attorney General in which you requested an opinion in an effort to resolve the conflict. However, an assistant attorney general indicated that the Department of Justice is not authorized to offer a legal opinion to a unit of local government.

Your letter to Attorney General Smith indicates that a complaint was made against the Town of Brookhaven and filed with the United States Department of Housing and Urban Development on April 3, 1981. The complaint was resolved on May 15, 1981, when a conciliation agreement was filed by the complainant and the Town of Brookhaven. You noted in your letter to the Attorney General, however, that although an agreement was filed by an assistant town attorney, no resolution ratifying the terms of the agreement has as yet been adopted by the Town Board. Nevertheless, one of the requirements of the conciliation agreement

stated that a complainant would submit a "site plan", which was indeed submitted and approved by the Town Planning Board. The site plan is currently on file with the Planning Board, and numerous individuals, including a county legislator, have requested permission to inspect the site plan. It is your view that the Planning Board is "free to release the site plan for public view" on several grounds.

The "conflict" has arisen due to a provision of the Civil Rights Act of 1968, which requires that certain information be kept confidential. Specifically, Title 42, §3610(a) of the United States Code pertains to claims of injury by means of discriminatory housing practices. The cited provision states that persons who consider themselves to be "aggrieved" may file a complaint with the Secretary of the Department of Housing and Urban Development. The Secretary is required to investigate and, in this regard, §3610(a) states that:

> "[I]f the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year".

From my perspective, the requirements concerning confidentiality pertain to those aspects of the conciliation process that lead to a conciliation agreement. If my contention is accurate, the records or other information reflective of the process by which a conciliation agreement is reached could not be disclosed.

Nevertheless, I believe that a line of demarcation may be drawn between the end of the conciliation process which, in this instance, has resulted in a conciliation agreement, and whatever remaining action or steps might be taken as indicated in records. Records prepared after an agreement is reached (i.e., after "such informal endeavors" have terminated) would not in my view be subject to the confidentiality requirements imposed by §3610 and would, therefore, be subject to whatever rights of access might exist.

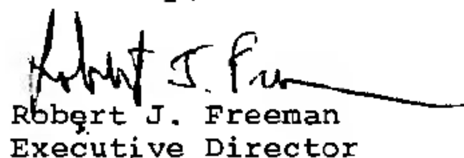
Therefore, I believe that the site plan that the Planning Board seeks to disclose falls outside the scope of federal confidentiality requirements and within the scope of the New York Freedom of Information Law.

Moreover, since no ground for denial in the New York Freedom of Information Law could in my view justifiably be cited to withhold the site plan, I believe that it would be available to any person.

It is noted that, in order to avoid what was characterized as a "potential conflict", your office sought permission from the complainant to release the site plan. The complainant, however, "refused to grant said permission". If my contention is accurate, i.e., that the site plan falls outside the scope of the confidentiality requirements to which reference was made earlier, permission to disclose given by the complainant could not in my view serve as a condition precedent to disclosure. Stated differently, if the site plan is subject to the provisions of the Freedom of Information Law rather than 42 USC §3610(a), the complainant would in my opinion have no control over a determination to disclose 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2465

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 13, 1982

Mr. Paul B. Coburn
Deputy Commissioner and Counsel
Department of Taxation & Finance
Law Bureau
State Campus
Albany, New York 12227

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. Coburn:

I have received your letter of April 26, which reached this office on May 6 and in which you requested an advisory opinion under the Freedom of Information Law. Your interest in compliance with the Freedom of Information Law is much appreciated.

Your inquiry concerns the fees for copying that may be assessed by the Department of Taxation and Finance. Specifically, according to your letter, although returns and reports filed by taxpayers are generally considered confidential under various provisions of the Tax Law, several of those statutes contain provisions that permit disclosure of reports or returns to the taxpayers who filed them, or their representatives. Since the returns and reports are not in your view subject to disclosure under the Freedom of Information Law, but may be disclosed only to specified persons, you have asked for an opinion as to whether fees charged by the Department for copies of such returns or reports are limited to those envisioned by the Freedom of Information Law, or whether the Tax Commission may by regulation prescribe reasonable fees in excess of such limitations.

In my view, the Department of Taxation and Finance will soon be restricted to the standards regarding fees set forth in §87(1)(b)(iii) of the Freedom of Information Law for the following reasons.

First, while the records in question may generally be considered confidential, the Freedom of Information Law in my view encompasses all records of an agency within its scope. In this regard, §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".

Due to the breadth of the language quoted above, I believe that all "records" of an agency are subject to the provisions of the Freedom of Information Law, whether or not they are accessible to the public generally, or even if they are considered accessible only to specified individuals as in the cases that you described.

Second, as you are aware, records considered confidential fall within §87(2)(a) of the Freedom of Information Law concerning records that are "specifically exempted from disclosure by state or federal statute". Nevertheless, it would appear that a special class of individuals, in this instance the individuals to whom tax returns and reports relate, may avail themselves of rights of access granted by the Tax Law. Since those records may be accessible to particular individuals, I would contend that the vehicles by which records may be obtained, i.e., provisions of the Tax Law, should be read in conjunction with the Freedom of Information Law, particularly in terms of its procedural aspects.

Third, at the present time, I believe that an agency may by means of regulation establish fees in excess of twenty-five cents per photocopy. In this regard, as you are aware, §87(1)(b)(iii) states that each agency is required to promulgate rules and regulations with respect to:

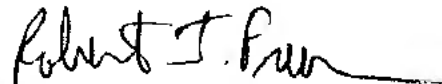
> "...the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law".

Stated differently, an agency may assess a fee of up to twenty-five cents per photocopy up to nine by fourteen inches, unless a different provision of law permits the assessment of a higher fee. In my view, the term "law" includes within its scope local laws, ordinances, and regulations promulgated by state agencies. As such, it would appear that regulations promulgated by a state agency establishing a fee in excess of twenty-five cents per photocopy would be valid.

Nevertheless, it is emphasized that the language of §87(1)(b)(iii) was recently amended by means of Chapter 73 of the Laws of 1982. Chapter 73 will become effective on October 15 of this year. With regard to fees, the amendment will provide, in brief, that an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute" (emphasis added). By substituting the term "statute" for "law", I believe that the only instances in which an agency could assess more than twenty-five cents per photocopy would involve those situations in which a statute enacted by the State Legislature so permits. Therefore, although I believe that the Department could by means of regulation now establish a fee in excess of twenty-five cents per photocopy, such a regulation could in my view remain effective only until October 15.

I hope that 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-2466

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 14, 1982

John Stone 82-A-1575
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 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. Stone:

I have received your letter of May 2.

You wrote that you are interested in obtaining records in possession of a trial court pertaining to you and a proceeding in which you were involved.

In this regard, although the Freedom of Information Law does not include the courts or court records within its coverage [see Freedom of Information Law, §§86(1) and (3), which respectively define "judiciary" and "agency"], many court records are available under §255 of the Judiciary Law (see enclosed). Therefore, if you believe that a particular court has possession of the records you are seeking, it is suggested that you direct a request to the court clerk of the appropriate trial court. Further, in making a request, it is recommended that you provide as much specificity as possible, including names, dates, docket and index numbers and other information that would enable a clerk to locate the records sought.

In response to your request, enclosed are copies of the Freedom of Information 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
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2467

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 13, 1982

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 May 1 in which you requested an advisory opinion under the Freedom of Information Law.

You have inquired as to your rights of access under the Freedom of Information Law to applications of individuals requesting death certificates in the possession of the City of Binghamton.

I would like to offer the following comment with respect to your inquiry.

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 City of Binghamton, 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.

A possible ground that may be cited for withholding individual applications for death certificates or portions of such applications is §87(2)(b) of the Law, which states that:

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

From my perspective, it is conceivable that release of personally identifying information contained in these applications, such as individual names and the purpose for their requests, could result in an unwarranted invasion of their personal privacy. Further, considerations of privacy may be particularly significant with respect to applications to review death certificates, for, as noted in earlier correspondence, the reason for which a request is made may serve as a condition precedent to gaining access. As stated in an earlier letter to you dated April 1, the Public Health Law permits an agency to withhold death records unless an applicant demonstrates a "proper purpose" for making a request.

Due to the "proper purpose" standard in the Public Health Law, it is in my view arguable that portions of the application identifying the person requesting a death certificate and the purpose for which the request is made could 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

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2468

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

May 17, 1982

William J. Rogan

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. Rogan:

I have received your letter of May 14 in which you requested information "on the Freedom of Information Act".

It is assumed that you are referring to the New York Freedom of Information Law, a copy of which is enclosed. Also enclosed is a pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" which may be useful to you, for it contains sample letters of request and appeal. With regard to "forms" used for requesting records, it is noted that the Committee has consistently advised that an applicant for records need not complete a form prescribed by an agency as a condition precedent to gaining access to records. On the contrary, in the Committee's view, any request made in writing that "reasonably describes" [see Freedom of Information Law, §89(3)] the records sought should suffice.

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. The enclosed pamphlet also reviews the grounds for denial.

Lastly, you indicated in a "PS" that a complaint was filed against you and that you were told that the name of the complainant was "confidential". 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 which if disclosed would result in an unwarranted invasion of personal privacy. In addition, §89(2)(b) lists five examples of unwarranted invasions of personal privacy.

With respect to complaints submitted to agencies by members of the public, it has been advised that the substance of a complaint is available, but that an agency may delete any details that may identify the complainant on the ground that disclosure could result in an unwarranted invasion of personal privacy. Therefore, the deletion of the name of the complainant from the complaint made against you may have been 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

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2469

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

May 17, 1982

Robert L. McCray
Box B 77-A-4624
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. McCray:

I have received your letter dated May 5, which reached this office on May 17.

As I understand your letter, you have requested from the Committee copies of reports concerning your stay at Attica, as well as copies of "all money order receipts". You have cited the Freedom of Information Act of 1974 and Rule 34 of the Federal Rules of Civil Procedure as the bases for your request.

I would like to offer the following comments regarding your inquiry.

First, the responsibility of the Committee on Public Access to Records involves providing 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 to provide advice to records. Consequently, this office cannot make the records in question available to you, for it does not have possession of those records. Requests, however, may be directed to the agency or agencies that maintain possession of the records in which you are interested.

Second, §89(1)(b) 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 regulations

consistent with those of the Committee. In this regard, I have enclosed a copy of the regulations promulgated by the Department of Correctional Services, which contain specific direction with respect to requests by inmates and procedural guidance regarding the processes by which requests may be made.

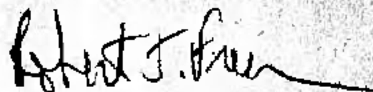
Third, it is emphasized that §89(3) of the Law requires that an applicant seek records "reasonably described". In this regard, it is unclear whether your request for "all money order receipts" would "reasonably describe" the records sought. It is suggested that, in making a request, you should supply as much specificity as possible, including dates, file designations, index or docket numbers, and similar information that would enable agency officials to locate the records in which you are interested.

And fourth, please note that the provisions that you cited, the Freedom of Information Act and the Federal Rules of Civil Procedure, are applicable to federal agencies and proceedings in federal courts. In New York, rights of access to records are governed by the provisions of the New York Freedom of Information Law.

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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2470

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 18, 1982

John Riccardi 76-C-0282
Ossining Correctional Facility
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. Riccardi:

I have received your letter of May 5 in which you requested advice regarding the procedures under which you might gain access to medical records pertaining to you. Specifically, you have received a letter from the Erie County Medical Center advising you that it is the policy of the Medical Center to release copies of your medical records only to a physician at the Ossining Correctional Facility or a physician from whom you are currently receiving medical care.

I would like to offer the following comments regarding your inquiry.

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 county hospital, 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.

However, rights of access to medical records are more specifically governed by the provisions of the Public Health Law. Section 17 of the Public Health Law states that:

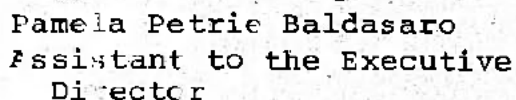
"[U]pon the written request of any competent patient, parent or guardian of an infant, or committee for an incompetent, an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records 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 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".

Therefore, on the basis of the language quoted above, there may be no direct right of access on the part of an individual to medical records pertaining to himself. As indicated in correspondence attached to your letter from the Erie County Medical Center, you can indirectly obtain copies of your medical records by requesting their release in writing to the appropriate hospital or physician. Consequently, it appears that you will be unable to obtain access to your medical records without informing the appropriate officials at your 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

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2471

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

May 19, 1982

Lawrence J. Zobel
City Attorney
City of Dunkirk
Department of Law
City Hall
Dunkirk, New York 14048

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. Zobel:

Your letters of May 4 addressed respectively to the Attorney General and the Comptroller have been forwarded to the Committee on Public Access to Records. The Committee is responsible for advising with respect to the Freedom of Information Law. As such, although both the Attorney General and the Comptroller render advisory opinions, as a rule, when opinions are sought pertaining to either the Freedom of Information Law or the Open Meetings Law, they are forwarded to the Committee on Public Access to Records.

In your letter, you raised the following question:

> "[I]f the victim of a crime, such as a home burglary, requests that the address of his home and his name be confidential, does the Police Department have to furnish such information to newsreporters, or can the Police Department honor the victim's request for confidentiality?"

I would like to offer the following comments regarding your inquiry.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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 this regard, I believe that there are likely three grounds for denial that may be relevant to your question.

One of the grounds 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, it is often difficult to determine whether disclosure of certain personal information would result in a permissible as opposed to an unwarranted invasion of personal privacy. Consequently, subjective judgments must often of necessity be made when dealing with issues regarding privacy.

Nevertheless, I do not believe that a request for or a promise of confidentiality necessarily requires that records or personal information found within records must be withheld. Further, in some circumstances, the capacity to withhold may be beyond the scope of the authority of a police department. For instance, if a complaint leads to an investigation that results in an arrest, the identity of the complainant might of necessity become known in a judicial proceeding as well as court records, both of which are generally open to the public. As such, neither a request for nor a promise of confidentiality would be of legal relevance. Further, in some instances, I have been led to believe that law enforcement officials feel that disclosure of the addresses where incidents occur may serve as a deterent and a method of increasing watchfulness or security within a particular neighborhood or community.

Additionally, the practices of police departments apparently vary with respect to the nature of the records that they maintain. For example, it has been held that police blotters are accessible [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. In the decision cited above, the Appellate Division found that a police blotter is a log or diary in which any event reported by or to a police department is recorded. The court also indicated that a police blotter is maintained in the ordinary course of business, that it contains no investigative information,

that it is merely a summary of events and occurrences and that, therefore, it is available under the Freedom of Information Law. However, I have no knowledge of the nature of the police blotter maintained by the Dunkirk Police Department. It might provide identifying information with respect to victims; however, often police blotters do not contain such personally identifying details.

I would like to point out, too, that members of the public often have the capacity to listen to police calls on citizen band radios or police scanners. In those cases, although the name of a victim might not be stated, the address might be given. In such situations, it would appear that there may be no reason for withholding the address of a victim if it could have become known to any member of the public by listening to the report of an event.

A second possible ground for denial is §87(2)(e), which states that an agency may withhold records or portions thereof that:

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

If the complaints to which you made reference represent the equivalent of a police blotter, as indicated previously, it has been held that a police blotter contains no investigative information and that, as a consequence, it could not likely be withheld under §87(2)(e). If, however, the records in question do fall within the scope of §87 (2)(e), it would appear that requests would have to be reviewed separately in order to determine the application of the cited provision.

The third ground for denial of possible 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..."

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 a report prepared by a police officer would constitute "intra-agency" material. However, it would appear further that the name or address of a victim would consist of factual information accessible under §87(2)(g)(i). Therefore, the information in question would in my view be accessible under §87(2)(g)(i), unless a different ground for denial, such as those mentioned previously, could appropriately be cited.

I hope that 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-2489

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 3, 1982

Mr. John Stone 82-A-1575
Downstate Separation Center
Red Schoolhouse Road
Box 445
Fishkill, NY 12524
3 B 12

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. Stone:

I have received your letter of May 20 which was addressed to Ms. Baldasaro of this office.

According to your letter, you unsuccessfully applied for a "master index card" regarding yourself from the Department of Correctional Services. Apparently you were advised that no such card exists.

In this regard, I would conjecture that you were referring to the "subject matter list" required to be compiled by agencies subject to the Freedom of Information Law under §87(3)(c) of the Law. Please note, however, that the subject matter list would not be created in such a manner that it identifies particular records pertaining to specific individuals; on the contrary, a subject matter list is required to indicate in reasonable detail by subject matter the types of records in possession of an agency. As such, a subject matter list would not refer to specific records of a particular individual but rather records of an agency generally. Further, the rules and regulations promulgated by the Department of Correctional Services refer to its subject matter list. Specifically, §5.13 of the regulations states that:

"(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in his possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.

(b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.

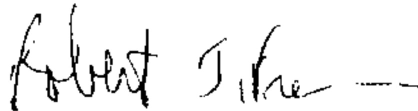
(c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered".

In view of the language quoted above, it is suggested that you might want to reconsider or perhaps resubmit a new request to the records access officer. It is noted that the records access officer is identified in the regulations, a copy of which has been attached.

You also indicated that you are interested in obtaining records from the Board of Education and Bureau of Child Welfare in New York City. In this regard, for the Board of Education, it is suggested that a request be submitted to the Records Access Officer, New York City Board of Education, 110 Livingston Street, Brooklyn, New York 11201. Although I am not familiar with the specific agency in which the Bureau of Child Welfare is housed, I would guess that it is a part of the Human Resources Administration, which is located at 250 Church Street, New York, NY 10013.

I hope that 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-2473

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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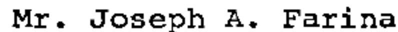
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 21, 1982

Mr. Joseph A. Farina


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. Farina:

I have received your letters of May 4 and 5 and the attached materials.

You have requested responses to several questions regarding numerous requests for records that you have submitted to various state agencies under the Freedom of Information Law.

I would like to offer the following observations in response to your inquiries.

First, you have detailed the difficulties you encountered in attempting to obtain copies of your personnel records from your previous employer, the Department of Correctional Services. As stated in previous correspondence from this office, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a state 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.

With regard to rights of access to personnel records pertaining to you, it appears that two of the eight grounds for denial may be relevant to your requests.

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 subject of the records. In those instances, if disclosure would result in an unwarranted invasion of personal privacy, the names or identifying details of those other persons could be deleted. It is also important to point out that §89(2)(c)(ii) states that:

> "(c) Unless 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. To the extent that inter-agency or intra-agency materials contain advice, suggestion, or impression, for example, they may in my view justifiably be withheld. 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.

Second, you have enclosed a copy of a letter from the Department of Correctional Services which states that the Inspector General's office, a bureau of that agency, "indicated that the records kept in reference to you are exempt from disclosure". You have expressed concern that this statement claiming an exemption is vague. 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..."

The regulations promulgated by the Committee do not require that an index be prepared for each denial which identifies every document withheld on the basis for such withholding. Perhaps you are referring to a "Vaughan" index, which may be requested under the federal Freedom of Information Act in which federal agencies may be required to identify each record that is denied.

Further, in a technical sense, records may be considered "exempt" from disclosure only if §87(2)(a) of the Freedom of Information Law applies. That provision refers to records that are "specifically exempted from disclosure by state or federal statute". As such, §87(2)(a) pertains to records that an agency cannot disclose due to a statutory prohibition. In all other instances, I believe that records may be "deniable" rather than "exempt".

Additionally, when an agency receives a request for a record, the agency is obligated under the Law to review the records sought in their entirety in order to determine which portions, if any, fall within the grounds for denial. To the extent that information falling within one or more grounds for denial is found in a record, such portions could be deleted while the remainder of the record would be available.

Third, you inquired as to your right to inspect under the Freedom of Information Law. Apparently, you believe that the cost of photocopying some of the records sought may be prohibitive. Section 87(2) of the Law requires an agency to "...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof..." Furthermore, it has been held by the courts that the right to inspect is concomitant with the right to copy [see e.g., Re Becker, 200 AD 178, 192 NYS 754 (1922)]. Consequently, in my opinion, you could request an opportunity to review the records prior to requesting photocopies in order to determine your need for particular records.

Fourth, attached to your correspondence is a copy of a request addressed to the Executive Director of the Security and Law Enforcement Employees Union. Please be advised that under the Law, the definition of "agency" includes only governmental entities; it does not in my view include unions and/or their representatives. Therefore, a union would not in my view be required to respond to your request for records under the Freedom of Information Law.

Lastly, in your letter of May 4, you included copies of requests and appeals made under the Freedom of Information Law, but for which you have not received replies. As stated in an earlier advisory opinion dated April 15, 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 addition, it has been held 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

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Anthony Costanzo
Arthur Fowler, Jr.
Donald Maloney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2474

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BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 21, 1982

Mr. Richard Benedetto
Gannett News Service
P.O. Box 7225
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, unless otherwise indicated.

Dear Mr. Benedetto:

As you are aware, I have received your letter of April 21 in which you requested an advisory opinion under the Freedom of Information Law. Please accept my apologies for the delay in response.

Specifically, you requested that I "issue a written opinion on whether the 16 1/2 hours of tapes made by New York City Mayor Edward I. Koch during his interview with Playboy magazine are public records". You also raised questions regarding the Mayor's right to return his copy of the tapes to Playboy. Your letter indicates further that you requested copies of the tapes from Frederick A. O. Schwarz, Jr., Corporation Counsel of the City of New York.

Prior to the receipt of your inquiry, the Office of Corporation Counsel contacted the Committee to request that it be notified when and if the Committee received a request for an advisory opinion regarding access to the tape recordings in question. Therefore, shortly after receiving your request for an opinion, I contacted the Corporation Counsel in order to inform him that a request for an advisory opinion had been submitted to the Committee. Having contacted the Corporation Counsel upon receipt of your letter, he requested that he be given an

opportunity to explain his points of view regarding rights of access to the tapes. In a spirit of cooperation and in good faith, it was agreed that Corporation Counsel should be given an opportunity to present his opinions regarding the tapes. As such, the ensuing opinion has been prepared based upon your letter as well as a memorandum submitted to the Committee by the Corporation Counsel. In addition, most recently, I received a letter from Burton Joseph, Special Counsel to Playboy Enterprises, Inc., in which he expressed his views regarding rights of access to the tapes.

I would like to offer the following comments regarding your inquiry.

It is emphasized at the outset that your initial question, the extent to which the Freedom of Information Law applies to tape recordings of interviews of a public official, is one of first impression. I am unaware of any judicial determinations rendered under the New York Freedom of Information Law or the federal Freedom of Information Act that have dealt with the issue.

With regard to the Freedom of Information Law generally, it is in my view clear that the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Perhaps the focal point of the Law is the introductory language of §87(2) which states that "[E]ach agency shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof" falling within one or more among eight grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

Before any review of the bases for withholding, I believe that two other issues must be considered. First, are the tape recordings "records", and second, are the tape recordings records of an "agency"?

In this regard, it is noted that the Freedom of Information Law contains an expansive definition of "record". Specifically, §86(4) of the Law defines "record" to mean:

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

The term "agency" is also broadly defined to include within its scope:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [see Freedom of Information Law, §86(3)].

From my perspective, when Mayor Koch maintained possession of the tapes in question, those tapes constituted the "records" of an agency. In the Corporation Counsel's memorandum, it was indicated that:

> "[I]n order to protect himself against use by reporters of inaccurate quotations, the Mayor has made it a practice to tape record all interviews".

Based upon that practice, since the definition of "agency" includes any "municipal...office", such as the Office of the Mayor of New York City, I believe that tape recordings of interviews constitute records of an agency. Further, due to the breadth of the definition of "record", I believe that a tape recording would constitute "information kept, held [or] filed" by an agency. It could in my view also be contended that the tape recording was produced by an agency, for as indicated by Corporation Counsel, it is the practice of the Mayor to tape record, or produce, all interviews. If my contentions regarding the definitions of "agency" and "record" are accurate, the tape recordings would be "records" of an agency and therefore subject to the Freedom of Information Law.

In fairness, I would like to point out that the Corporation Counsel has contended that the tape recordings in question do not constitute "records" subject to the Freedom of Information Law. Specifically, Mr. Schwarz wrote that §84 of the Freedom of Information Law, a statement of legislative declaration, indicates that the Law is intended to enable the public "to know the process of governmental decision-making and to review the documents and statistics leading to determinations". He wrote that an exclusive interview conducted to "plumb the personality" of a mayor would not fall within the scope of the "process of governmental decision-making" and would not be a document or statistic "leading to determinations". It was also contended that:

> "...the Law was never intended to apply to personal records--not part of the Government's decision-making process--which happen to be in the possession of an agency. While copies of the tapes were physically stored in the Mayor's office the material contained on those tapes in no way belonged to the Mayor, the Mayor's office or any City agency".

The Corporation Counsel cited a decision rendered under the federal Freedom of Information Act, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 155-157 (1980), which dealt with the scope of what constituted "agency records" under the federal Freedom of Information Act. In sum, the Corporation Counsel stated that:

> "[I]t cannot under even the most liberal statutory construction be considered a record on which Government decisions are based".

Similarly, Mr. Joseph, Special Counsel to Playboy Enterprises, Inc., expressed the opinion that the scope of the Freedom of Information Law should be limited to "access to records of government and its process of decision-making". Mr. Joseph sought to distinguish records relating to "some governmental--as distinct from personal or private--function".

I respectfully disagree with both the Corporation Counsel and Special Counsel to Playboy. In my view, the fact that the tape recordings were kept or held by the Mayor in his office brought those tape recordings within the scope of the definition of "record" and, therefore, within the scope of rights of access granted by the Freedom of Information Law.

Referring once again to the statement by the Corporation Counsel that tape recordings of interviews are kept as a matter of practice by the Mayor, it would appear that such records are maintained by the Mayor in his capacity as Mayor and in the performance of his official duties. While it might be argued that a line of demarcation may be drawn between records concerning governmental functions and others that may be characterized as "personal", it does not appear that the definition of "record", in view of the breadth of its language, permits that such a distinction may be made. Further, under the circumstances, it may be difficult, if not impossible, to separate the governmental from the personal aspects of the life of a high governmental official vis-a-vis that person's records, particularly if the records are maintained in the governmental office of that official, as Mayor Koch has apparently done as a matter of practice.

With respect to the determination rendered in Kissinger, supra, it was found that the mere physical location of papers and materials in government offices would not alone bring those papers and materials within the scope of the federal Freedom of Information Act.

Nevertheless, it is important to point out that, while the structure of the New York Freedom of Information Law is similar to that of the federal Freedom of Information Act, there are numerous distinctions between the two enactments. In my view, when the New York Freedom of Information Law, originally enacted in 1974, was amended in 1977, efforts were made to review the experience under the federal Act and correct what were perceived to be its deficiencies. For instance, one of the provisions that will be discussed later in this opinion concerns an exception to rights of access regarding trade secrets. The exception in the New York Freedom of Information Law [§87(2)(d)] is clearer than that found in its federal counterpart [5 U.S.C. §552(b)(4)]. I would contend that

the same would be true with respect to provisions in the two statutes regarding inter-agency and intra-agency materials [see New York Freedom of Information Law, §87 (2)(g) as opposed to 5 U.S.C. §552(b)(5)] and the capacity of a law enforcement agency to withhold records the disclosure of which might endanger the life or safety of an individual [see Freedom of Information Law, §87(2)(e) and (f) as opposed to 5 U.S.C. §552(b)(7)]. Some of the other distinctions made in the New York Freedom of Information Law involve time limits for responses to requests [§89(3)], the fees assessed for searching and copying records [§87(1)(b)(iii)] and the creation of an advisory body (the Committee on Public Access to Records) designated to advise and oversee the implementation of the Law, for which there is no federal counterpart.

With respect to the specific issue of what constitutes a "record", the federal Act contains no definition of the term. In view of the controversies related to the absence of such a definition, the Legislature in New York opted to include the broad definition of "record" that now appears in the New York Freedom of Information Law.

Moreover, the Court of Appeals, the state's highest court, has held that the purpose for which a record may be prepared or used is of no moment. Specifically, in its finding that records of a volunteer fire company concerning a lottery held to raise funds fell within the scope of the Freedom of Information Law, the Court stated that:

> "[T]he statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and non-governmental activities, especially where both are carried on by the same person or persons" [Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, at 581 (1980)].

Another judicial determination that might have a bearing upon the issue raised here involved a situation in which a government official prepared notes that were later used as the basis for the minutes of a meeting of a public body. Although minutes were prepared, the notes remained in the office of the individual who prepared them. Although it was contended that the notes were personal and not records of an agency, here the Board of Regents or the Education Department, it was found that:

> "[U]nder the liberality to be accorded to the Freedom of Information Law, the court finds that differentiation so claimed to be more fancied than real, and it is clear that in his attendance at the board meetings, Mr. Carr serves in his official capacity" [Warder v. Board of Regents, 410 NYS 2d 742, at 743 (1978)].

The court specified further that "public disclosure laws require liberality of construction", and that the personal notes fell within the definition of "record" appearing in §86(4) of the Freedom of Information Law (id.).

Moreover, other decisions have concluded that items such as tape recordings [Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978] and computer tapes [Szikszay v. Buelow, 436 NYS 2d 558, 107 Misc 2nd 886] fall within the scope of the Law.

In short, it is my view that so long as information is "kept, held, filed, produced or reproduced by, with or for an agency...", it is a "record" subject to rights of access granted by the Freedom of Information Law. As such, I believe that the tape recordings in question fell within the scope of the Freedom of Information Law when they were in possession of the Mayor and his office. Further, if, for example, the tape recordings were "produced by, with or for" an agency, they might remain subject to the Freedom of Information Law even though they have been returned to Playboy. Therefore, even if physical custody of the records was relinquished, legal custody could nonetheless remain within the Office of the Mayor. However, I am unaware of any judicial determinations pertaining to the return or relinquishing of physical custody of records by an agency to a third party.

Assuming that the tape recordings were or may be records that fall within the scope of the Freedom of Information Law, the remaining issue involves the extent, if any, to which their contents fall within one or more of the grounds for denial appearing in paragraphs (a) through (h) of §87(2).

As stated at the outset, the introductory language in §87(2) refers to the capacity of an agency to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. In my view, the authority to withhold portions of records leads to two conclusions. First, it would appear that the Legislature envisioned situations in which a single record might be accessible and deniable in part. Second, the introductory language of §87(2) in my view imposes a responsibility upon an agency to review records sought in their entirety to determine which portions, if any, fall within one or more grounds for withholding. As such, there may be situations in which portions of a record are available because no ground for denial exists, while the remainder might be withheld if one or more bases for withholding may appropriately be asserted.

Again, assuming that the tape recordings were or continue to constitute "record" subject to the Freedom of Information Law, there would in my view be two grounds for denial of possible significance.

The first such ground for denial would in my view be §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". From my perspective, the cited provision would be applicable only with respect to those portions of the tapes which contain so-called "off the record" comments. The remaining aspects of the tapes for which no "off the record" treatment has been accorded could not in my opinion be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for it would appear that the Mayor essentially consented to disclosure by means of publication. Stated differently, if it can be assumed that Playboy was free to publish any aspect of the tape recordings, except those portions considered to be "off the record", §87(2)(b) concerning unwarranted invasions of personal privacy would be relevant only with respect to those portions of the tapes in which "off the record" comments were offered.

Further, if it is assumed that even those portions of the tapes consisting of "off the record" comments fall within the definition of "record", those portions of the tapes would in my view also be subject to review in order to determine which aspects, if any, could appropriately be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy.

In this regard, Mr. Joseph, Special Counsel to Playboy stressed that public officials often speak "off the record" and that the technique of speaking off the record is "vital to the journalistic profession". I agree with Mr. Joseph's contention. Nevertheless, once again, since "off the record" comments are part of the tape recordings, I do not believe that such a characterization alone would remove those portions of the tapes from the definition of "record".

I would also like to point out that the considerations of privacy mentioned earlier might be applicable to the privacy of the interviewer in conjunction with off the record comments, as well as the privacy of Mayor Koch.

The second and perhaps more important basis for withholding is §87(2)(d) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In this regard, both the Corporation Counsel and the Special Counsel to Playboy have contended that the tape recordings fall within the scope of §87(2)(d) and, therefore, could be withheld.

In his memorandum, the Corporation Counsel agreed with points that I made earlier regarding efforts to clarify the basis for withholding trade secrets as it appears in the federal Freedom of Information Act [5 U.S.C. §552(b)(4)]. The cited provision of the federal Freedom of Information Act permits a federal agency to withhold:

> "...trade secrets and commercial or financial information obtained from a person and privileged or confidential."

The Corporation Counsel indicated that "[T]he draftsmen of the New York statute attempted to improve this vague standard by inserting a more definite criterion in the [New York] Freedom of Information Law." The Corporation Counsel also made reference to advisory opinions of the Committee, which have been supplied to the Office of Corporation Counsel on an ongoing basis for several years, and which indicate that the thrust of §87(2)(d) is based upon "harmful effects of disclosure".

It is true in my view that the draftsmen of the amendments to the Freedom of Information Law in 1977 sought to prepare and set forth language which is based by and large upon potentially harmful effects of disclosure. From my perspective, the Freedom of Information Law is based largely upon what may be considered to be common sense. Stated differently, the Law in my opinion provides in essence that all records are available except to the extent that disclosure would be damaging to a person or some governmental process, in which case, there is likely an applicable ground for denial. Conversely, in situations in which disclosure would not be harmful to a person or governmental process, it is likely that no ground for denial could appropriately be invoked to withhold records.

The "trade secret" exception was in my view intended to enable an agency to withhold records or portions thereof when, as indicated in the specific language of the Law, disclosure would "cause substantial injury to the competitive position of the subject enterprise", in this instance Playboy.

In a discussion of the concept of an "exclusive" interview, the Corporation Counsel wrote that:

> "...the economic advantage which inheres in obtaining an exclusive interview would be destroyed if rival publishers could, as is attempted here, force the Government to turn over copies of interview tapes on demand.

> "In addition, if rival news organizations could obtain such materials under the Law, they would injure the publisher by being able to emulate its question asking and editing techniques. It is these which represent the real trade secrets of publishers. What is published reveals just a small fraction of the questions and dialogue by which the reporter makes the subject comfortable and willing to talk freely. Similarly, what is published reveals none of the selection and editing techniques which are the business and expertise of the editors" (emphasis supplied by Corporation Counsel).

The Corporation Counsel wrote further that:

> "Compelled disclosure would mean that _Playboy's_ competitors will be allowed to unjustly profit from _Playboy's_ investment, at no cost to themselves."

In addition, various legal treatises and judicial determinations were cited in the memorandum from the Corporation Counsel.

Mr. Joseph, Special Counsel to _Playboy_ offered similar points and wrote that:

> "[T]he pursuit of the interview with Mr. Koch was a commercial effort by my client that resulted in a valuable product to which we are exclusively entitled. We paid for the interview, went to substantial expense to acquire, transcribe and edit the interview, and the information contained as a result of our journalistic efforts constitutes a valuable property right. To make this information available to others -- especially a journalistic competitor -- is to disclose information in derogation of our interest. Playboy has the right to republish, reedit and otherwise exploit this interview, including previously unpublished material, and to make the same avail-

> able to a competitive medium 'would cause substantial injury to (our) competitive position...' as is recognized by the statute."

Further, as stated by Corporation Counsel,

> "[I]n its advisory capacity, the Committee does not, of course, undertake to determine what in fact constitutes a trade secret; it merely advises as to whether in its view the trade secret exemption is an appropriate ground for denying access to the requested materials."

I agree with Corporation Counsel in that neither the Committee nor its staff has judicial or quasi-judicial authority. Certainly this office cannot determine what constitutes a "trade secret".

However, I would like to offer a number of points regarding the claim made by Corporation Counsel and Playboy regarding the capacity to deny based upon §87(2)(d) of the Freedom of Information Law.

First, as stated at the outset, there do not appear to be any judicial determinations concerning the status of government records of interviews with government officials or the status of what might be characterized as a "joint literary product" produced by a reporter and a government official.

Second, as noted earlier, the Corporation Counsel cited several judicial determinations that may be of general rather than direct relevance to the tape recordings in question. They are not in my view directly relevant, for the cases did not deal with situations in which materials were in possession of government or in which records might be subject to rights of access conferred upon the public by a disclosure statute.

The earliest decision cited by Corporation Counsel was rendered by Supreme Court, New York County, in 1876 (Kiernan v. Manhattan Quotation Telegraph Co., New York Practice Reports). In Kiernan, the issue involved the property right of foreign news telegraphed to an agent in New York City. The Court found that there was apparently a property right to news and stated that:

> "[I]t would be an atrocious doctrine to hold that dispatches, the result of the diligence and expenditure of one man, could with impunity be pilfered and published by another.
>
> "It is undoubtedly true that in respect to news, its publication cannot be interfered with where the party procures the intelligence by the diligence of his own agents; but if he seeks to profit by the superior diligence of his rivals, it is unjust that he should be allowed to do so until the right of property has been abandoned by publication" (id. at 196).

The extant situation in my view differs from that described in Kiernan, for there is no issue relating to "pilfering" news; on the contrary, your request has been made by means of a statutory vehicle, the Freedom of Information Law. Moreover, Kiernan involved a situation in which "news" may have been "pilfered" prior to, rather than following, publication.

Another decision cited by Corporation Counsel, International News Service v. Associated Press, was rendered by the United States Supreme Court in 1918 (248 U.S. 215). The facts of the case indicate that an incorporated association of newspaper publishers gathered news at its expense, which was telegraphed to its members for their exclusive publication. A rival company serving other newspapers made a practice of obtaining this news through early publications of the first company's members, thereby enabling its members to compete with newspapers of the first company for "prompt publication". It was held that the first company had a "quasi property" right in the news that it had gathered and that the appropriation of its news by the second company resulted in "unfair competition".

In my view, the key aspect of International News Service, as well as Kiernan, supra, is that rival publishers obtained news for "prompt publication". In both cases, it appears that rival publishers could disseminate news obtained at the expense and effort of others even before those who had obtained the news could have had a reasonable opportunity to publish the news it had gathered.

The existing situation in my view is different, for Playboy published its interview with the Mayor several weeks ago. In addition, in International News Service, it appears that the rival news organization published the news it had appropriated as if it were its own, without mentioning the source of the news. That would not apparently be so in this instance. In addition, as noted in the discussion of Kiernan, supra, the issue here does not in my opinion involve a dispute between private corporate entities. On the contrary, it is founded upon a potential public right of access to governmental records.

The remaining cases cited by Corporation Counsel involve the concept and parameters of what might constitute a "trade secret". One such case is Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, §757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the Court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.)

As indicated earlier, Corporation Counsel stressed that the jurisdiction of the Committee is advisory and not in any way judicial and that it could not determine the extent to which the materials in question may be characterized as trade secrets. Therefore, there appear to be questions of fact that could likely be determined only by a court regarding the extent, if any, to which the tapes constitute trade secrets.

However, I believe that two points should be made in this regard. First, in my view §87(2)(d) of the Freedom of Information Law contains two standards. To fall within the scope of the exception, records must initially be found to consist of trade secrets. If such a finding is made, it must thereafter be determined that disclosure would cause "substantial injury to the competitive position of the subject enterprise", i.e., Playboy (emphasis added). As such, in my opinion, a finding that the tape recordings constitute trade secrets, without more, would be insufficient to deny access, for it would also have to be proven by the agency [see Freedom of Information Law, §89(4)(b)] that disclosure would indeed cause substantial injury to Playboy's competitive position.

The second point was made earlier, that records or "portions thereof" falling within one or more of the exceptions to rights of access may be withheld. As indicated by Corporation Counsel, interviewing techniques, such as the "dialogue by which the reporter makes the subject comfortable and willing to talk freely" might be found to constitute trade secrets in whole or in part, which if disclosed would cause substantial injury to Playboy's competitive position. However, other aspects of the tapes might not be found to meet the dual standard found in §87(2)(d).

It is also noted that a column appearing in the New York Times on April 2 referred to a comment by a "top editor" of Playboy in which it was stated that "there's nothing 'meaningful' or 'relevant' on the remaining thirteen hours of tape." It is emphasized once again that if the tapes could be found to be trade secrets, it would appear that only those portions which if disclosed would cause substantial injury to Playboy's competitive position could in my view be withheld. As such, a review of tapes in their entirety would apparently be necessary, perhaps with an eye toward both the interview techniques as well as the specific content of the tapes.

A fourth decision cited by Corporation Counsel is Mobay Chemical Corp. v. Costle [447 F. Supp. 811 (1978)], which also deals with trade secrets. In relevant part, the Court stated that:

> "[G]eneral approval is given to the definition of 'trade secret' as incorporated in the RESTATEMENT OF TORTS. [Emphasis supplied].
>
> "In determining whether given matter constitutes a trade secret, consideration shall be given to-
>
> (a) the extent to which the data is independently known to outsiders or is used by outsiders for similar purposes;
>
> (b) the extent to which it is known by insiders;
>
> (c) the extent of the measures taken by an owner to guard its secrecy;
>
> (d) value of the data to the owner and others, including the extent to which, if used in conduct of the business, it would confer a competitive advantage on said owner;
>
> (e) the amount of effort or money expended on developing the data; and
>
> (f) the ease or difficulty with which the data could properly be acquired or duplicated by others."

The applicability of the conditions precedent, as described by the Court, to a finding that the records in question constitute trade secrets is largely unknown to me. However, one of the conditions in my view bears review. Specifically, one of the conditions involves "the extent of the measures taken by an owner to guard its secrecy". Here there are arguably two "owners", Playboy and the Office of the Mayor, which as stated earlier is in my opinion an "agency" subject to the Freedom of Information Law. In addition, with respect to the measures taken by Playboy to assure the secrecy of its interview, a question might arise concerning what apparently was a grant of permission by Playboy to enable the Mayor to produce and maintain tape recordings of the interview. To

ensure its ownership of tapes, perhaps an arrangement could have been made whereby Playboy would have the only copies. Although the condition regarding attempts to "guard secrecy" may be relevant, I could not conjecture as to its effect upon a claim that the tapes constitute trade secrets.

Third, if interviews of government officials by the news media are considered "trade secrets", concerns of a different nature might arise. For instance, it might be contended that records of interviews with other categories of persons could also be considered trade secrets. By analogy, could a similar argument be made with respect to records of interviews with lobbyists or contractors? In those cases, the public might be deprived of information that more clearly relates to the government's decision-making process. Further, as noted by Corporation Counsel, it is the practice of the Mayor to prepare and maintain tape recordings of interviews by the news media. In this regard, I am unaware of any requirement that a summary, tape recording or transcript of interviews be created. Nevertheless, having opted to create such records, it is conjectural whether a characterization of a particular class of interviews by the news media as trade secrets might lead to similar denials with respect to interviews with others.

Fourth, I am aware of one situation in which a reporter requested materials from a federal agency. The records consisted of summaries as well as transcripts of interviews conducted by a different reporter with various government officials. Specifically, a reporter employed by the Daily Oklahoman sought to engage in an in depth study of the relationship between the Department of the Army and the news media. Although he was initially denied access to summaries of interviews and verbatim transcripts of interviews with various military officials, by appealing the denials, he eventually obtained materials regarding articles that had been published, but was denied access to materials regarding articles that had not yet been published. As I understand the situation, the Department of the Army has determined that the exception regarding trade secrets in the federal Freedom of Information Act is in its view applicable until a news article is printed or broadcast. Following publication, the Army has, however, apparently disclosed the entire content of interviews.

As such, although there is no judicial precedent involved, a federal agency in its review of the trade secret exception in the federal Freedom of Information Act has chosen to draw a line of demarcation in terms of access between records of interviews that are sought prior to publication or broadcast and those sought following publication or broadcast.

Whether the New York courts in construing the New York Freedom of Information Law would adopt a similar point of view is obviously unknown at this juncture. However, even if such a dividing line is drawn, it appears that the dual test described earlier regarding §87(2)(d) would be necessary in terms of a review of tapes, if, for example, "interviewing techniques" could indeed be trade secrets. Further, even if a denial in whole or in part might now be warranted, it could disappear over the course of time, due to the flexibility of §87(2)(d). Stated differently, while disclosure of a trade secret might within a given period of time cause substantial injury to the competitive position of a commercial enterprise, the passage of time would in my view likely diminish what might at a particular point in time constitute harmful effects of disclosure.

In sum, it is my view that the tape recordings of the Mayor's interview with Playboy magazine were at the time of the Mayor's possession of the tape recordings "records" subject to the Freedom of Information Law; that if it is found that the records were produced for the Office of the Mayor, they may continue to fall within the definition of "record" and, therefore, be subject to the Freedom of Information Law; and that the extent to which the unpublished portions of the tape recordings fall within §87(2)(b) and (d) of the Freedom of Information Law is at this juncture conjectural in terms of both the application of those exceptions to rights of access and the extent to which they might be applied.

The second question raised in your letter involves whether Mayor Koch "had the right to return his copies of the tapes to Playboy magazine." Although there are various provisions of law governing the periods of time within which records must be retained prior to their disposal or destruction [see e.g., for state agency records, §186 of the State Finance Law; for local government records, §65-b of the Public Officers Law; and for New York City

government, Chapter 72 of the New York City Charter], I believe that the capacity to provide advice with respect to those provisions of law is beyond the scope of the jurisdiction of this office. Consequently, I do not believe that a response to your second question can be provided by the staff of the Committee.

It is noted, too, that the Corporation Counsel raised issues regarding the application of constitutional provisions in relation to rights of access. However, I believe that it would be beyond the scope of the Committee's authority to deal with those issues.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Committee Members
Hon. Edward I. Koch
Burton Joseph
Frederick A.O. Schwarz, Jr.

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 24, 1982

Reverend Doctor J.M. Starkey

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 Reverend Starkey:

I have received your letter of May 7 as well as the letters attached to it. Please be advised that your correspondence reached this office on May 17.

You have requested that the Committee on Public Access to Records assist you in making requests under the Freedom of Information Law by forwarding the nineteen letters to the appropriate New York State and/or New York City agencies. Apparently, you had encountered difficulties in determining the names of the records access officers for both state and city agencies.

I would like to offer the following comments in response to your correspondence.

First, it is noted at the outset that the Committee is authorized to render advice under both the Freedom of Information and Open Meetings Laws. Although the Committee is unable to mail your requests for you, on your behalf, I have assembled a list of names and addresses of records access officers (see attached) that may be useful to you. For future reference, you should be aware that it is not necessary to cite a specific name in order to make a request; your letter can simply be addressed to the records access officer of the agency that you believe has possession of records sought.

Second, one of your requests is addressed to District Council 37 and the Social Services Employees Union Local. Under the Freedom of Information Law, the definition "agency" includes only governmental entities; it does not in my view include a union or its representatives. Therefore, a union would not in my view be required to respond to your request for records under the Law.

Lastly, in reviewing your requests, it appears that you have used separate letters when more than one record is sought from a single agency. In order to reduce your paperwork, it is suggested that you seek various records of an agency in a single 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
Assistant to the Executive
Director

RJF:PPB:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2476

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 24, 1982

Marc L. Parris
County Attorney
County of Rockland
County Office Building
New City, NY 10956

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. Parris:

I have received your letter of April 27, which reached this office on May 13.

Your inquiry concerns a request for records of the Rockland County Park Commission which, in your view, is "too vague" and would require an employee of the Park Commission to "expend a great deal of County time supervising" the applicant in his review of Park Commission records. Your questions are whether the County may impose any time limit or restriction on the materials provided for review and whether an applicant would be required to pay the County "for time spent by a County employee who will supervise" the applicant while he is searching for the records of the Park Commission.

I would like to offer the following comments regarding your inquiry.

First, as you are aware, I am familiar with the request, for the applicant in question, Mr. Martus Granirer, requested an advisory opinion from this office. A response to his request dated May 7 was also sent to you.

Second, with respect to the capacity of the County to impose a time limit on the period within which an applicant can review records, as you may be aware, the regulations promulgated by the Committee, which govern the

procedural aspects of the Law, provide guidance regarding hours for public inspection. Specifically, §1401.4 of the regulations states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment".

In view of the language quoted above, if the Park Commission has regular business hours, it would appear that an applicant for records could review those records during regular business hours. If the Park Commission has no regular business hours, the appointments procedure described in §1401.4(b) would in my view be applicable.

Third, there is not in my opinion any restriction on the number of records that may be requested by an individual. As noted in my letter to Mr. Granirer, one of the responsibilities of a records access officer involves assisting the requester "in identifying requested records, if necessary" [see regulations, §1401.2(b)(2)]. Often when a request is voluminous, the records access officer has the ability to assist an individual in narrowing his or her request.

Fourth, I do not believe that the County can assess a fee for the time spent by a County employee who may supervise an applicant when the applicant is reviewing or searching for records. As stated in §1401.8(a) of the regulations, no fee may be charged for inspection of records or search for records. Therefore, I do not believe that the County can charge a fee for the personnel time that may be involved in supervising an applicant who seeks to review records.

Lastly, I have reviewed Resolution No. 400, which was passed by the Rockland County Legislature in 1975 and which specifies the procedure by which members of the public may seek records under the Freedom of Information Law from agencies of Rockland County government. In my opinion, since the Resolution is based upon the Freedom of Information Law as enacted in 1974, it is out of date. Further, there are several provisions which in my view would fail to comply with the current Freedom of Information Law, effective January 1, 1978, as well as the updated regulations of the Committee.

For instance, Section 1(b) lists the categories of records deemed available under the original Freedom of Information Law. The current Freedom of Information Law, however, contains no such list and provides instead that all records are available, except those falling within one or more grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

Section 2(a) refers to requests for "identifiable public records". In this regard, although the original Freedom of Information Law required an applicant to request "identifiable" records, the current Freedom of Information Law requires that an applicant seek records "reasonably described" [see §89(3)].

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. Moreover, 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 current regulations of the Committee, as well as model regulations designed to assist agencies in developing rules and regulations consistent with those of the Committee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Martus Granirer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-768
FOIL-AO-2422

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 25, 1982

Yasuo Sekino
Kanagawa Prefectural Assemblyman
Kanawaga Prefectural Government
1, Nihon-odori, Naka-ku
Yokohama 231, Japan

Dear Mr. Sekino:

As you may be aware, your letter of May 17 addressed to New York Secretary of State Paterson has been forwarded to the Committee on Public Access to Records. Please note that your letter reached this office on May 24. The Committee is responsible for advising with respect to the New York Freedom of Information Law, and, as indicated in earlier correspondence, I look forward to meeting with you and other members of your delegation in Albany on June 7.

In your letter, you raised five questions and requested my opinion regarding those matters prior to our discussion.

Your first question involves a situation in which a citizen requests records while a public body remains "in session". I assume that your question involves a request prior to the making of a final determination. In this regard, I would like to offer several general comments.

First, the New York 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 (see attached). Many of the grounds for denial are based upon potentially harmful effects of disclosure. Therefore, if, for example, an agency is involved in contract negotiations and premature disclosure would adversely

affect its capacity to enter into the most effective contractual agreement, records may be withheld to the extent that disclosure would "impair present or imminent contract awards" [see Freedom of Information Law, §87(2)(c)]. Similarly, if a police department is investigating a crime and disclosure would interfere with an investigation, the agency may likely withhold records on the ground that the records are compiled for law enforcement purposes and disclosure would interfere with its investigation [see §87(2)(e)(i)].

In a different context, if advice is provided by staff to the head or governing body of an agency, that advice may be withheld under §87(2)(g), which permits 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..."

As such, although the advice provided in a memorandum by staff might be withheld, a final policy or determination made by the agency would become available.

I would also like to point out that there may be another statute of potential relevance to your question. Specifically, New York, like the majority of other states, has enacted an open meetings law. In brief, the New York Open Meetings Law applies to meetings of public bodies, such as a city council, a town board, or other legislative body. The Law requires that all meetings of such bodies be conducted open to the public, except in situations in which closed or "executive sessions" may be held. The Open Meetings Law, a copy of which is attached, contains eight grounds for entry into an executive session. As in the case of the Freedom of Information Law, the grounds for executive session are based largely upon potentially harmful effects of disclosure.

Your second question involves a situation in which a citizen requests records and is denied, and what steps that person may take to obtain the records.

Under the regulations developed by the Committee, each agency is required to designate one or more "records access officers" who are required to respond to requests made under the Freedom of Information Law. If a records access officer denies access, a citizen may appeal the denial to the head or governing body of the agency, who has seven business days from the receipt of the appeal to fully explain in writing the reasons for further denial, or grant access to the records. In addition, any person may request an advisory opinion in writing from this office. Although such an opinion may not be binding, the opinions are in many instances persuasive. Further, if a citizen feels that a denial by the head of an agency was inappropriate, the person may seek review by the initiation of a judicial proceeding. As in the case of the federal Freedom of Information Act, the burden of proof is on the agency to demonstrate that the records withheld fall within one or more of the eight grounds for denial.

Your third area of inquiry concerns the protection of privacy and the degree to which high ranking public officials or state representatives may be "exempted". Further, you asked whether the earnings of a state representative are specified as available or deniable in the Law. Here I would like to offer two points.

First, §87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". With respect to public employees, however, the courts have found that public employees enjoy a lesser right to privacy than any other group, because they are required to be more accountable than any other group. Further, in interpreting the privacy provisions of the Freedom of Information Law, the courts have found in essence that records that are relevant to the performance of a public employee's official duties are available, for it has been found that disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy.

Second, §87(3)(b) of the Freedom of Information Law requires that each agency prepare a payroll record indicating the name, public office address, title and salary of all employees. A similar provision pertaining to the State Legislature appears in §88(3)(b) of the Freedom of Information Law. As such, the salaries of all public employees, including high ranking officials, in New York are available to the public.

The fourth question concerns the application of the Law to a situation in which a commercial enterprise seeks records "involving disclosure of know-how" of another firm. In this regard, §87(2)(d) states that an agency may withhold records or portions thereof that:

> "...are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Therefore, 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 enterprise".

In addition, new provisions were added to the Freedom of Information Law on January 1, 1982, which apply to state agencies (as opposed to units of municipal government, such as cities, towns and villages). Under those provisions, if a commercial entirprise submits records to a state agency pursuant to law or regulation, and if it believes that those records constitute trade secrets, the commercial enterprise may request that the records be kept by the agency separate and apart from all other records. In such cases, an agency cannot disclose those records under the Freedom of Information Law unless it informs the commercial enterprise that submitted the records that a request has been made. At such time, the commercial enterprise is given an opportunity to demonstrate why disclosure would cause substantial injury to its competitive position.

Lastly, you requested a table of cases for a period of one year indicating denials by citizens. In this regard, the Committee prepares on an annual basis a summary of all judicial decisions rendered under the Freedom of Information Law as part of its annual report. The summary does not

indicate all denials, but rather only those situations that have resulted in the initiation of judicial proceedings. Enclosed for your consideration is the latest case summary, which identifies cases denied within the past year by means of an asterisk (*).

I hope that I have been of some assistance and look forward to our meeting on June 7.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Makoto Soga

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-769
FOIL-AO-2478

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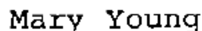
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 26, 1982

Mary Young


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. Young:

I have received your letter of May 7 in which you requested an advisory opinion.

According to your letter, you recently paid $26.50 for copies of school district records and minutes of meetings. You stated your objection to paying twenty-five cents per page since you have been a taxpayer and a resident of the District for twenty-two years. You indicated further that copies of minutes of meetings are provided at no charge to District residents at the meetings. However, it appears that you were assessed a fee because you "didn't happen to attend those meetings when the minutes were distributed". You also raised a question regarding "the blocking out of information on public minutes of meetings".

I would like to offer the following comments regarding your inquiry.

First, as a general rule, an agency, such as a school district, may charge up to twenty-five cents per photocopy. Specifically, §87(1)(b)(iii) of the Freedom of Information Law provides that each agency is required to adopt rules and regulations concerning the procedural aspects of the Law, 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".

In view of the language quoted above, I believe that it is clear that an agency may generally assess a fee of up to twenty-five cents per photocopy.

Nevertheless, assuming that your statement is accurate, i.e., that copies of minutes are distributed free of charge to District residents who attend meetings, it would appear that any District resident should be accorded the same treatment. However, if, for example, a request for minutes is made long after a meeting, it would appear that a fee for photocopying would be reasonable. On the other hand, if a request is made shortly after the free distribution of minutes at a meeting, once again, it would appear reasonable that the minutes should be made available to others free of charge as well.

Your second area of inquiry concerns "the blocking out of information" on minutes of a meeting. You have included a copy of the minutes which contain the "blocked out" information. The specific section that has been deleted refers to "...should read..." As such, there is no indication of what may have been deleted. In my view, since minutes of an open meeting represent the final determination of an agency, such as a school board, they are available in their entirety. Therefore, it does not appear that there was any basis for deleting the information in question from the minutes of the meeting of July 15, 1981.

I would like to point out, however, that there may be situations in which information may be deleted from minutes. In this regard, I direct your attention to §101 of the Open Meetings Law concerning minutes. That provision distinguishes between minutes of open meetings and executive sessions. The cited provision states that:

> "1. [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.
>
> 2. [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.

> 3. [M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session".

Please note that the requirements concerning minutes of executive sessions are less expansive than those regarding minutes of open meetings. Further, §101(3) states that minutes of executive sessions shall be available to the extent provided by the Freedom of Information Law. As such, there may in some situations in which deletions from minutes of executive sessions are made. However, the minutes that you attached to your letter appear to be minutes of an open meeting. Consequently, it does not appear that the deletions were appropriate.

With respect to your last area of inquiry, you indicated that a request for records was made but that a carbon copy rather than a copy of the original document was provided. All that I can suggest in this regard is that if the original document can be located, a copy of that document should be made available if it is accessible under the Freedom of Information Law. If no original exists, the School District would not be required to create a new record on your behalf [see Freedom of Information Law, §89(3)]. In addition, if an agency cannot locate a record, §89(3) of the Freedom of Information Law states in part that an agency "...shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2479

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 26, 1982

Mr. Gregory McBride
#81-A-2884
Greenhaven Correctional Facility
Drawer B
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. McBride:

I have received your letter of May 9 which deals with a request made under the Freedom of Information Law for records of the New York City Police Department.

In brief, you are apparently seeking various records concerning some eleven arrests. The majority of records sought were denied, but the appeals officer indicated that complaint reports might be made available if you sent specific information that would assist in identifying the reports. In this regard, since you have apparently exhausted your administrative remedies, I do not believe that it would be appropriate to comment with respect to the specific aspects of your inquiry. However, as you intimated, there appears to be a conflict in terms of judicial direction regarding the utility of rights of access granted by the Freedom of Information Law.

Specifically, in your letter, you referred to advice given by this Committee as well as a judicial interpretation of the Freedom of Information Law concerning the absence of a "need to know" to utilize the Freedom of Information Law. The decision generally cited

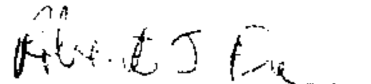
regarding that principle is Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], in which the Appellate Division, Fourth Department, stated that if records are available under the Freedom of Information Law, they should be made equally available to any person, without regard to status or interest. In apparent conflict with Burke is People v. Billy Billups [Sup. Ct., Queens Cty., Criminal Term, NYLJ, July 13, 1981], a copy of which has been attached pursuant to your request, and in which the Supreme Court, Queens County held that the Freedom of Information Law cannot be used by:

> "...defendant who was given an opportunity under the Criminal Procedure Law to obtain what he now seeks. The Freedom of Information Law cannot be used merely to make untimely discovery applications."

Based upon the language quoted above and the possible conflict between Burke and Billups, it would appear that the issue could at this juncture be determined only by a court.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Rosemary Carroll

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2480

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 26, 1982

Robert C. Glennon
Counsel
Adirondack Park Agency
Post Office Box 99
Ray Brook, NY 12977

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. Glennon:

As you are aware, I have received your letter of May 7 in which you requested an advisory opinion.

Specifically, you have described a situation in which the Adirondack Park Agency, pursuant to its statutory authority, requests "fiscal or marketing data" from an applicant. The applicant thereafter agrees to supply the information but requests that the information be excepted from disclosure on the ground that it constitutes trade secrets pursuant to §89(5)(a) of the Freedom of Information Law. Following the receipt of the information, the agency apparently has determined to hold or will hold a quasi-judicial hearing regarding a proposed project. You also wrote that, under the circumstances, the information supplied by the applicant is crucial to any determination made by the Agency and would constitute a "critical part of the record".

Under §89(5)(a) of the Freedom of Information Law, a person submitting records to an agency "pursuant to law or regulation" may request that such information be characterized as a trade secret and kept separate and apart from all other agency records. Further, such information remains outside the scope of rights of access unless and until "an entitlement to such exception" has been finally determined. Therefore, if indeed the agency accepts a claim that the

information submitted by the applicant constitutes a trade secret, the information could justifiably be withheld under the Freedom of Information Law. Concurrently, however, a quasi-judicial proceeding may be held during which, as a general rule, the testimony and other information deemed part of the "record" becomes public. The question, therefore, involves the manner in which the materials excepted from disclosure as trade secrets could be presented and discussed during a hearing without divulging the contents of the information.

Unless there is a provision that would require that the material be presented and discussed publicly, a proceeding could in my view be conducted closed to the public with respect to consideration of information characterized as trade secrets.

With respect to the Open Meetings Law, as you are aware, §103(1) exempts from the provisions of that statute "judicial or quasi-judicial proceedings". As such, if the proceeding in question is quasi-judicial, it would fall outside the scope of the Open Meetings Law. Further, in such a situation, it would appear that the hearing could be held open or closed to the public.

Moreover, even if the materials are considered during a "meeting" subject to the Open Meetings Law, it is possible that there would be a ground for entry into an executive session. 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..."

Based upon the language quoted above, if, for example, the financial or credit history of a corporation would be involved, an executive session would in my view be appropriate.

Lastly, you asked whether you should require those in attendance at a closed session "to swear not to reveal the exempt information". Although it may not be required

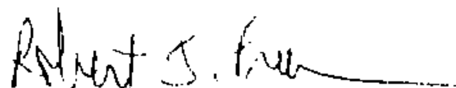
that such drastic steps be taken, I would like to point out that §74 of the Public Officers Law contains a code of ethics and that §74(3)(c) states that:

> "[N]o officer or employee of a state agency, member of the legislature or legislative employee should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests".

Perhaps a review of the code of ethics by those in attendance at a closed hearing would constitute a sufficient "warning" regarding unauthorized disclosures.

I hope that 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-2481

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 27, 1982

Mrs. Pearl Michaels

<u>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.</u>

Dear Ms. Michaels:

I have received your letter of May 10 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you have followed the appropriate procedures promulgated by the Office of the Chancellor of the New York City Board of Education in your efforts to obtain a copy of the school safety plans of P.S. 202 and P.S. 190, both of which are public schools in New York City. You indicated further that you were informed initially by the records access officer for the Board of Education that the plans did not exist but that they would likely be available several months after your request. Although you have not received the safety plans from the records access officer for the Board of Education, Mary C. Tucker, Counsel to the Board, wrote to you on May 4 that:

> "[W]ith reference to your request for copies of the current safety plans for P.S. 190 and P.S. 202 in Community Schools District #19, Brooklyn, I am advised that the union representatives at the schools have copies which are available for review".

As such, it appears that the records in question are available from the schools rather than the Board of Education.

In this regard, you have asked whether you are entitled to receive copies of the school safety plans from the records access officer of the Board of Education or whether you should receive an "available copy" from officials of the schools. It appears that your contention is that you should have the capacity to gain access to the official copy accepted by and on file with the Board of Education.

I would like to offer the following comments regarding your inquiry.

First, from my perspective, the intent of the Freedom of Information Law involves facilitating public access to records rather than hindering access. Under the circumstances, perhaps Ms. Tucker felt that it would be easier and more convenient for you to obtain copies of the safety plans in the district that has possession of the plans and in which you are employed.

Further, as you may be aware, the Committee is responsible for promulgating regulations governing the procedural implementation of the Freedom of Information Law. With respect to the responsibilities of a records access officer, §1401.2(a) of the Committee's regulations indicates that the records access officer "shall have the duty of coordinating agency response to public requests for access to records". As such, a records access officer in my view need not be the sole individual who provides access to records; on the contrary, the records access officer, as stated in the regulations, is responsible for coordinating an agency's response to requests. It appears that Ms. Tucker by means of her letter attempted to do so.

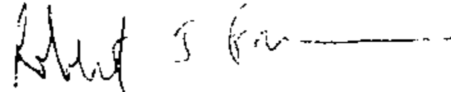
Lastly, although you believe that the safety plans in possession of the Board of Education are accessible under the Freedom of Information Law, once again, it appears that Ms. Tucker felt that it would be easier for you to obtain copies from Community School District #19. Moreover, in order to ensure that the copies of the safety plans in possession of Community School District #19 are true copies of the original safety plans in possession of the Board of Education, the Freedom of Information Law permits you to request a certification indicating that the records in possession of Community School District #19 are true copies of the originals in possession of the Board. Here I direct your attention to §89(3) of the Freedom of Information Law, which states in part that:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

It is suggested that you might want to seek a certification regarding the "correctness" of the copies of the safety plans in possession of Community School District #19.

I hope that 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 C. Tucker

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2482

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 27, 1982

Mr. Barry Brown

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. Brown:

As you are aware, I have received your recent letter in which you requested an advisory opinion.

You have raised questions regarding compliance with the Freedom of Information Law by the Department of Social Services with respect to the time limits within which it must respond to your requests.

Please be advised that I have contacted Richard Chady, Records Access Officer for the Department of Social Services, on your behalf in order to obtain additional information regarding your request. Mr. Chady informed me today that a response to your request was mailed to you on May 25. Therefore, it would appear that the issue is moot.

Nevertheless, for future reference, I would like to point out that §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the re-

ceipt 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)].

Enclosed for your consideration are copies of the Freedom of Information Law and the regulations promulgated by the Committee to which reference was made in the preceding paragraphs.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Richard Chady

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2483

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 27, 1982

Mr. Norman Verbanic

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. Verbanic:

I have received your letter of May 12 in which you requested advice regarding the Freedom of Information Law.

According to your letter, you are concerned that you may have been overcharged in terms of the fees paid for photocopying records. Specifically, you indicated that you were assessed a fee of fifty cents per page by the Lackawanna City Comptroller for records sought under the Freedom of Information Law. Although you were initially advised by that office that the fee would be twenty-five cents per page, you were nonetheless charged fifty cents per page when you received the records.

I would like to offer the following comments in response to your inquiry.

First, as a general rule, the Freedom of Information Law authorizes an agency, such as the City of Lackawanna, to charge no more than twenty-five cents per photocopy, unless a different fee is prescribed by some other provision of law. Section 87(1)(b)(iii) of the Law (see attached) states that an agency must adopt procedures concerning 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".

Therefore, to reiterate, unless a provision of law other than the Freedom of Information Law permits an agency to charge more than twenty-five cents per photocopy, the agency would be restricted to charging no more than twenty-five cents per page.

It is noted, however, that the term "law" as set forth above, can include acts passed by the State Legislature as well as ordinances or local laws, for example. Consequently, if the City of Lackawanna assessed the fee of fifty cents per photocopy on the basis of an ordinance or local law, such a fee would in my view be legal. If the fee is based on policy or tradition rather than any provision of law, the maximum fee that may be charged would be twenty-five cents per photocopy. As such, it is suggested that you attempt to determine whether the fee of fifty cents per photocopy is based upon a local enactment of the City of Lackawanna.

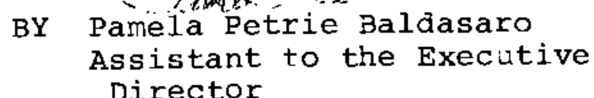
Second, you asked whether any changes in the Freedom of Information Law have occurred that would authorize a fee of fifty cents per photocopy. In this regard, the Committee has recommended legislation for several years, which, if enacted, would restrict the fees assessed by agencies to twenty-five cents per photocopy, unless a different fee is authorized by a statute, i.e. an act of the State Legislature. On May 3, 1982, Governor Carey signed into law legislation which includes such an amendment. The legislation will become effective on October 15, 1982. Therefore, after October 15, agencies will be precluded from assessing fees in excess of twenty-five cents per photocopy, unless a statute specifically so provides. I have enclosed a copy of the legislation which may be cited as Chapter 73 of the Laws of 1982.

Lastly, in order to apprise officials of the City of Lackawanna of the opinion expressed herein regarding the current and future provisions regarding fees, a copy of this opinion will be sent to the City Comptroller.

I hope 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
Enc.
cc: City Comptroller

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2484

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 28, 1982

Ms. Patricia B. Adduci
County Clerk
County of Monroe
Office of the County Clerk
County Office Building
Rochester, New York 14614

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. Adduci:

I have received your letter of May 13 in which you raised questions regarding fees that may be assessed by the Office of the Monroe County Clerk for copies of documents in its custody.

You wrote that, currently, as clerk you are charging one dollar per page for certified copies of records when your office makes the copies. Further, if a "customer" brings a paper to be certified, you charge thirty cents per page with a one dollar minimum fee. For uncertified copies, you have been charging thirty cents per page.

As you intimated, as a general rule, under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, unless a different fee is prescribed by some other provision of law. Specifically, §87(1)(b)(iii) requires that all agencies, such as Monroe County, establish rules and regulations concerning the procedural implementation of the Freedom of Information Law, including reference to:

> "...the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law."

I believe that there are several provisions of law other than the Freedom of Information Law that would be applicable to the fees that may be assessed by your office. For instance, §208(4) of the County Law makes reference to "a fee of twenty cents for each folio", as well as a fee of one dollar for a certification to the effect that records could not be found after a diligent search is made.

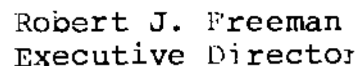
Perhaps of greater relevance would be §§8020 and 8021 of the Civil Practice Law and Rules, which deal respectively with the services and fees of county clerks acting as clerks of a court and other than as clerks of courts. I would conjecture that the fees to which you made reference in your letter are based in part upon §8020(f) of the Civil Practice Law and Rules, which in subdivision (2) states that a clerk may assess fees as follows:

> "[F]or certifying a prepared copy of any order, record or other paper entered or filed in his office, in the counties within the city of New York, four dollars, and in all other counties thirty cents a page or portion thereof, with a minimum fee of one dollar; such fee includes the certifying, when required, or any exhibit, affidavit of service or legal back annexed to such order, record or paper."

Various other fees for copying, certifying and exemplifying are found in the two cited provisions of the Civil Practice Law and Rules. It is likely in my view that a review of those statutes will provide you with the direction that you need and answers to your questions regarding 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2485

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

June 1, 1982

Donny J. Harvey
297949A
Coffield
RT. 1, Box 150
Tennessee Colony, TX 75861

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. Harvey:

I have received your letter of May 10, which reached this office on May 24.

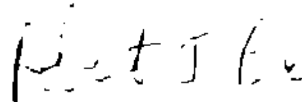
You have indicated that you are an inmate in a correctional facility in Texas and that you are interested in obtaining your "FBI rap sheet" and other records concerning you that are maintained by the Texas Department of Corrections.

Please be advised that the Committee on Public Access to Records has jurisdiction only with respect to the New York Freedom of Information Law, which includes within its scope only records of government in New York. As such, the New York Freedom of Information Law would have no application to records in possession of either a federal agency, such as the FBI, or an agency of Texas state government.

It is suggested, however, that you inquire within your facility with regard to the scope of any Texas access to records law. Further, it is possible that your rap sheet may be available to you under applicable federal regulations. In New York, the regulations of the Department of Correctional Services make specific reference to rights of access by inmates to criminal history information, which is generally viewed as the equivalent of a "rap sheet". It is possible that similar regulations may be in effect in Texas.

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 1, 1982

Mr. Alfred P. Duffy
Assistant Superintendent
Poughkeepsie City School District
11 College Avenue
Poughkeepsie, NY 12603

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. Duffy:

I have received your letter of May 13 and appreciate your interest in complying with the Freedom of Information Law.

Your first question involves a request by a citizen to review payroll records "which include gross pay, net pay, social security numbers, number of dependents, garnishees and union members information". Although the District has long provided lists of names and salaries, you have contended that the specific information that you identified need not be made available.

I am in general agreement with your contention.

In this regard, it is noted that the Freedom of Information Law contains specific direction regarding payroll information. Section 87(3)(b) of the Freedom of Information Law states that each agency, such as a school district, 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 District is required to maintain on an ongoing basis the payroll information envisioned by §87(3)(b).

With respect to the other information that you identified, 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 the disclosure of which would result in "an unwarranted invasion of personal privacy." While the scope of what constitutes an unwarranted invasion of personal privacy is open to conflicting interpretations, for often subjective judgments must of necessity be made, the courts have provided a significant amount of guidance regarding rights of access to records pertaining to public employees. In brief, it has been held that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than any other group. Further, several courts have stated in essence that records that are relevant to the performance of one's 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 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley, Sup. Ct., Wayne Cty., March 25, 1981; 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, in situations in which records are irrelevant to the performance of one's 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].

From my perspective, those aspects of the records regarding public employees involving their social security numbers, the number of dependents claimed, garnishees, and union information could likely be withheld with justification for they are likely irrelevant to the performance of the employees' duties and, therefore, disclosure of such information would in my view likely constitute an unwarranted invasion of personal privacy.

The second question raised in your letter involves a request to review paid bills and invoices. You stressed that those files contain "documents pertaining to the settlement of lawsuits and employee grievances which have been settled". You have requested an opinion regarding the "amount of access" that may be permitted with respect to those records.

In my view, the records in question are likely available in great measure, if not in toto.

There are three judicial determinations of which I am aware that may be relevant to your question. In Geneva Printing, supra, the issue involved rights of access to records containing the result of a disciplinary action against a public employee that was concluded by a settlement. It is noted that the municipality apparently entered into an agreement to the effect that the terms of the settlement would remain confidential. Notwithstanding the agreement concerning confidentiality, it was held that the terms of the settlement should be made available. As noted earlier, if records are relevant to the performance of one's official duties, it has been found that such records would if disclosed result in a permissible invasion of privacy and, therefore, should be made available. The court in Geneva Printing found that disclosure would not constitute an unwarranted invasion of personal privacy. The court also found that the record of a settlement constitutes a "final determination" made by an agency, which is accessible under §87(2)(g)(iii) of the Freedom of Information Law.

Section 87(2)(g) states that an agency may withhold records that:

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

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.

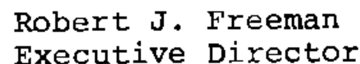
Under the circumstances, although the records in question could be characterized as "intra-agency" materials, it appears that they represent final determinations made by an agency that would be accessible.

Further, in Malman v. Supervisor and Town Board of the Town of Islip [Sup. Ct., Nassau Cty., August 20, 1981], a resolution by a town board authorizing a stipulation of settlement was also found to be available. In another decision, access was granted in approximately 1,500 grievances and the decisions rendered thereon [see United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)]. As such, it appears that the records are likely available.

Lastly, it is possible that some of the bills and invoices in question may pertain to the services provided by the District's attorney for services rendered. In this regard, 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)]. If, however, portions of the bills contain information that is confidential under the attorney-client relationship, those portions could in my view be deleted under §87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". Nevertheless, as a general rule, I believe that the bills submitted by an attorney to a client, based upon case law, fall outside the scope of the attorney-client privilege and therefore are accessible.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AD-2487

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

June 2, 1982

Ms. Katie Kemp

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. Kemp:

I have received your letter of May 18 in which you requested information regarding the means by which you may obtain copies of health records pertaining to you.

In brief, it is your contention that a denial of your health records by those who possess them would represent a violation of your constitutional, civil and human rights. It appears that you are specifically interested in gaining access to records of the New York hospital and a dentist in its dental clinic. You also wrote that you believe that a copy of dental health records pertaining to you are in possession of the New York University Dental Clinic.

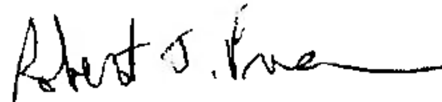
Notwithstanding your contentions, I do not believe that there is any "right" on the part of an individual to gain access to health or medical records pertaining to him or her. Further, it is emphasized that the Freedom of Information Law applies only to records of government in New York; it does not apply to private facilities, such as the New York Hospital or New York University.

There is, however, a provision in the Public Health Law which permits what might be characterized as indirect access by a patient to medical records pertaining to him or her. Specifically, §17 of the Public Health Law, a

copy of which is attached, states that a competent patient may designate the physician of his or her choice to request medical records pertaining to him or her from a hospital or another physician, which must make the records available to the physician designated by the patient. Therefore, it is suggested that you might want to discuss the matter with the physician of your choice, who could under §17 of the Public Health Law likely obtain from other physicians, clinics or hospitals medical records pertaining 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

Attachment

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

OML-AO-725
FOIL-AO-2488

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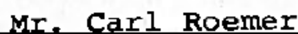
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 2, 1982



Mr. Carl Roemer

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. Roemer:

I have received your letter of May 14 and appreciate your kind words.

According to your letter, residents of the Town of Otsego have encountered difficulty in reviewing assessment records. Apparently, the records in question consist of:

> "...a set of 4 foot by 6 foot maps, a 12 inch by 20 inch tax roll, several file drawers containing property record cards, procedural manuals and various property sales records."

You have indicated further that the Town maintains a "spacious Town Hall" which is staffed by a clerk fifteen hours a week. Nevertheless, when you submitted a request for records to the Town Assessor on May 11, you were informed that they were "his records, kept in his dwelling..." and that you could make an appointment to see them. You also wrote that the Assessor cannot be reached until after six p.m., that maps were not available at his home and that the effect of the location and unavailability of the records in your view discourages access and "deprive[s] people of their right to appeal". It is your contention that the records in question should be kept in a public building whenever possible and should be "freely accessible".

I would like to offer the following comments regarding the situation that you described.

First, as you intimated in your letter, assessment records are in my view generally available under both the Freedom of Information Law and §51 of the General Municipal Law.

Second, §89(1) of the Freedom of Information Law requires the Committee to develop general rules and regulations of a procedural nature. In turn, §87(1) requires each agency, which would include the Town of Otsego, to adopt regulations consistent with those of the Committee. In this regard, §1401.2 of the Committee's regulations requires that the governing body of a public corporation, i.e., the Town Board, designate "one or more persons as records access officer". The records access officer has "the duty of coordinating agency response to public requests for access to records." As such, it is suggested that you request and obtain a copy of the rules and regulations promulgated by the Town Board under the Freedom of Information Law in order to determine who the records access officer or officers might be. Often, since a town clerk is the legal custodian of all town records (see Town Law, §30), the clerk is designated "records access officer" and would be responsible for coordinating responses to requests for town records.

Section 1401.3 of the regulations requires that each agency designate the location where records shall be available for public inspection and copying. Further, §1401.4 states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regulat business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

If it is appropriate for the records in question to remain in possession of the Assessor, I believe that the written procedure to which reference is made in §1401.4(b) should exist.

It is, however, questionable in my view whether the records should be kept at the home of the Assessor. If, for example, a public employee is currently working with particular records and must bring them to his home or place of business on a temporary basis, such activity would appear to be reasonable. However, if there is no necessity of keeping records continually or as a general rule at one's home, it would appear to be more appropriate to maintain such records in a town facility, such as the Town Hall, for example.

In a judicial determination concerning a situation that was apparently somewhat similar to that which you describes, the Supreme Court in Onondaga County ordered that:

> "...the plaintiff be allowed to view all Town records, free from harrassment by week-end appointment or during hours concurrent with current office hours now maintained by the Pompey Town Clerk. Said viewing to occur at defendant's house and defendant to inform plaintiff's attorney... of available viewing week-end hours in writing, and it is further
>
> "ORDERED, that defendant make available to the Town Clerk, by way of legible xerox copies any and all reasonably detailed records requested by the plaintiff..." [see Stemmer v. Argasto, Sup. Ct., Onondaga Cty., August 17, 1981].

As such, even though records were kept at the home of an assessor, it was ordered that they be made available and that records requested by the plaintiff be made available to the Town Clerk when photocopies were requested.

Your second area of inquiry deals with a situation in which village officials have conducted open hearings in its assessment review process. According to your letter, "[A]s a result the news media and others sat at the hearings and some of the people were afraid to appeal and some who did appeal felt they were subject to pressure from the news media because they appealed." In this regard, I direct your attention to the Open Meetings Law, which applies to public bodies.

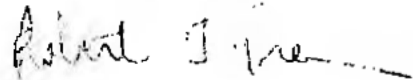
Although a board of assessment review would in my view constitute a "public body" as defined by §97(2) of the Open Meetings Law, it has been advised that the proceedings that you described are exempt from the Open Meetings Law.

Section 103 of the Open Meetings Law exempts from the provisions of the Law judicial or "quasi-judicial" proceedings. Based upon discussions with officials of the Division of Equalization and Assessment, I believe that the hearings in question are quasi-judicial and therefore exempt from the Open Meetings Law. Since the Open Meetings Law is not applicable, the hearings may in my view be closed. It is important to note, however, that there is no provision of which I am aware that would require that the hearings be closed. Therefore, while the proceedings in question need not be open to the public, there is no requirement that they be closed.

Enclosed for your consideration are copies of an explanatory pamphlet dealing with the Freedom of Information and Open Meetings Law and an advisory opinion prepared in February by this office that deals with several of the issues that you raised regarding assessment 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.
cc: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2489

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 3, 1982

Mr. John Stone 82-A-1575
Downstate Separation Center
Red Schoolhouse Road
Box 445
Fishkill, NY 12524
3 B 12

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. Stone:

I have received your letter of May 20 which was addressed to Ms. Baldasaro of this office.

According to your letter, you unsuccessfully applied for a "master index card" regarding yourself from the Department of Correctional Services. Apparently you were advised that no such card exists.

In this regard, I would conjecture that you were referring to the "subject matter list" required to be compiled by agencies subject to the Freedom of Information Law under §87(3)(c) of the Law. Please note, however, that the subject matter list would not be created in such a manner that it identifies particular records pertaining to specific individuals; on the contrary, a subject matter list is required to indicate in reasonable detail by subject matter the types of records in possession of an agency. As such, a subject matter list would not refer to specific records of a particular individual but rather records of an agency generally. Further, the rules and regulations promulgated by the Department of Correctional Services refer to its subject matter list. Specifically, §5.13 of the regulations states that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in his possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.
>
> (b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.
>
> (c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered".

In view of the language quoted above, it is suggested that you might want to reconsider or perhaps resubmit a new request to the records access officer. It is noted that the records access officer is identified in the regulations, a copy of which has been attached.

You also indicated that you are interested in obtaining records from the Board of Education and Bureau of Child Welfare in New York City. In this regard, for the Board of Education, it is suggested that a request be submitted to the Records Access Officer, New York City Board of Education, 110 Livingston Street, Brooklyn, New York 11201. Although I am not familiar with the specific agency in which the Bureau of Child Welfare is housed, I would guess that it is a part of the Human Resources Administration, which is located at 250 Church Street, New York, NY 10013.

I hope that 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-2490

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 3, 1982

Kathy Hallinan Homestead
Personnel Officer
County of Onondaga
Department of Personnel
105 County Office Building
Syracuse, New York 13202

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. Homestead:

I have received your letter of May 13, 1982 in which you requested an advisory opinion with respect to rights of access to records of county management evaluation systems.

I would like to offer the following comments in response to the three areas of inquiry outlined in your correspondence.

It is noted at the outset that rights of access to government records are generally determined by the Freedom of Information Law (see attached). 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 thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

In my view, there are likely two grounds for denial of potential relevance.

One ground for denial that may be relevant to the records in question is §87(2)(b) of the Freedom of Information Law, which 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 relative to records that identify public employees. For instance, it has been held in various contexts 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); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; 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 that are irrelevant to the performance of a public employee's official duties may justifiably be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial that might be applicable to records you described is §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 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. To the extent that inter-agency or intra-agency materials consist of advice, recommendation, suggestion and the like, they would fall within the scope of the exception to rights of access and therefore could be withheld. Further, since the records in question would likely be developed within the county government, it appears that all of them could be characterized as "inter-agency or intra-agency materials".

With respect to evaluations which are, in my view, based on judicial interpretations of the Freedom of Information Law, the privacy provisions discussed earlier could not likely be cited as a basis for withholding evaluations, for the evaluations are relevant to the performance of the official duties of a county department head or program manager. However, they might justifiably be withheld under §87(2)(g) if they are essentially advisory in nature and used to assist a supervisor in reaching a decision. In such circumstances, evaluations would not constitute final determinations, for their contents might be accepted or rejected by a decision-maker. If that is so, they could likely be withheld under such conditions [see McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd with no opinion)].

To reiterate, if an evaluation is advisory in nature and contains no statistical or factual information, instructions to staff that affect the public or could not be considered a statement of policy or final agency determination, it would in my opinion be deniable.

With respect to the specific areas that you mentioned, I believe that rights of access may be determined only by review of specific language. For instance, is a "goal statement" merely advisory to an individual, or is it an "instruction to staff that affects the public" or a statement of policy that would be available? Would the accomplishment of goals be viewed subjectively or in some substantive,statistical fashion? If statistics or other specific measurements are devised, that type of information would in my view likely be available. Would the accom-

plishment of goals result in extra compensation? In my view, if an individual is awarded extra compensation, the record of that compensation would clearly be available. With regard to the performance standards that you cited, would a statement of one's "task" be comparable to a job description or, again, an instruction to staff that affects the public? If so, I believe that it would be available. If the ratings of "outstanding, acceptable or unacceptable" are based solely upon increases or decreases in administrative costs or budget allocations, it would appear that all the information could be considered statistical or factual and therefore would be available.

In short, it appears that the key provision in relation to the questions is §87(2)(g), which was discussed in some detail earlier. Under the circumstances, I do not believe that more specific advice could be provided, for you have much greater familiarity with the types of information in question and their usage than I.

Lastly, you have inquired as to whether I am aware of any state agency that has received requests for managerial performance evaluations. Although I have no personal knowledge of such requests, the type of responses would most likely be as variable as the agencies' perceptions of §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

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Ken Mackintosh

Attachment

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2491

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 4, 1982

Steven G. Dworsky, Legislator
District #1 - City of Troy
Rensselaer County Legislature
85 23rd Street
Troy, New York 12180

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. Dworsky:

I have received your letters of May 19 and 20, as well as the correspondence attached to them.

You have requested an advisory opinion "as to whether a member of the Rensselaer County Legislature has the right to use the Freedom of Information Law, as a representative of the people in seeking to acquire records". You noted also that in your view, none of the records that you have requested "are considered deniable under the Freedom of Information Law".

I would like to offer the following comments regarding your inquiry.

In terms of background, an advisory opinion was prepared at your request on April 26 concerning questions you raised regarding a requirement that you must pay fees for copies of records requested in the performance of your official duties and a procedure applicable to county legislators who request records.

It would appear that your most recent letter is related, for it involves your capacity to use the Freedom of Information Law, even though you may be a member of the Rensselaer County Legislature.

From my perspective, the Freedom of Information Law does not distinguish among applicants for records. The focal point of the Law in my view is §87(2), which states, in brief, that each agency, such as a county, shall "make available for public inspection and copying all records" except "records or portions thereof" that fall within one or more among eight ensuing grounds for denial. The language of §87(2) contains no restriction upon who may invoke its provisions or rights conferred upon the public. Further, other aspects of the Law refer to a "person" requesting records [see §89(3)] and the fact that "any person" may appeal a denial of access to a record [see §89(4)].

Moreover, in one of the initial judicial determinations rendered under the Freedom of Information Law, the Appellate Division, Fourth Department, in Burke v. Yudelson (368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 3d 165) cited and upheld a resolution promulgated by the Committee in which it was suggested that accessible records should be made equally available to "any person, without regard to status or interest".

Therefore, based upon the specific language of the Freedom of Information Law as well as its judicial interpretation, it is my view that any person, including a member of a county legislature, has the right to use the Freedom of Information Law.

Lastly, as stated earlier, it appears that your question has arisen due to the procedures to which reference was made in an earlier opinion. In this regard, there is another judicial determination that may be relevant. Zuckerman v. NYS Board of Parole (368 NYS 2d 811, 53 AD 2d 405) involved the scope of regulations promulgated by a state agency which apparently required confidentiality of a certain class of records. In holding that the regulations were overbroad, the Appellate Division, Third Department, stated that:

> "It is established as a general proposition that a regulation cannot be inconsistent with a statutory scheme (see, e.g., Matter of Broadacres Skilled Nursing Facility v. Ingraham, 51 A.D. 2d 243, 245-46, 381 N.Y.S. 2d 131, 133-134) and the statute involved here specifically states that exemptions can only be controlled by other statutes, not by regulations

> which go beyond the scope of specific statutory language (Public Officers Law, §88, subd. 7, par. [a]). This conclusion is further reinforced by the general rule that public disclosure laws are to be liberally construed (Cuneo v. Schlesinger, 157 U.S. App.D.C. 368, 484 F.2d 1086, cert. den. 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873; Matter of Burke v. Yudelson, 81 Misc.2d 870, 368 N.Y.S.2d 779) and that statutory exemption from disclosure must be narrowly construed to allow maximum access (Vaughn v. Rosen, 157 U.S. App.D.C. 340, 484 F.2d 820, cert. den. 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873; see Public Officers Law, §85)(id. at 813)".

Although your question does not involve "confidentiality", the language quoted above in my opinion merely reinforces the specific language of the Freedom of Information Law and the general rule that disclosure laws should be liberally construed.

I hope that 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: Rensselaer County Legislature

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2492

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

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MARCELLA MAXWELL
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 7, 1982

James Hill
81 A 4289
Box 51
Comstock, NY 12821

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. Hill:

I have received your letter of June 2 in which you requested information concerning your capacity to gain access to your parole file.

Without greater knowledge of the nature of the records in which you are interested or whether or not you are involved in a hearing, it is difficult to provide specific direction.

Nevertheless, I would like to offer the following comments.

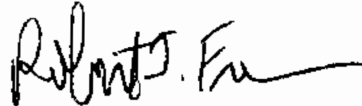
First, any request to an agency, such as the Division of Parole, should be made in writing. Further, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". As such, when making a request, it is suggested that you include as much detail as possible, including names, dates, file designations, index numbers and similar information that would enable agency officials to locate the records sought.

Second, enclosed for your consideration are several documents that may be useful to you. They include the Freedom of Information Law, an explanatory pamphlet that

contains sample letters of request and appeal, and various aspects of regulations promulgated by the New York State Division of Parole. It is noted that §8008.5 makes specific reference to case records and that §8008.3 provides the address to which you may send requests made under the Freedom of Information Law. The regulations enclosed include Part 8005 and 8008 of the regulations of 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

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2493

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

COMMITTEE MEMBERS

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. MARK LAWTON
MARCELLA MAXWELL
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 4, 1982

James Thomas
78-A-3550
P.O. 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. Thomas:

I have received your recent letter in which you requested assistance in gaining access to various records.

Among the records in which you are interested are judicial decisions, papers apparently in possession of various courts and other agencies, as well as specific provisions of the New York Code of Rules and Regulations promulgated by the Department of Correctional Services.

Enclosed for your consideration are copies of the regulations that you requested. It is noted that the records sent to you include not only the specific provisions that you cited, but each aspect of the regulations promulgated by the Department of Correctional Services concerning access to records. As such, the regulations include 7 NYCRR §5.1 through 5.54.

With respect to your request for other records, it is emphasized that the Committee is responsible for providing advice with respect to the Freedom of Information Law. This office does not have custody of records, such as those in which you are interested, nor does it have the authority to compel any unit of government to make records available.

Further, the Freedom of Information Law excludes from its coverage the courts and court records. The definition of "agency" appearing in §86(3) specifically excludes the "judiciary", which is defined in §86(1) (see attached, Freedom of Information Law). As such, the Freedom of Information Law is not applicable to court records.

There are, however, various provisions of law applicable to court records that might be relevant. One such general provision is §255 of the Judiciary Law, a copy of which has been attached. In making a request for court records, since a court clerk is generally the custodian of such records, it is suggested that requests be directed to the clerk of a court that you believe maintains the records sought. A request should include as much specificity as possible, such as reference to names, dates, docket and indictment numbers, and similar information that will enable a clerk to locate the records.

With regard to records of agencies subject to the Freedom of Information Law, requests for records should be sent directly to the agencies that maintain the records. It is noted that §89(3) of the Freedom of Information Law requires that an applicant for records "reasonably describe" the records sought. Therefore, again, as much specificity as possible should be provided in making a request.

Lastly, enclosed for your consideration is a copy of 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.

I hope that 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-2494

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 7, 1982

A.J. Kirsch

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. Kirsch:

I have received your note of May 20.

Apparently you have encountered difficulties in obtaining various types of records. In particular, it appears that you have tried to obtain court records pertining to yourself, but that you have not received responses to your inquiries.

Since I am not familiar with the nature of the records you are seeking, I would like to make the following general observations in response to your correspondence.

It is noted initially that the Freedom of Information Law pertains to records in possession of agencies of government in New York State. In this regard, §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".

Please note that the definition quoted above specifically excludes the "judiciary" from the Law.

There are, however, various provisions of law applicable to court records that might be relevant. One such general provision is §255 of the Judiciary Law, a copy of which has been attached. In making a request for court records, since a court clerk is generally the custodian of such records, it is suggested that requests be directed to the clerk of a court that you believe maintains the records sought. A request should include as much specificity as possible, such as reference to names, dates, docket and indictment numbers, and similar information that will enable a clerk to locate the records.

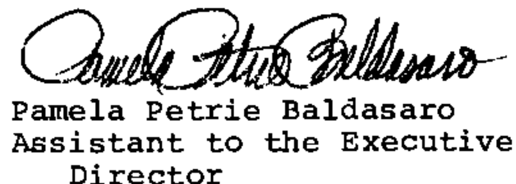
With regard to records of agencies subject to the Freedom of Information Law, requests for records should be sent directly to the agencies that maintain the records. It is noted that §89(3) of the Freedom of Information Law requires that an applicant for records "reasonably describe" the records sought. Therefore, again, as much specificity as possible should be provided in making a request.

Lastly, enclosed for your consideration is a copy of 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.

I hope 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2495

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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COMMITTEE MEMBERS

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 7, 1982

Adrienne Millstein

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 May 21 in which you requested that this office "intervene" with respect to your unsuccessful attempts to gain access to records from the New York City Board of Education.

In terms of background, you wrote that you submitted a request for records to the Board of Education initially on July 23, 1979. Apparently, no response had been received for nearly three years. As such, you resubmitted your requests on February 23, 1982. In response to those requests, you received a letter indicating that a response could be anticipated on May 17. As yet, however, you have not been granted or denied access to the records sought.

I would like to offer the following comments regarding your situation.

First, although copies of this response will be sent to the appropriate officials of the Board of Education, the Committee on Public Access to Records has no authority to compel compliance with the Freedom of Information Law or otherwise require an agency to make records available.

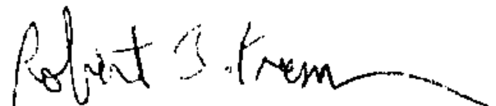
Second, as I pointed out to you in my letter of December 18, 1981, the Freedom of Information Law and the regulations promulgated by the Committee contain specific

direction regarding the time limits for responses to requests. Under the circumstances, I believe that you may consider yourself to have been constructively denied access and that, therefore, you may appeal the denial to the Board's appeals officer.

Further, there is a judicial determination which indicates that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required by §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)]. Consequently, if, for example, you receive no response to an appeal within seven business days of the receipt of the appeal by the Board's designated appeals officer as required by §89(4)(a) of the Freedom of Information Law, I believe that you may initiate 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: Ruth Bernstein, Records Access Officer
Appeals Committee, Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2496

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 8, 1982

Alan Berman
Deputy Town Attorney
Office of Town Attorney
Town of Ramapo
237 Route 59
Suffern, NY 10901

<u>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.</u>

Dear Mr. Berman:

I have received your letter of May 24 and appreciate your interest in complying with the Freedom of Information Law.

According to your letter, questions have arisen regarding §89(2)(b)(iii) of the Freedom of Information Law in relation to requests for copies of individual building permits sought "for the purpose of obtaining commercial leads". You have asked whether an applicant can receive copies of individual business permits for commercial purposes. Further, in a related vein, you asked whether an individual may request all building permits issued within a given month, or whether that person must request copies of "specific building permits".

I would like to offer the following comments regarding your inquiry.

In terms of background, §89(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". Further, §87(2)(b) refers to provisions found in §89(2) of the Law.

In conjunction with your questions, §89(2)(b) lists five examples of unwarranted invasions of personal privacy. One of those examples 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..." [see §89(2)(b)(iii)].

Questions similar to those appearing in your letter have arisen in the Department of State, in which the Committee is housed, for the Department licenses various occupations. Although lists of names and addresses are generally withheld when the lists are requested for commercial or fund-raising purposes, requests for individual licenses are granted, even when applicants for licenses could essentially prepare their own lists from the individual licenses.

Further, I believe that permits or licenses have long been available to the public as a general rule. From my perspective, a license is, by and large, intended to let the public know that a particular individual is qualified to engage in a particular regulated profession. Similarly, I believe that a permit is intended to ensure that certain construction and other community standards have been met. Therefore, again, I believe that requests for individual permits, rather than lists of names and addresses of license or permit holders, should be made available.

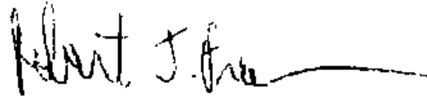
Lastly, you asked whether an applicant may request building permits issued "for the past month", or whether he must request copies of "specific building permits".

In this regard, it is emphasized that the original Freedom of Information Law enacted in 1974 required an applicant for records to request "identifiable" records [see original Freedom of Information Law, §88(6)]. However, one among a series of amendments to the Freedom of Information Law that became effective on January 1, 1978, altered that standard. Currently, §89(3) states that an applicant for records must submit a request for records "reasonably described". In my view, the current standard

is more reasonable and realistic than the former, for without knowledge of the contents of particular records, an applicant often had no capacity to seek "identifiable" records. As such, it is my view that an applicant need not request "specific" building permits, but rather may request and obtain copies of building permits issued during a particular time period.

I hope that 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-2497

162 WASHINGTON AVENUE, ALBANY, NEW YORK 1223[illegible]
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 8, 1982

Michael Hajovsky

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. Hajovsky:

I have received your letter of May 24 addressed to Gilbert P. Smith, Chairman of the Committee, as well as the correspondence attached to it. Please be advised that the staff of the Committee generally responds to inquiries.

According to your letter, you submitted a request to Commissioner Ameruso of the New York City Department of Transportation for various records on April 16. It is unclear whether there was no response to your request or whether the Department denied the records in writing. You have indicated that you have a "valid meed for these documents in connection with a written agreement with the City of New York". As such, you have requested a "ruling" regarding your rights of access to the documents identified in your request to the Department of Transportation.

I would like to offer the following comments regarding your situation.

First, it is noted that the Committee is authorized to provide advice with respect to the Freedom of Information Law. The Committee has no authority to issue what might be characterized as a "ruling".

Second, the Freedom of Information Law is generally based upon a "right to know" rather than a "need to know". Stated differently, if a record is accessible under the Law,

it should be made 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). Moreover, notwithstanding need, if a record may justifiably be withheld under one or more among the eight grounds for denial listed in §87(2) of the Freedom of Information Law (see attached), a "need to know" would likely be irrelevent.

Third, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general rules and regulations regarding the procedural aspects of the Freedom of Information Law. In turn, §87(1) of the Law requires each agency, such as the City of New York and its component agencies, to develop similar regulations consistent with those adopted by the Committee. In this regard, §1401.2 of the regulations promulgated by the Committee (see attached) requires the designation of one or more "records access officers" who are responsible for dealing initially with requests made under the Freedom of Information Law.

Your letter of request of April 16 was directed to the Commissioner of the Department of Transportation. Since a denial by a records access officer may be appealed to the head of the agency or the person designated by the head of the agency [see Freedom of Information Law, §89 (4)(a)], I would conjecture that the Commissioner is not the records access officer. If you have not received a response to your request, it might be worthwhile to submit a new request to the "records access officer" at the Department of Transportation. I have enclosed for your consideration an explanatory pamphlet which contains sample letters of request and appeal that may be useful to you.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of 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)].

Lastly, having reviewed your request to Commissioner Ameruso, it would be impossible to provide specific advice regarding rights of access to the records in which you are interested. As noted earlier, §87(2) lists eight grounds for withholding records. In this regard, it is likely that one or more of the exceptions would be relevant to the records in which you are interested. For example, §87(2)(c) states that an agency may withhold records or portions thereof which if disclosed would impair present or imminent contract awards or collective bargaining negotiations. I have no knowledge as to whether contracts are being negotiated. If that is the case, it is possible that §87(2)(c) would be applicable in part.

Another potentially relevant ground for denial is §87(2)(g), which states that an agency may withhold records that:

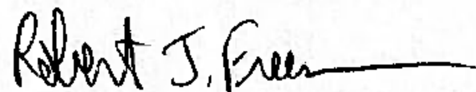
> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

Once again, it is possible that some of the records that you are seeking consist of materials submitted among or between officials of the Department of Transportation or other agencies. If that is so, §87(2)(g) would be relevant.

In short, I regret that I cannot provide more specific advice regarding rights of access to the records sought at this juncture.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Records Access Officer, Department of Transportation

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2498

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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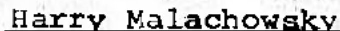
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 8, 1982

Harry Malachowsky


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. Malachowsky:

I have received your letter of May 26, in which you requested advice regarding the use of the Freedom of Information Law.

Specifically, according to your letter, you have for several months unsuccessfully sought to obtain the voting record of your state senator. Although various officials have been contacted, no responses have been forthcoming.

I would like to offer the following comments regarding your inquiry.

First, although records of the State Legislature are treated differently under the Freedom of Information Law from the records of agencies of government generally, §88(3) requires that each house of the State Legislature including the Senate:

> "...shall maintain and make available for public inspection and copying:
>
> (a) a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes..."

As such, in every instance in which the Senate votes, a record must be prepared which indicates the manner in which each senator voted.

Second, I have made several calls on your behalf and found that the records in which you are interested are in possession of and can be made available by the Secretary of the Senate. As such, it is suggested that you submit your request in writing to Mr. Stephen F. Sloan, Secretary of the Senate, Room 321, The Capitol, Albany, NY 12247.

Further, in submitting your request, it is recommended that you supply as much specificity as possible, including the name of the senator, the time periods of the votes in which you are interested, specific areas of concern and similar information that will enable Mr. Sloan's office to locate and identify the records sought. I have also been informed that the Senate charges ten cents per photocopy, which is billed to you following the receipt 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2499

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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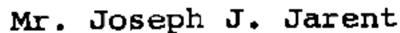
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 8, 1982

Mr. Joseph J. Jarent


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. Jarent:

I have received your letter of May 21 in which you requested advice under the Freedom of Information Law.

Apparently you have requested records containing "specific medical information" regarding yourself from the Board for Professional Medical Conduct. However, having made several inquires to that office, you have received no response to date. Therefore, you asked whether or not the State Board for Professional Medical Conduct (Board) is subject to the Freedom of Information Law.

First, although the Board operates under broad confidentiality requirements that will be discussed later, I believe that it is 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 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 Board is a "governmental entity" performing a "governmental function", it is in my view an "agency" that falls within the scope of the Freedom of Information 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, reports and patient records of any committee remain confidential, unless specific direction is given to the contrary.

In addition, the Court of Appeals has held that records in possession of the Board, including medical records and patient interviews, are confidential and must be withheld under §87(2)(a) of the Freedom of Information Law as well as Article 31 of the Civil Practice Law and Rules [see John P. v. Whalen, 75 AD 2d 1021 (1980); aff'd 54 NY 2d 89 (1981)].

Third, even though records may be withheld under the Freedom of Information Law, agencies must nonetheless in my opinion respond to requests within the time limits specified in the Freedom of Information Law and the regulations promulgated by the Committee.

In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of

three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

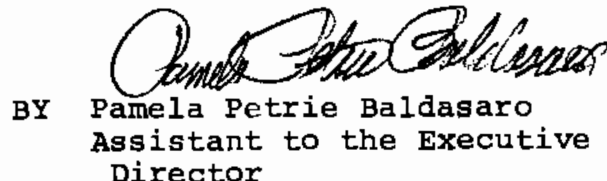
In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Lastly, I appreciate your having sent a copy of an article appearing in Newsday regarding the recent amendment of the Freedom of Information Law. An aspect of the legislation that was not mentioned involves a provision that will limit fees for photocopying to twenty-five cents per photocopy, unless a different fee is authorized by statute. In addition, 1981 amendments were enacted regarding the treatment of trade secrets by state agencies. In this regard, I have enclosed copies of the legislation recently signed by the Governor, which will become effective on October 15, the current version of the Freedom of Information Law, which includes the provisions regarding trade secrets, and a memorandum to state agencies pertaining to the new language dealing with trade secrets.

I hope 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.
cc: Board for Professional Medical Conduct

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2500

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 8, 1982

Mr. John P. O'Connor
O'Connor Investigation Service Inc.
6 Elm Tree Place
Stamford, CT 06906

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'Connor:

I have received your letter of May 27 in which you raised questions regarding a denial of access to records.

Specifically, according to your letter, on February 22, you requested permission to view a birth index file maintained by the New York City Department of Health. You indicated further that the information "is required in a divorce action". In response to your request, the records access officer for the Department of Health advised you that disclosure would constitute an unwarranted invasion of personal privacy under §89 of the Freedom of Information Law. The access officer also cited §3.27(e)(4) of the New York City Health Code which permits disclosure "when good cause is shown".

You have asked for advice regarding whether you provided "good cause", as well as examples of "good cause".

I would like to offer the following comments regarding your inquiry.

First, access to the records in question is not likely governed by the Freedom of Information Law. Access to such records is generally governed by the provisions of the Public Health Law, §4174, and the Administrative Code of the City of New York. In all honesty, I do not have in our library a copy of the provisions of the Health Code to which you made reference.

Nevertheless, I would like to point out that §4174 of the Public Health Law refers to the capacity of the State Health Commissioner to provide copies of vital records, "unless he is satisfied that the same does not appear to be necessary or required for judicial or other proper purposes..." Similarly, §576-4.0 of the Administrative Code of the City of New York refers in subdivision (1) to certified copies of records of birth, which would be available only under specified circumstances, and in subdivision (2) states that:

> "[U]pon request in all other cases, a certification of birth shall be issued by the department unless it does not appear to be necessary or required for a proper purpose. A certification of birth shall contain only the name, sex, date of birth and place of birth and date of filing in the department of the original certificate of birth of the person to whom it relates, and if upon request by, or on behalf of the person to whom it relates, or by a parent or legal representative of such person, the name or names of the parent or parents listed on the original certificate of birth, and none of the other data on the record of birth."

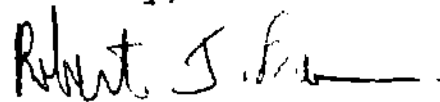
In view of the provisions of both the Public Health Law and the Administrative Code, birth records generally need not in my view be made available unless such records are requested for a "proper purpose". The phrase "good cause" as indicated in your letter does not appear in either of the cited provisions. However, it appears to be somewhat similar to the "proper purpose" standard.

With respect to your question concerning whether you provided "good cause", since the Committee lacks jurisdiction regarding the records in question and has no judicial or quasi-judicial authority, I could not conjecture as to the sufficiency of your request. Further, due to the dearth of case law on the subject, it would be inappropriate to conjecture as to what constitutes "good cause". You might want to contact the Bureau of Vital Records at the State Health Department in order to request general information and guidance regarding what might constitute a "proper purpose". The address for that office is:

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

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-780
FOIL-AO-2501

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 9, 1982

Mr. David M. Dutko
Assistant Corporation Counsel
Office of the Corporation Counsel
City of Binghamton
City Hall - Governmental Plaza
Binghamton, New York 13901

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. Dutko:

I have received your letter of May 27 and appreciate your interest in complying with the Freedom of Information and Open Meetings Laws.

Your inquiry concerns an intent on the part of the City of Binghamton to establish a local development corporation. The corporation would be formed under §1411 of the Not-for-Profit Corporation Law, and your question is whether the activities of the Binghamton Local Development Corporation would be subject to either the Freedom of Information Law or the Open Meetings Law. You have intimated that the corporation would not seem to fall within the definition of "agency" appearing in §86(3) of the Freedom of Information Law or the definition of "public body" found in §97(2) of the Open Meetings 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 is possible that such corporations are subject to the provisions of the Freedom of Information Law. Further, they would in my view likely fall within the scope of the Open Meetings Law.

Section 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 Binghamton.

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 might perform 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. Nevertheless, the status of a local development corporation under the Freedom of Information Law in my view remains open to question and judicial review.

With respect to the Open Meetings Law, I believe that the meetings of the board of a local development corporation would be subject to that statute, for the definition of "public body" appearing in §97(2) of the Open Meetings Law is not in my opinion as restrictive as the definition of "agency" in the Freedom of Information Law.

"Public body" is defined to include:

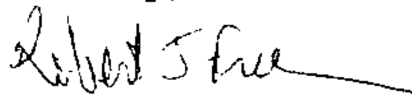
> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction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

By breaking the definition into its components, I believe that each condition necessary to a finding that a local development corporation is a "public body" may be met. A local development corporation is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. Its board consists of more than two members. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, it appears that a local development board conducts public business and performs a governmental function for a public corporation, in this instance, the City of Binghamton.

In view of the foregoing, while it is not completely clear that the records of a local development corporation are subject to the Freedom of Information Law, its meetings would in my view likely fall within the scope 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2502

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 9, 1982

Ronald Mastrovincenzo
74-A-323
Box B
Dannemora, NY 12929
H-6-12

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. Mastrovincenzo:

I have received your letter of May 29, which reached this office on June 9.

According to your letter, you are currently confined at the Clinton Correctional Facility. In this regard, you have requested from this office copies of documents, papers, and articles which pertain to your violation of parole 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. Further, the Committee has no authority to require an agency, such as the Department of Correctional Services or the Division of Parole, to make records available. As such, requests should be directed to the agencies that have possession of the records.

Nevertheless, I would like to offer the following comments and suggestions.

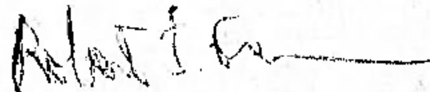
First, §89(1) of the Freedom of Information Law requires that the Committee promulgate general regulations concerning the procedural implementation of the Freedom of Information Law. In turn, §87(1) of the Law requires that each agency adopt its own regulations consistent with those of the Committee.

Second, in order to assist you in submitting requests to the agencies that maintain custody of the records that you are seeking, I have enclosed various regulations. Specifically, enclosed are §§5.1 through 5.54 of the rules and regulations promulgated by the Department of Correctional Services regarding access to the Department's records. It is noted that §§5.20 through 5.25 refer specifically to inmate records. Also enclosed are copies of §§8005 through 8008 of the regulations promulgated by the Division of Parole. Those regulations pertain to revocation hearings, appeals, discharge from parole or conditional release, and access to records of the Division.

Lastly, it is noted that §89(3) of the Freedom of Information Law requires that an applicant for records must request records "reasonably described". Therefore, when submitting a request to the designated records access officer of an agency, as much specificity as possible should be provided, including names, dates, identification, index and docket numbers and similar information that will enable a records access officer to locate the records sought. I would also like to point out that agencies may generally charge up to twenty-five cents per photocopy for records made available under the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-781
FOIL-AO-2503

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 9, 1982

Mr. Charles Greenberg

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 letter of May 28 as well as the materials attached to it. Your letter concerns the status of the Baldwin Educational Assembly (BEA) under the Freedom of Information and Open Meetings Laws. In this regard, you have requested a "determination" regarding the applicability of those laws to the BEA.

I would like to offer the following comments regarding your inquiry.

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 and Open Meetings Laws. As such, the Committee has no authority to render what might be characterized as a "determination" of a judicial or quasi-judicial nature.

In my view, however, which is based upon a review of the by-laws of the BEA, that group is subject to both the Freedom of Information and Open Meetings Laws.

With respect to the Open Meetings Law, I believe that the issue is whether the BEA is a "public body".

In terms of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in §97(2) of the Open Meetings Law. Perhaps the leading case on the subject involved a situation in which a school board designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that the advisory committees in question which had no capacity to take final action fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body".

Due to the determination rendered in Daily Gazette supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §97(2) 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."

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies."

In view of the amendments to the definition of "public body", I believe that virtually any entity designated or created to serve as a body by a school board or any public body would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Moreover, a review of the definition of "public body" in terms of its components in my opinion leads to the conclusion that it is subject to the Open Meetings Law. Specifically, the BEA is an entity consisting of more than two members. It conducts its business by means of a quorum [see by-laws, Article XI(E)]. Further, in view of its duties, I believe that the BEA conducts public business and performs a governmental function for a public corporation, in this instance, a school district.

For the reasons expressed above, the BEA is in my view a "public body" subject to the Open Meetings Law.

Similarly, it appears that the records generated by or in possession of the BEA are subject to the Freedom of Information Law. In this regard, §86(3) of the Freedom of Information 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."

From my perspective, since the BEA and its membership are designated by the Board of Education, it would be a "municipal...committee" that falls with in the scope of the definition of "agency".

As you pointed out, Article IX(C) of the by-laws concerning standing committees states that:

> "[A]ll information presented within a committee or sub-committee meeting shall be treated as confidential by the committee members."

Assuming that the BEA and its records are subject to the Freedom of Information Law, the language quoted above in my view would conflict with and fail to comply with the requirements of that statute. I am not suggesting that all records of the BEA are accessible, but rather that they are subject to whatever rights of access or grounds for denial that might exist under the Freedom of Information Law.

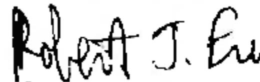
As a general rule, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

As such, I believe that requests for records of the BEA should be accorded the same treatment as requests that may be directed to the District under the Freedom of Information Law.

Enclosed for your consideration are copies of the Freedom of Information and Open Meetings Laws, as well as an explanatory pamphlet pertaining to 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: Lawrence Reich
School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-782
FOIL-AO-2504

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

June 9, 1982

Mr. Louis J. Fascia
Fascia Floors
8 Central Avenue
Mechanicville, NY 12118

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. Fascia:

I have received your letter of May 27 as well as the materials attached to it.

According to the materials, you water bill was adjusted some time ago. In response to your questions concerning the adjustment, you were informed that it was determined at a meeting of the Mechanicville City Council. However, having requested minutes containing the decision to adjust your water rates, you were informed that no minutes make reference to the adjustment.

Consequently, you have requested a "ruling" from this office concerning whether there can be a "council decision at either a public meeting or an executive session on a tax matter without some kind of a record taken."

I would like to offer the following comments regarding your inquiry.

First, it is emphasized that the Committee on Public Access to Records has no authority to issue what could be characterized as a "ruling". On the contrary, the Committee is authorized to provide advice under the Freedom of Information Law [see attached, Freedom of Information Law, §89(1)] and the Open Meetings Law [see attached, §104].

Second, if indeed a public body, such as a city council, renders a decision with respect to a particular issue, reference to that decision must in my view be contained in minutes of a meeting. In this regard, I direct your attention to §101 of the Open Meetings Law which states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. 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; 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."

Based upon the provisions quoted above, action taken by a public body, whether during an open meeting or an executive session, must be referenced in minutes.

Third, to the extent that minutes exist, they would in my view be accessible under the Freedom of Information Law. As stated in subdivision (3) of §101 of the Open Meetings Law:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Moreover, since a decision to alter a water rate would be reflective of a "final determination", I believe that it would be accessible under §87(2)(g)(iii) of the Freedom of Information Law.

Lastly, I would conjecture that it is possible that the absence of reference to a decision regarding your water rate should be considered in conjunction with general practices of the city government. For instance, if decisions were made with respect to a series of taxpayers and their water rates, it is possible that minutes might not contain reference to the alteration of a single taxpayer's rate.

Further, often governing bodies, such as a city council, delegate certain powers or authority to other bodies or individuals. In this regard, if such authority has been delegated by the City Council to a particular city employee, it is in my view likely that minutes would not contain specific reference to a change in your water rate.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosures

cc: City Council

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2505

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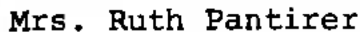
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 10, 1982

Mrs. Ruth Pantirer



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 Mrs. Pantirer:

I have received your letter of June 1 in which you requested advice regarding your unsuccessful attempts to obtain rent guidelines regarding your apartment.

You have indicated in your letter that you have been unable to obtain rent guidelines from a number of state agencies and offices identified in your letter. In this regard, I would conjecture that none of the agencies or offices that you mentioned maintain possession of the guidelines in which you are interested. Further, unless I am mistaken, the rent guidelines that you are seeking are developed by and in possession of a New York City agency.

Specifically, it is suggested that you direct a request for the guidelines to the New York City Department of Housing Preservation and Development. In this regard, I believe that the person designated to respond to requests made under the Freedom of Information Law, the records access officer for the Department, is Alfred Schmidt. As such, it is recommended that you should address your request to:

Alfred Schmidt
Records Access Officer
New York City Department of Housing
Preservation and Development
100 Gold Street - Rm. 9097
New York, NY 10038

As you may be aware, §89(3) of the Freedom of Information Law requires that an applicant for records submit a request in writing for records "reasonably described". Therefore, when making a request, it is suggested that you provide as much specificity as possible, including dates, locations, the type of apartment and similar information that will enable the records access officer to locate the records sought. I would also like to point out that the Department may charge a fee of up to twenty-five cents per photocopy for records.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations governing the procedural implementation 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2506

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 10, 1982

Mr. Ronald Benson
#77-A-2904
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. Benson:

I have received your letter of May 24 in which you requested advice regarding the Freedom of Information Law.

According to your letter, you have encountered difficulty in obtaining various records. Apparently, you are seeking records pertaining to your arrest and subsequent conviction.

First, records in possession of agencies of New York State government are subject to the provisions of the New York Freedom of Information Law, a copy of which is attached. The statute that you cited, 5 U.S.C. §552, applies only to records in possession of federal agencies. As such, the federal Freedom of Information Act is not applicable to records in possession of the New York law enforcement agencies you contacted.

Second, the scope of the Freedom of Information Law is determined in part by the definition of "agency" appearing in §86(3) of the Law. That definition specifically excludes the "judiciary", which is defined in §86(1) to mean the courts. Consequently, some of the records you are seeking may be in possession of the court in which you were convicted. In this regard, §255 of the Judiciary Law,

a copy of which is attached, provides substantial rights of access to records in possession of a court clerk. It is suggested that you submit a request to the clerk of the court that you believe has possession of records you are seeking.

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as law enforcement agencies, 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.

Fourth, in my view, there are several grounds for denial that may be relevant to the records you are seeking. 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 most of the records you are seeking appear to have been created or compiled for law enforcement purposes, it is in my view questionable whether disclosure at this juncture could interfere with an investigation or deprive a person of a right to a fair trial. It is possible, however, that such record might contain information regarding a confidential informant or unusual criminal investigative techniques or procedures, for instance. If that is the case, portions of those records could likely be withheld.

Fifth, 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.

Sixth, of possible relevance to your inquiry 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, to the extent that the records you are seeking, i.e., police reports, contain advice, opinion or recommendation they may be withhold either in whole or in part if the contents did not fall within the three exceptions.

Seventh, 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)].

Eighth, also 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 and snapshots you are seeking under the Freedom of Information Law.

Lastly, you have indicated that you are also seeking access to any official records prepared by the New York City Police Department reflective of an indictment filed against your co-conspirator. In addition to the above cited grounds for denial, it is possible that §87(2)(b) may also be relevant. Consequently, the New York Police Department could withhold records or portions of records requested in conjunction with another individual if disclosure would result in "an unwarranted invasion of personal privacy". It is also suggested that court records might contain some of the information in question.

Enclosed for your review is a copy of an explanatory pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" 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.

cc: Michael Julian

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2507

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 10, 1982

Mr. James J. Ryan
Condello, Ryan & Piscitelli
Counsellors at Law
308 State Street
Albany, New York 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. Ryan:

I have received your letter of June 2, as well as the materials attached to it.

According to your letter, you unsuccessfully sought to obtain records in possession of the Division of the Lottery regarding efforts by the Division to develop and administer electrical games of chance. The Attorney General advised that such games of chance would be illegal.

Notwithstanding the opinion of the Attorney General, a denial of your request was rendered on appeal by counsel to the Division on the ground that the Division had not made a "final decision". It is your view, however, that:

> "[L]etting the matter die from lack of attention seems to me to be as much a final decision as the proposal of a rule. Under the interpretation of counsel and/or the Director of the New York State Lottery, no agency would ever be required to provide information unless an affirmative decision had been made to go forward, since they could always respond that the idea or ideas are 'simmering'.
>
> While the idea may be simmering in the Division of the Lottery, their legal interpretation of the Freedom of Information Law appears to be half-baked".

You have asked whether there may be interpretations rendered by this office under the Freedom of Information Law that might be used in the future to "...dissuade agencies from taking the position that they need not disseminate information which might not be in complete conformity with the agency's wishes".

I would like to offer the following comments regarding your inquiry.

It is emphasized at the outset that the following observations are general in nature and are not intended to pertain specifically to your requests for records directed to the Division of the Lottery. As you may be aware, the Court of Appeals in John P. v. Whalen [75 AD 2d 1021 (1980); aff'd 54 NY 2d 89 (1981)] intimated that the jurisdiction of the Committee ends when an agency has rendered a final determination on appeal. Therefore, again, the ensuing comments are not intended to apply to the particular situation described in your correspondence, but rather various provisions of the Freedom of Information Law generally.

First, there is no requirement that the head of an agency render a final determination in conjunction with an appeal of an initial denial of access. In this regard, I direct your attention to §89(a)(a) of the Freedom of Information Law, which 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".

Based upon the language quoted above, the head of an agency may designate a person or body to render determinations on appeal.

Second, the Committee on Public Access to Records is required to promulgate general regulations regarding the procedural aspects of the Freedom of Information Law pursuant to §89(1)(b)(iii) of the Law (see attached). In turn, §87(1) of the Law requires each agency to develop its own rules and regulations consistent with those of the Committee. One of the aspects of the Committee's regulations involves the specific designation of a person or body to determine appeals. Section 1401.7(a) of the regulations states that:

> "[T]he governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law".

Further, §1409(c) of the regulations provides that each agency shall publicize by posting or by publication in a local newspaper:

> "[T]he 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".

As such, appeals should in my view be handled by a specifically designated person or body on a consistent basis.

Third, you have raised questions concerning what may constitute a "final decision" by an agency. Here I direct your attention to §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold records that:

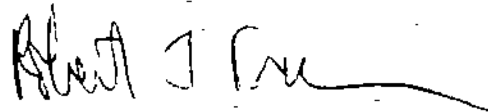
> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

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 consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available. Therefore, it is my view that statistical or factual information found within inter-agency or intra-agency materials is available. Further, the Law does not condition rights of access to such data on the making of a final determination. In my opinion, statistical or factual data found within inter-agency or intra-agency materials would be available whether or not it relates to a final determination made by an agency.

With regard to what might be considered "final", I have enclosed a copy of Miracle Mile Associates v. Yudelson [68 AD 2d 176 (1979)], which cited earlier opinions of the Committee and found that usage of an ordinary dictionary definition of "final" would "produce an unreasonable result by denying access to all opinions, orders and determinations except those made by the highest agency" (id. at 182). The Court adopted the legal definition of "final" which "permits the access...at each stage of an often multilevel administrative process" (id.). I have also enclosed a number of advisory opinions prepared by this office on the subject that may be useful to you in the future.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2508

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 14, 1982

Frank G. Colone
President
Newburgh Teachers' Association
1 Lafayette Street
Newburgh, New York 12550

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. Colone:

I have received your letter of May 27 as well as the correspondence attached to it.

According to your letter, you submitted a request under the Freedom of Information Law to the Newburgh School District on February 3. Your request was acknowledged on March 1 to the effect that a "denial or an acceptance" would be forwarded to you by April 20. Having received no response by that date, you appealed a constructive denial of access on May 4. The appeal was denied on May 18.

You have raised questions regarding the absence of a subject matter list, the failure to appoint a records access officer or appeals officer, and the legality of the role of a single individual who responds to both initial requests made under the Freedom of Information Law and appeals.

I would like to offer the following comments regarding your inquiry.

It is emphasized at the outset that the following observations are general in nature and are not intended to pertain specifically to your requests for particular records directed to the Newburgh City School District. As you may

be aware, the Court of Appeals in John P. v. Whalen [75 AD 2d 1021 (1980); aff'd 54 NY 2d 89 (1981)] intimated that the jurisdiction of the Committee ends when an agency has rendered a final determination on appeal. Therefore, again, the ensuing comments are not intended to apply to the particular situation described in your correspondence, but rather various provisions of the Freedom of Information Law generally, as well as the regulations promulgated by the Committee.

First, with respect to the absence of a "subject matter list", I would like to direct your attention to §87(3)(c) of the Freedom of Information Law. The cited provision states that each agency, such as a school district, 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".

As such, it is clear that a school district is required to prepare a subject matter list regarding all of its records, whether or not the records are available. I would like to point out, however, that a subject matter list need not identify with particularity each and every record of an agency. On the contrary, a subject matter list is in my view required to refer to categories of records of an agency in reasonable detail in order that an applicant may identify a category of records that may include the records sought [see attached regulations, §1401.6(b)].

Second, with regard to the alleged absence of rules and regulations adopted by the District under the Freedom of Information Law, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate general regulations of a procedural nature regarding the implementation of the Freedom of Information Law. In turn, §87(1) of the Law requires that the governing body of a public corporation, i.e., the board of education in a school district, must adopt rules and regulations consistent with those of the Committee. Therefore, the Board of Education should have adopted rules and regulations regarding the procedural implementation of the Freedom of Information Law, as amended, within sixty days after its effective date, which was January 1, 1978.

Third, §1401.2(a) of the regulations promulgated by the Committee requires 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".

Further, §1401.7(a) of the regulations states that:

> "[T]he governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law".

Based upon the provisions quoted above, the school board is in my view required to designate one or more records access officers and an appeals person or body. It is also noted that §1401.7(b) states in part that "The records access officer shall not be the appeals officer". Consequently, if a single individual responds to both initial requests and appeals, it would appear that the right to appeal envisioned in §89(4)(a) of the Freedom of Information Law would effectively be nullified.

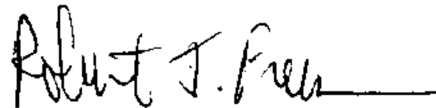
Lastly, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can 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. 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:ss

Attachment

cc: Board of Education
Mr. DeWitt

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2509

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 15, 1982

Fred M. Anderson
P.O. Box 1000
Dorm Three
Montgomery, PA 17752

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. Anderson:

I have received your letter of June 5 as well as the correspondence attached to it.

According to the materials, you have unsuccessfully attempted to obtain certain letters from Prisoners' Legal Services. You have requested the assistance of this office in obtaining those materials.

I would like to offer the following comments regarding your letter.

First, I have received a copy of a letter dated June 9 addressed to you from Martha Mann, Legal Assistant, at Prisoners' Legal Services. According to her letter, she has been unable to locate the correspondence in which you are interested. I have contacted Ms. Mann since the receipt of that letter and she informed me that she has searched for the records in question but has been unable to locate them.

Second, it appears that you may be requesting records from Prisoners' Legal Services based upon an understanding that Prisoners' Legal Services is subject to the Freedom of Information Law. In my view, that organization does not fall within the scope of the Freedom of Information Law.

Section 86(3) of the Freedom of Information Law defines "agency" to mean:

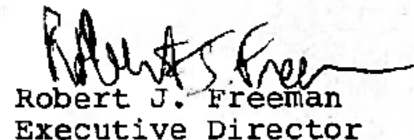
> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or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

From my perspective, the definition of "agency" generally applies to governmental entities that perform a governmental function. Prisoners' Legal Services is a not-for-profit corporation. Moreover, I believe that, as its designation suggests, it provides services of a legal rather than a governmental nature. Therefore, I do not believe that Prisoners' Legal Services is in any way subject to the Freedom of Information Law.

Therefore, although Prisoners' Legal Services has engaged in significant efforts to assist you and respond to your inquiry, I do not believe that it is generally required to provide access to its records pursuant to the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Martha Mann

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-784
FOIL-AO-2510

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

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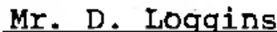
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 15, 1982

Mr. D. Loggins


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. Loggins:

I have received your letter of June 3, 1982, in which you requested an advisory opinion under the Freedom of Information Law.

You have asked whether a state college, specifically Empire State College, must release a copy of its proposal to offer a master's degree program that was submitted to the Board of Regents. You have also asked whether the Board of Regents is required to release its copy of the proposal.

I would like to offer the following comments regarding your inquiry.

First, several telephone calls have been made on your behalf in order to determine the status of the proposal by Empire State College to offer a master's degree program. In this regard, I was informed that the Board of Regents some time ago approved the proposal. However, to become effective, I have been led to believe that the proposal must also be approved by the Governor. Such action has as yet not apparently been taken.

Nevertheless, I believe that the proposal would likely be available under the Freedom of Information Law from either the Empire State College or the Board of Regents, if those agencies maintain the records that you are seeking. Having spoken with an official of Empire State College, it appears that Empire State College does not have a copy of the proposal. However, I believe that the Board of Regents and/or the Education Department maintain a copy.

Second, 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 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.

Third, from my perspective, there is only one ground for denial of possible relevance. 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 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, since the Board of Regents has approved the proposal, I believe that the proposal would be available, for it is reflective of a final determination made by an agency and, therefore, available under §87(2)(g)(iii). Even though the Governor may not have given a final approval to the request, since the Board of Regents has made its final determination concerning the proposal, I believe that it would be available from the Board of Regents [see Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979)].

Moreover, I have been led to believe that the proposal has been discussed by the Board of Regents at open meetings held by the Board of Regents. If that is so, the action taken by the Board of Regents would be recorded in minutes. In this regard, 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 other matter formally voted upon and the vote thereon".

Further, §101(3) states that minutes of open meetings of public bodies must be prepared and made available within two weeks.

Lastly, in order to request a copy of the records in which you are interested, it is suggested that you submit a request to the designated records access officer at the State Education Department, in which the Board of Regents is housed. Your request may be addressed to:

Eugene Snay
Records Access Officer
State Education Department
Education Building
Albany, NY 12234

It is noted that the Freedom of Information Law requires that an applicant submit a request in writing for records "reasonably described". Consequently, when submitting a request, as much specificity as possible should be provided. In addition, as you may be aware, an agency may assess fees for photocopying.

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2511

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

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BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 15, 1982

James Thomas
#78-A-3550
Post Office Box
Comstock, NY 12821

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. Thomas:

I have received your letter of June 14, in which you requested various records from this office.

Specifically, you have requested copies of particular aspects of conditional release rules.

In this regard, 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 does not have possession of records generally, such as those in which you are interested.

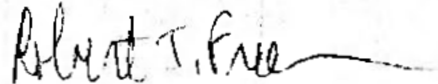
It is suggested that you submit a request for the records in which you are interested to the records access officer of the agency that maintains them. Under the circumstances, it wuld appear that the appropriate agency is the Division of Parole, which is located at 1450 Western Avenue, Albany, NY 12203.

As you may be aware, §89(3) of the Freedom of Information Law requires that an applicant for records submit a request in writing for records "reasonably described". Therefore, it is suggested that in making a request for rules, regulations, policies, or guidelines regarding conditional release, you should provide as much specificity as possible regarding the types of information concerning conditional release in which you are interested.

Enclosed are copies of Parts 8002 and 8003 of the regulations promulgated by the Division of Parole regarding parole release and release conditions. Those provisions are general, and I have no knowledge as to whether the Division of Parole maintains more specific policies or guidelines than those contained in the attached regulations regarding conditional release. Again, however, it is suggested that you request existing materials on the subject.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2512

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

COMMITTEE MEMBERS

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BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 15, 1982

John H. Cates
79 A 2087
Drawer B
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. Cates:

I have received your letter of June 12, in which you requested the assistance of this office in gaining access to certain records.

According to your letter, you have unsuccessfully attempted to gain access to records of the New Haven Correctional Center in Connecticut. It is your belief that the records in question are available under 5 U.S.C. §552, the federal Freedom of Information Act.

I would like to offer the following comments regarding your inquiry.

First, the statute that you cited, the federal Freedom of Information Act, applies only to records in possession of federal agencies. Consequently, I do not believe that it would be applicable to records of an agency of either Connecticut or New York State government.

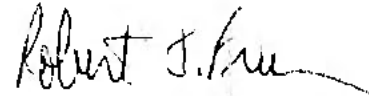
Second, the statute over which the Committee on Public Access to Records has jurisdiction is the New York Freedom of Information Law, which applies only to records of agencies of government in New York. Further, since I am not familiar with the provisions of a Connecticut Freedom of Information Act, I could not offer you specific advice regarding your capacity to gain access to the records that you are seeking.

Third, it is suggested, however, that you write to the Connecticut Freedom of Information Commission, which oversees the implementation of the Connecticut Freedom of Information Act. To obtain information regarding the Connecticut Law, it is recommended that you write to the Connecticut Freedom of Information Commission, 30 Trinity Street, Hartford, CT 06115.

I would guess that the Connecticut Commission could provide you with the advice that you need regarding access to records of a Connecticut 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2513

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 15, 1982

Richard J. Martuzas
Dorm Three
Box 1000
Montgomery, PA 17752

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. Martuzas:

I have received your letter of June 6, in which you requested assistance regarding a request directed to the Office of the Attorney General under the Freedom of Information Law.

I have made several phone calls on your behalf in order to determine whether your letter of May 15 addressed to the Attorney General had been received and answered. I was informed today that a response to your request has been sent to you.

With respect to your inquiry, I would like to offer the following general observations regarding the Freedom of Information Law.

First, it appears that your inquiry involves false arrest and/or imprisonment. In this regard, it is possible that lawsuits initiated based upon such claims might be brought throughout the state against various units of government, both state and local. As such, I would conjecture that there is no central repository for the type of information that you are seeking. Stated differently, it is unlikely that individual agencies of government would be aware of each and every lawsuit brought regarding a particular issue throughout the state.

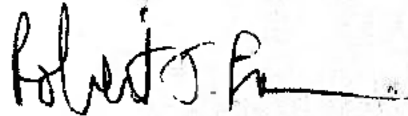
Second, it is emphasized that the Freedom of Information Law is a statute pertaining to access to existing records; it is not in my view a law that permits the cross-examination of public officials or that otherwise requires an agency to create records in response to a request. For instance, in your letter, you asked for information regarding the "statute of limitations on filing a claim for unlawful imprisonment for which the state is responsible". From my perspective, that aspect of your inquiry does not pertain to access to records, but rather raises a legal question.

Third, §89(3) of the Freedom of Information Law requires that an applicant submit a request in writing that "reasonably describes" the records sought. As such, when making a request, it is suggested that you provide as much detail as possible, such as names, dates, file designations, index numbers and similar information that would enable agency officials to locate the records sought.

Lastly, it is suggested that you raise the issues cited in your letter before an attorney of your choice. It is likely that an attorney could provide you with appropriate guidance.

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-2514

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

COMMITTEE MEMBERS

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MARCELLA MAXWELL
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 17, 1982

Mr. Barshai Allah
Box 51 F-16 S.H.U.
Comstock, NY 12821-0051

<u>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.</u>

Dear Mr. Allah:

I have received your letter of June 7, which reached this office on June 17.

You have raised questions regarding the extent to which inmates are entitled to obtain free copies of records under the Freedom of Information Law, and "exactly what records are readily accessible" to inmates.

I would like to offer the following comments regarding your questions.

First, as a general rule, pursuant to §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents for a photocopy of an accessible record. While the federal Freedom of Information Act, 5 U.S.C. §552, contains provisions regarding the waiver of fees in certain circumstances, there is no similar provision in the New York Freedom of Information Law.

Second, also with respect to fees, the Department of Correctional Services has promulgated regulations designed to implement the Freedom of Information Law that make reference to fees. Specifically, §5.36 of the Department's regulations states that:

> "[T]he fee for photocopies of a department record shall be 25 cents per page, not exceeding 9 inches by 14 inches in size. The fees for other types of copies or other size copies or transcripts shall be such reasonable amounts as the deputy commissioner for administrative services shall establish, in conformity with the regulations of the Committee on Public Access to Records. Notwithstanding the provisions of this section, the custodian of the record may, in his discretion, waive all or any portion of the fees authorized by this section for any department record".

Based upon the language quoted above, it appears that a custodian of Department records may, but need not, waive fees for copies of records that may be assessed by the Department.

Third, in terms of rights of access to records, 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. Further, a review of the grounds for denial appearing in §87(2) indicates that many of the grounds for withholding are based upon potentially harmful effects of disclosure.

The information that you are seeking appears to involve records pertaining to specific inmates, as well as policies and administrative procedures implemented by the Department of Correctional Services. In this regard, the regulations of the Department of Correctional Services pertaining to access to records make specific reference to inmates records [see §5.20 through 5.25].

Further, as a general rule, policies adopted by an agency as well as instructions to staff that affect the public are in my view available under §87(2)(g) of the Freedom of Information Law. The cited provision states 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.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Department of Correctional Services regarding access to Department records and 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

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2515

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

COMMITTEE MEMBERS

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 17, 1982

Mr. Richard Duffee

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. Duffee:

I have received your letter of June 11 in which you raised questions regarding a resolution recently passed by the Peekskill School Board.

Specifically, you indicated that the Board passed a resolution "raising the charge for school records" from twenty-five cents to fifty cents a page "and increasing the time for producing records from 5 to 8 school days." In this regard, you have asked whether the law regarding fees and the time limits for responses to requests has been changed, or whether the resolution passed by the School Board is "illegal". You also requested that, if the resolution is in my view inconsistent with the Freedom of Information Law, I so inform the Peekskill School Board.

In my opinion, both aspects of the resolution violate the Freedom of Information Law.

First, with respect to fees, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate rules and regulations regarding the procedural implementation of the Freedom of Information Law. In turn, §87(1) requires the governing body of a public corporation, in this instance a school board, to adopt its own rules and regulations consistent with those promulgated by the Committee. Further, §87(1)(b)(iii) requires that the rules and regulations adopted by an agency, including the School Board, contain provisions regarding:

> "the fees for copies of records which shall not exceed twenty-five cents per photcopy 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 can establish fees up to twenty-five cents per photocopy, unless a different fee is prescribed by some other provision of law. In my view, a resolution passed by a school board would not constitute a provision of law. Therefore, I do not believe that the fee of fifty cents adopted by the Peekskill School Board is in compliance with the Freedom of Information Law.

Further, it is noted that the Governor recently signed legislation to amend the Freedom of Information Law into law. Chapter 73 of the Laws of 1982, which will become effective on October 15 of this year, amends §87(1)(b)(iii) by permitting the establishment of fees for photocopies of up to twenty-five cents per photocopy "except when a different fee is otherwise prescribed by statute" (emphasis added). The replacement of the term "law" by "statute" will effectively preclude agencies from establishing fees in excess of twenty-five cents per photocopy, unless a statute, an act of the State Legislature, so prescribes. Therefore, even if the School Board had the authority to enact a "law" raising the fees to fifty cents per photocopy, such a provision would become ineffective and void on October 15.

The second aspect of the resolution apparently increases the time limits for responding to requests from five to eight school days. As you intimated in your letter, §89(3) of the Freedom of Information Law states in part that an agency must respond to a request "within five business days of the receipt of a written request for records reasonably described..." Since there is specific statutory direction regarding the time within which an agency must respond to a request, I do not believe that the School Board may unilaterally extend the time by means of a resolution. Further, to the extent that the resolution of the Board conflicts or is inconsistent with the provisions of a statute, such as the Freedom of Information Law, I believe that it would be void and of no effect.

As requested, a copy of this advisory opinion will be forwarded to the Peekskill School Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peekskill School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2516

'MITTEE MEMBERS

THOMAS H. COLLINS
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BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

June 18, 1982

Mr. Robert Spencer
Robert Spencer Productions
74-10 35th Avenue
Jackson Heights, NY 11372

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. Spencer:

I have received your requests of June 1 and 3 for an advisory opinion, as well as the materials attached to them.

According to the materials, you have submitted written requests for records to the New York City Police Department, the New York City Department of Investigation and the State Commission on Investigation, under the Freedom of Information Law. The records in which you are interested relate to an investigation arrest and trial of a particular individual which occurred approximately twelve years ago. Apparently, you believe that the records sought may include film footage and tape recordings created during surveillance of the defendant.

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, including law enforcement agencies, 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, since at least a decade has passed since the investigation and arrest, it is possible that some of the records may have been destroyed. In this regard, §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 the agencies to which you submitted requests no longer have possession of the records, they would not be required to reconstruct or recreate records in response to your request.

Third, as we discussed, there may be various grounds for withholding existing records that are the subject of your requests.

For instance, §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 records sought may have been created or compiled for law enforcement purposes, due to the passage of time, it is in my view questionable whether disclosure could interfere with an investigation or deprive a person of a right to a fair trial. It is possible, however, that the records might contain information regarding a confidential informant or reveal unusual criminal investigative techniques or procedures. To that extent, records could likely be withheld.

Another ground for denial that sometimes 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.

Section 87(2)(g) could also be relevant to your request. 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 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, even if §87(2)(e) or (f) might not be applicable, §87(2)(g) might remain applicable, depending upon the contents of inter-agency or intra-agency materials.

A last possible ground for denial is §87(2)(b) of the Law. Under that ground for denial, an agency may withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". Therefore, to the extent that the film footage and/or tape recordings reveal personally identifying details, §87(2)(b) might be applicable.

Fourth, with respect to the request for the trial testimony of a particular employee of the New York City Department of Investigation, it should be noted that the definition of "agency" specifically excludes the "judiciary" [see Freedom of Information Law, §86(1)and (3)]. As such, the Freedom of Information Law does not apply to courts and court records. Some of the information that you are

seeking might be in possession of the trial court in which the proceeding was held. In this regard, §255 of the Judiciary Law, a copy of which is attached, provides substantial rights of access to records in possession of a court clerk. It is suggested that you submit a request to the clerk of the court that you believe has possession of the trial records.

Fifth, you have enclosed a copy of a letter which partially denied your request for records submitted to the New York City Police Department under the Law. Of the two reasons cited for denial, one group of records was withheld on the ground that they constituted police officers' personnel records that are exempt 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 of the contents of the records in question or their use, all that I can suggest is that if the records are indeed personnel records of police officers 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. For your review, I have enclosed a copy of the case cited in the letter of denial (see Gannett Co., Inc. v. James, App. Div., 447 NYS 2d 781).

Sixth, 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)].

Seventh, you expressed concern regarding the degree of description that must be included in a request for records. Section 89(3) of the Freedom of Information Law states that an agency may require that a request be made in writing, and that the request must involve "a record reasonably described". As such, the Freedom of Information Law does not in my view require that an applicant for records identify records with particularity.

Attached to your correspondence of June 3 are copies of your amended request letter of May 7, describing fourteen types of records you are seeking and a response from the New York City Police Department dated May 28, which appears to be a denial. The denial by the New York City Police Department includes eleven categories for denial which apparently may be checked off where appropriate. However, none of these categories are in any way marked on the copy you enclosed. In this regard, the introductory language of §87(2) of the Law states that all records are available, as noted above, except those records or portions thereof which fall within one or more of the grounds for denial. Therefore, when an agency receives a request for records, it is in my view obligated to review the records sought in their entirety in order to determine which portions, if any, fall within the grounds for denial. From my perspective, the response letter from the New York City Police Department does not indicate which categories for denial apply to any of the fourteen types of records you described in your amended letter.

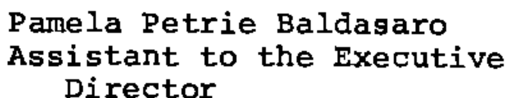
Eighth, the letter of denial from the New York City Police Department advised you to search the library of the Surrogate's Court for any relevant judicial records. Unless I am mistaken, the trial court in which the proceeding was conducted would be the most likely location in which a search for records should be initiated. You were further advised in the denial that "most of the documents you requested are available by a subpoena duces tecum". This suggestion might refer to the procedure for issuance of a subpoena duces tecum under Article 23 of the Civil Practice Law and Rules (CPLR). In particular, §2302 of the CPLR sets forth the circumstances under which such a subpoena can be issued, with or without a court order.

Lastly, the response you received from the State Commission of Investigation granted access to records of testimony taken at a public hearing of the Commission, but denied the other records you requested, citing §87(2) of the Law, §7501 _et seq._ of the Unconsolidated Laws, and the Civil Rights Law, §73. Under §87(2)(a) of the Freedom of Information Law, an agency can withhold records or portions thereof that are specifically exempted from disclosure by statute. Under the cited provisions of the Unconsolidated Laws and the Civil Rights Law, members and employees of the State Commission of Investigation are prohibited from disclosing information, testimony or evidence obtained at private hearings, preliminary conferences or interviews, except where the hearing is open to the public. Consequently, it appears that the records made available to you by the Commission represent the records that the Commission is permitted to release.

I hope 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: Charles W. Segal
Clive Morrick
B. Hirsch

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2517

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 18, 1982

Mr. Edward Burley
77-B-1294
Great Meadow Correctional Facility
Box 51
Comstock, New York 12821

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. Burley:

I have received your letter of June 10 in which you requested assistance from this office.

Specifically, you indicated that you were transferred from the Arthur Kill Correctional Facility to the Great Meadow Correctional Facility in March of this year. Although you have asked for the reasons for your transfer, you have been unable to determine the reasons even though several requests for an explanation have been made.

I would like to offer the following comments and suggestions regarding your inquiry.

First, the Freedom of Information Law grants access to certain existing records. As a general rule, if information does not appear in existing records, an agency would have no obligation to create records on your behalf [see Freedom of Information Law, §89(3)]. Therefore, if, for example, there is no record indicating the reason for your transfer, the Department of Correctional Services would not be required to create such a record.

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records 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 of the Committee.

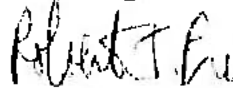
In this regard, the Department of Correctional Services has promulgated regulations concerning access to its records. It is noted that §5.20 through §5.25 deal specifically with inmate records. It is suggested that you review those provisions of the regulations.

Third, §89(3) of the Freedom of Information Law states in part that an applicant for records is required to submit a request for records "reasonably described". As such, when making a request under the Freedom of Information Law, it is suggested that you provide as much detail as possible, including names, dates, file designations, index or identification numbers and similar information that will enable a records access officer to locate the records sought. It is also noted that §5.11 of the regulations designates the Department's records access officer and that §5.20 of the regulations states that a present inmate "shall direct his request to the facility superintendent or his designee".

Enclosed for your consideration are copies of the regulations promulgated by the Department of Correctional Services regarding access to records and a pamphlet concerning the Freedom of Information 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2518

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 21, 1982

Dr. Roger S. Gradess

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 Dr. Gradess:

I have received your letter of June 11 in which you requested an advisory opinion under the Freedom of Information Law, as well as the correspondence attached to it.

According to the correspondence, on May 19, you directed a request under the Freedom of Information Law to Eugene Snay, Records Access Officer, of the State Education Department. Mr. Snay informed you on May 25 that your request had been forwarded to Dr. Judy E. Hall, Executive Secretary for the State Boards for Psychology and Massage. Dr. Hall responded to your request on June 2.

In relevant part, you requested all records pertaining to the psychology licensing examination given in October, 1981, including the following:

> "a. the scoring manual used to grade the essay section of this examination;
>
> b. any and all records of The State Education Department in which are contained the standards applied in scoring the essay section of this examination;
>
> c. examination essay questions and answers given in said examination after the final usage of such questions and answers.

d. the names of the persons who scored the essay section of this examination, and their business addresses;

e. the names of the persons who scored my particular essays, and their business addresses;

f. the number of persons taking the essay section of this examination;

g. the number or percentage of those who passed;

h. any statistical data compiled from the essay scores of those persons taking this examination, including but not limited to the raw scores assigned by each independent rater, measures of inter-rater reliability or agreement, the distribution of raw scores, the distribution of the averaged scores of the independent raters, and the method by which raw scores were converted to a 100 point scale."

In response to your request, Dr. Hall referred to §2.6 of an instruction manual sent to all candidates and indicated that the psychologists who participated in scoring the essay examinations are current or former board members.

Although Dr. Hall enclosed a summary of pass/fail rates, she wrote that "other specific information you requested is not available to candidates." As such, it appears that much of the information that you requested has been denied, even though no specific reason for denial was offered.

I would like to offer the following comments regarding your inquiry.

First, the Freedom of Information Law is an access to records law. Stated differently, if an applicant requests information that does not appear in the form of an existing record or records, an agency would have no obligation to create a new record on behalf of an applicant [see attached, Freedom of Information Law, §89(3)]. The extent to which the information requested exists in the form of records is unknown to me.

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 the Education Department, are available, except to the extent that records or portions thereof fall within one or more of the ensuing grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

Third, 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. From my perspective, the capacity to withhold portions of records results in two conclusions. The first is that the Legislature likely envisioned situations in which a single record might be both accessible and deniable in part. The second in my view is that an agency is obligated to review records sought in their entirety in order to determine which portions, if any, fall within one or more of the grounds for denial.

Fourth, although Dr. Hall responded to your request, it does not appear that her response was sufficient. In this regard, I direct your attention to §89(1)(b)(iii) of the Freedom of Information Law, which requires the Committee on Public Access to Records to promulgate regulations of a procedural nature. In turn, §87(1) of the Law requires each agency to adopt regulations consistent with those of the Committee.

One of the aspects of the regulations involves the designation of one or more records access officers by the head of the agency. The records access officer has the responsibility of "coordinating agency response to public requests for access to records" [see attached, regulations, §1401.2(a)]. In addition, §1401.2(b) of the regulations states that:

> "[T]he records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
>
> > (i) Make records available for inspection; or
> >
> > (ii) Deny access to the records in whole or in part and explain in writing the reasons therefor..."

While Dr. Hall denied access to the records, I do not believe that her "explanation", i.e. that "the other specific information you requested is not available to candidates", represents a sufficient rendition of the reasons for denial. As stated by the Court of Appeals in Fink v. Lefkowitz,

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be order (Public Officers Law, §87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection to exempt its records from disclosure (see Church of Scientology of N.Y. v State of New York, 46 NY2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [47 NY 2d 567, 571 (1979)].

Based upon the provisions of the Freedom of Information Law, the regulations promulgated by the Committee, as well as judicial interpretations of the Law, an assertion that records are not available without more is in my view inadequate.

As you are aware, however, §89(4)(a) of the Freedom of Information Law permits an applicant to appeal a denial within thirty days to the head or governing body 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 "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Fifth, with respect to rights of access, parts a. and b. of your request involve requests for the scoring manual and standards applied in scoring the essay section of an examination. To the extent that such records exist, they would in my view likely 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 language quoted above contains what in effect is a double negative. Although inter-agency an 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 manual and standards would likely be reflective of the policy of the State Education Department regarding particular aspects of the examination process.

It is also noted that §87(2)(h) 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."

While the language quoted above permits an agency to withhold examination questions and answers if the questions will be given in the future, I do not believe that §87(2)(h) would be relevant to the scoring manual or the standards that you requested.

Section 87(2)(h) would be applicable to part c. of your request, in which you sought examination questions and answers given in the examination administered in October of 1981, but restricted your request to those questions and answers that had been finally administered.

Parts d. and e. of your request involve the names of persons who scored the examination and their business addresses, as well as those who scored your particular essays and their business addresses. As mentioned earlier, an agency is generally not required to create a record in response to a request. Therefore, if records do not exist that are reflective of the information sought,

they need not be created. Consideration, however, should be given to §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". While Dr. Hall indicated that those who participated in scoring the examinations were current or former board members, her response did not specifically answer your question. To the extent that such records exist, the question would be whether the disclosure of the identities would result in a permissible as opposed to an unwarranted invasion of personal privacy. In all honesty, issues regarding privacy often necessitate the making of subjective judgments. Consequently, it would not be appropriate to provide specific direction with respect to parts d. and e. of your request.

The remaining three areas of your request involve the number of persons who took the essay portion of the examination, the percentage of those who passed, as well as statistical data regarding an analysis of the examination. Again, to the extent that such information does not exist as a record, it need not be compiled on your behalf. However, to the extent that the information does exist, it is in my view available. As noted earlier, §87(2)(g) permits an agency to withhold inter-agency and intra-agency materials with certain exceptions. One of those exceptions involves "statistical or factual tabulations or data" found with inter-agency or intra-agency materials [see §87(2)(g)(i). With respect to your request, it appears that existing records would constitute intra-agency materials, but they would be reflective of statistical or factual data that are available.

Lastly, Dr. Hall wrote that the information sought "is not available to candidates". In this regard, as a general rule, the status of an applicant for records or the reason for which a request is made would be irrelevant. As stated in Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], if records are accessible under the Freedom of Information Law, they should be made equally available "to any person, without regard to status or interest."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Eugene Snay

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2519

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 24, 1982

Mario Herrera
Box B 81 A 862
Dannemora, NY 12929
F-5-40

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. Herrera:

I have received your letter of June 2 in which you requested advice regarding access to records.

According to your letter, you are seeking access to an affidavit which you believe is in possession of an investigator assigned to your case under §772-c of the County Law. In your correspondence, you indicated that an investigator assigned to your defense advised you that he obtained alibi information that may contain exculpatory evidence.

I would like to offer the following comments in response to your inquiry.

First, the scope of the Freedom of Information Law is determined in part by the definition of "agency" appearing in §86(3) of the Law (see attached). That definition specifically excludes the "judiciary", which is defined in §86(1) to mean the courts. It is possible that the affidavit you are seeking may be in possession of the court in which you were convicted. In this regard, §255 of the Judiciary Law grants broad rights of access to records in possession of a court clerk. If you believe that the affidavit may be part of the court record, it is suggested that you submit a request to the clerk of the appropriate court.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as law enforcement 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) of the Law.

Third, if an agency subject to the Freedom of Information Law has possession of the record you are seeking, in my view, there are several grounds for denial that may be relevant. For instance, §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 most of the records you are seeking appear to have been created or compiled for law enforcement purposes, it is in my view questionable whether disclosure at this juncture could interfere with an investigation or deprive a person of a right to a fair trial. Since I am unfamiliar with the contents of the affidavit, I cannot advise with certainty as to the application of §87(2)(e) of the Freedom of Information Law.

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". Again, since I am not familiar with the contents of the record in question, it is unknown to me whether the language quoted above would be applicable.

Fourth, §240.20 of the Criminal Procedure Law (CPL) may be relevant to your inquiry. That section describes when and how material may be disclosed upon demand by a defendant. Since the jurisdiction of the Committee on Public Access to Records is limited to rendering advisory opinions under the Freedom of Information Law, I could not conjecture as to the application of the CPL to your request.

With respect to the time in which a demand for discovery may be made, the factual circumstances of a recent case may 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, <u>People & C. v. Billy Billups</u>, Sup. Ct., Queens Cty., NYLJ (July 13, 1981)].

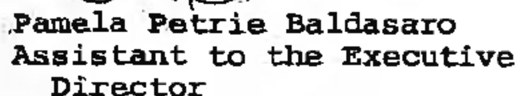
Fifth, it is suggested that you contact your attorney, for it is possible that he or she may be able to advise you as to the location of the record you are seeking.

Lastly, I have enclosed a copy of an explanatory pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door", which may assist you in making a request 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

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-787
FOIL-AO-2520

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 25, 1982

Mrs. Betty Ann Di Spigna

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 Mrs. Di Spigna:

I have received your letter of June 19, as well as the correspondence attached to it. You have raised a series of questions that relate to both the Open Meetings and Freedom of Information Laws.

Your letter makes reference to a pamphlet prepared by the Committee entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" which indicates that minutes of both open meetings and executive sessions as well as voting records of public bodies must be kept. You asked whether school boards are "somehow exempt" from either of those requirements. You also raised questions regarding an increase in the budget of your School District.

I would like to offer the following comments regarding your inquiries.

First, §101 of the Open Meetings Law contains what may be characterized as minimum requirements concerning the contents of minutes. With respect to open meetings, §101(1) states that:

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

Section 101(2) contains provisions regarding minutes of executive sessions. That 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 body the freedom of information law as added by article six of this chapter."

Based upon the language quoted above, a public body must generally prepare minutes of executive sessions only when action is taken during an executive session. Therefore, if, for example, a public body enters into an executive session and merely discusses public business but takes no action, minutes of the executive session need not be compiled.

It is important to point out, however, that the law concerning the capacity to take action during an executive session differs with respect to public bodies in general as opposed to school boards. 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:

> "...any 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)].

Another decision construcing 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.

Most recently, the Appellate Division, Second Department, also found that a school board may taken action by means of a vote only during an open meetings [Sanna v. Lindenhurst Board of Education, App. Div., 2nd Dept., NYLJ, April 13, 1982.

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.

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.

With respect to the record of votes to which you made reference, I direct your attention to §87(3)(a) of the Freedom of Information Law, which states that each agency, including a school board, shall maintain and make available:

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

As such, in every instance in which the School Board votes, I believe that a record must be prepared indicating who voted and the manner in which each member voted.

In terms of your question concerning the expenditure of public monies by the School District, I have enclosed a copy of §170.2 of the regulations promulgated by the Commissioner of Education (8 NYCRR). Those regulations pertain to the recordkeeping requirements of school districts concerning their finances. In this regard, I believe that the Freedom of Information Law as well as other statutes grant access to books of account, ledgers and similar documentation regarding the finances of a school district.

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. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the financial records in which you might be interested would likely consist solely of "statistical or factual tabulations or data" that would be available under §87(2)(g)(i). Moreover, §§51 of the General Municipal Law and 2116 of the Education Law have long granted access to the types of records that you might be seeking.

Lastly, attached to your letter is correspondence regarding a copy of a "list of available records" prepared by the School District. In my view, that list is likely misleading, for there may be various other records that are available. Further, a list of available records would not comply with §87(3)(c) of the Freedom of Information Law. The cited provision states that each agency shall maintain:

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

The language quoted above indicates that the "subject matter list" required to be prepared by each agency must make reference by subject matter in reasonable detail to all records of an agency, whether or not the records are available.

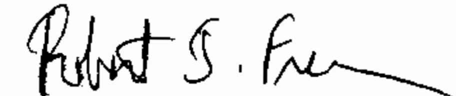
I would also like to point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Based upon a review of those grounds for denial, I believe that they are flexible, for records might justifiably be withheld now, but the same records might become available in the future. For instance, §87(2)(c) states that an agency may withhold records which "if disclosed would impair present or imminent contract awards or collective bargaining negotiations". In the context of that provision, records might justifiably be withheld when they are sought while collective bargaining negotiations are ongoing, for disclosure might "impair" the negotiations. Nevertheless, after an agreement is reached, the "impairment" that may have existed could essentially disappear. As such, records considered deniable today might become available at some point in the future.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law and an explanatory pamphlet that deals with both laws.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Joan Whiteford

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2521

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 25, 1982

Ms. Linda M. Nelson
Assistant General Counsel
American Federation of State,
County & Municipal Employees
140 Park Place
New York, New York 10007

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. Nelson:

I have received your letter of June 22 as well as the correspondence attached to it.

You have sought an advisory opinion under the Freedom of Information Law with respect to a request directed to the New York City Health and Hospitals Corporation (HHC) for a copy of a "report on waste anesthetic gas exposure in the operating room at Lincoln Hospital". The request was initially made on March 3 and was answered on April 26 "with a one-page excerpt presumably from the requested report". The correspondence indicates that the report was prepared by Auranel Anesthesia Products, Inc., and that it is approximately ten pages long. Due to the insufficiency of the response, an appeal was sent to HHC on May 6. However, as of the date of your letter, neither additional information nor a denial has been provided by HHC.

I would like to offer the following comments regarding your inquiry.

First, I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" expansively to include:

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

Due to the breadth of the definition, if the report in question was produced for or is maintained by HHC, I believe that it constitutes a "record" 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 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. Based upon a review of the grounds for denial, it does not appear that any of the grounds for denial could justifiably be cited to withhold the report in question.

There is a recent decision, however, which involved a situation in which a third-party consultant acting pursuant to contract provided an agency with a report. Although the third-party consultant fell outside the definition of "agency" appearing in §86(3) of the Freedom of Information Law, it was found that the report fell within the exception for "inter-agency and intra-agency materials" appearing in §87(2)(g) of the Freedom of Information Law [see Sea Crest Construction Corp. v. Stubing, 82 AD 2d 546 (1981)]. Whether the report in question was prepared under circumstances similar to those found in Sea Crest is unclear. Nevertheless, even if the document in question could be characterized as inter-agency or intra-agency materials, §87(2)(g) provides substantial rights of access to such materials. 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 policy or determinations must be made available. Under the circumstances, it would appear that substantial portions of the report would consist of "statistical or factual tabulations or data" that would be available under §87(2)(g)(i). Further, depending upon the status of the report, it might conceivably be characterized as a "final determination" made by HHC available under §87(2)(g)(iii).

With respect to the time limit for responding to an appeal following a denial of access, §89(4)(a) 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".

Based upon your correspondence, HHC has failed to respond to your appeal within the statutory time limit required by §89(4)(a) of the Freedom of Information Law.

In order to encourage compliance with the Freedom of Information Law, copies of this opinion will be sent to the records access and appeals officers of HHC.

I hope that 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: John McLaughlin
Rebecca Negri

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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ROBERT J. FREEMAN

June 27, 1982

Ms. Dolores J. Binnie

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. Binnie:

I have received your letter of June 16 in which you raised questions regarding a will. It appears that you are attempting to determine whether you signed a legal document that may have been connected with or part of a will.

It is emphasized at the outset that the Freedom of Information Law does not apply to the courts or court records, for §86(3) of the Freedom of Information Law defines "agency" in such a way that it specifically excludes the "judiciary".

Nevertheless, there are various provisions of law that provide rights of access to court records. In this regard, since your inquiry pertains to a will, I have enclosed copies of two sections of the Surrogate's Court Procedure Act. Section 2502 pertains to the books that must be maintained by the clerk of a surrogate's court. Subdivision (1) states that the clerk shall keep and maintain:

> "[A] record book properly indexed in which shall be entered a description of every proceeding with proper entities under each denoting the papers filed, orders and decress made and the steps taken therein, with the dates of filing and recording the several papers in the proceeding."

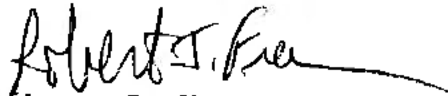
As such, if a legal paper has been filed, it would appear that the reference to such a filing would be recorded in a book kept by a surrogate's court clerk.

Also enclosed is §2507 of the Surrogate's Court Procedure Act entitled "Reception of wills for safekeeping".

Perhaps a review of the two enclosed statutes will provide you with the capacity to locate 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
Executive Director

RJF:jm

Encs.

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 28, 1982

James Thomas
#78-A-3550
Post Office Box 51
Comstock, NY 12821

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. Thomas:

I have received your latest letter, dated June 17, as well as the correspondence attached to it.

Having directed requests under the Freedom of Information Law to the District Attorney of New York County, it appears from your correspondence that responses to those requests have been delayed.

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)].

Under the circumstances described in your correspondence, it is suggested that you contact your attorney, who could likely provide specific advice and perhaps expedite the process of gaining access to records available to you 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

cc: Gerard V. Bradley

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 28, 1982

Robert N. Swetnick, Counsel
Division of State Athletic Commission
Department of State
New York, New York 10007

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. Swetnick:

As you are aware, I have received your letter of June 21 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, §206.13 of the rules promulgated by the State Athletic Commission requires that all contracts "between licensed promoting corporations and a boxer, or a manager of a boxer, affecting or calling for the services of a boxer" must be filed with the Commission prior to a contest, and the contracts must indicate "the amount of the purse to be paid to the fighter". Although the Commission has generally made contracts available under the Freedom of Information Law, Madison Square Garden Boxing, Inc., a licensed promoting organization, has contended that the contracts constitute trade secrets which if disclosed would cause substantial injury to its competitive position. It has also been contended that disclosure would constitute an unwarranted invasion of personal privacy of the boxers involved. Based upon its contentions, Madison Square Garden Boxing, Inc., has requested an "exception" from disclosure pursuant to §89(5) of the Freedom of Information Law.

I would like to offer the following comments regarding the situation.

First, as a general rule, the Freedom of Information Law is permissive. While an agency may withhold records under certain circumstances [see Freedom of Information Law, §87(2)(a) through (h)], an agency may disclose, even if records are deniable.

Second, however, as indicated to you by phone, the Freedom of Information Law contains new provisions regarding the treatment of "trade secrets" submitted by a commercial enterprise pursuant to law or regulation to a state agency. Specifically, §89(5)(a)(1) states in part that:

> "[A] person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article".

Section 89(5)(a)(3) states further that:

> "[I]nformation submitted as provided in subparagraph one of this paragraph shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction".

In response to a request that records be excepted from disclosure as trade secrets, an agency may review the sufficiency of such a request at any time. If an agency determines that records do not constitute trade secrets, it is required to issue a written determination stating the reasons therefor [see §89(5)(b)(3)]. A denial of a request for an exception from disclosure may be appealed within seven business days of the receipt of a denial of such a request [see §89(5)(c)(1)]. If an appeal is made, it must be determined by the head or governing body of the agency or its designated representatives within ten business days of the receipt of the appeal. In addition, notice of a determination made in writing must be served upon the firm requesting an exception from disclosure containing a

statement of the reasons for the determination. If the person receiving an adverse determination regarding its request for an exception from disclosure seeks to challenge the determination, an Article 78 proceeding may be commenced "within fifteen days of the service of the written notice containing the adverse determination..." [see §89 (5)(d)]. Section 89(5)(e) states that the burden of proof in a challenge to an adverse determination is on the person seeking the entitlement to an exception from disclosure.

It is further noted that §87(4)(a) of the Freedom of Information Law requires that agencies that maintain records containing trade secrets must promulgate regulations pertaining to such records which shall include reference to:

> "(1) the manner of identifying the record or parts;
>
> (2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;
>
> (3) the manner of safeguarding against any unauthorized access to the records".

Third, with respect to trade secrets generally, the basis for withholding such records is found in §87(2)(d) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "...are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my view, whether the contracts constitute trade secrets in whole or in part is at this juncture unclear and should likely be determined based upon issues of fact with which I am unfamiliar. Among considerations to be reviewed might be the status of contracts in possession of other state commissions. For instance, if other states routinely disclose similar contracts, it might be difficult to justify a contention that disclosure would "cause substantial injury to the competitive position" of Madison Square Garden Boxing, Inc. Another consideration might involve the time at which a request is made. For instance,

if a request is made prior to the consummation of the contracts by both boxing contestants, perhaps the effect of disclosure would be more significant than in a situation in which a request is made after both contracts have been signed and approved by the Commission. If the concern involves an intent to preclude disclosure prior to the signing of the contracts by both boxers prior to a contest, it is in my view questionable whether the "trade secrets" exception would be applicable, for the issue might not involve the competitive position of Madison Square Garden Boxing, Inc. A further consideration might pertain to past practices. If, as you wrote, the contracts in question have in the past been routinely made available, it might be difficult to justify now how disclosure of the same records would fall within the scope of §87(2)(d).

In short, as indicated previously, it appears that a determination regarding the sufficiency of a claim that the contracts constitute trade secrets involves findings of fact based upon the specific circumstances.

Fourth, the other basis for withholding raised by Madison Square Garden Boxing, Inc., 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".

When dealing with issues of privacy, often subjective judgments must of necessity be made. Stated differently, one reasonable person might review a record and contend that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy. An equally reasonable person reviewing the same record might, however, contend that disclosure would be inoffensive, thereby resulting in a permissible invasion of personal privacy.

In my view, it is questionable whether disclosure of the contracts would result in an unwarranted invasion of personal privacy, for boxing is regulated by the state and persons involved in boxing are likely required to submit substantial amounts of information to the Commission for their protection as well as the protection of the public. Moreover, unlike many situations in which personal

information might justifiably be withheld under §87(2)(b), personal details regarding boxers are routinely disclosed. For instance, to engage in a contest, it is known that the health condition of a boxer has been approved. Other details including height, weight, and other physical attributes of boxers are generally made available. One might contend that by engaging in a boxing contest, a boxer essentially relinquishes his privacy with respect to many aspects of his life.

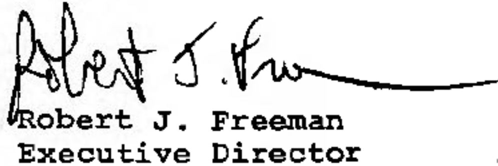
With regard to the financial details of a contract, again, it appears that a judgment would have to be made by the Commission. If the information was reflective of the entire annual income of an individual, disclosure might indeed result in an unwarranted invasion of personal privacy; but if the contract represents only a portion of one's earnings, the degree to which one's privacy is invaded would likely be somewhat diluted. In addition, often newspapers and magazines publish the financial details involving a contest. In such cases, disclosure of the financial details of a contract in possession of the Commission would not likely constitute an unwarranted invasion of personal privacy.

Fifth, it is emphasized that the introductory language of §87(2) of the Freedom of Information Law refers to the capacity to withhold "records or portions thereof" that fall within one or more mong the ensuing grounds for denial. As such, I believe that the Commission is required to review the contracts in their entirety to determine which portions, if any, may justifiably be withheld. For instance, it is possible that portions of contracts might constitute trade secrets that could be withheld, or portions might if disclosed result in an unwarranted invasion of personal privacy. To that extent, portions of contracts might be deleted, while granting access to the remaining portions for which no ground for denial would apply.

Lastly, I realize that the preceding comments do not provide specific direction regarding rights of access. Nevertheless, I am hopeful that the review of the provisions regarding trade secrets and privacy will help the Commission in formulating a determination.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Kenneth W. Munoz, Esq.

STATE OF NEW YORK

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 29, 1982

Owen P. Bristol
Board of Education
City School District of Peekskill
Administration Center
1031 Elm Street
Peekskill, New York 10566

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. Bristol:

I have received your letter of June 22 concerning the fees for photocopies that may be assessed under the Freedom of Information Law.

According to your letter, it is your understanding that the Board of Education of the Peekskill City School District, of which you are a member, is restricted to charging twenty-five cents per photocopy for records up to nine by fourteen inches, but that "other entities, such as city governments, towns, villages, etc. do not have a twenty-five cents per page restriction placed upon them". You have asked that consideration be given to raising the twenty-five cent fee to a "more realistic figure".

I would like to offer the following comments regarding your letter.

First, as a general rule, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches. However, the units of local government to which you referred may in some instances assess a higher fee. The applicable provision of the Freedom of Information Law is §87(1)(b)(iii), which states in part that the fees for photocopies "...shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law".

The cities, towns, and villages, for example, may in some cases charge more than twenty-five cents per photocopy because they may enact local laws or ordinances requiring fees in excess of twenty-five cents per photocopy. When such ordinances or local laws have been enacted, the fees are valid, for they are prescribed by "law".

In this regard, various reports have been directed to the Committee indicating that fees have been established as high as twenty-five dollars per photocopy. When such fees are adopted by means of a local law, for example, they would be valid, notwithstanding the effect of dissuading members of the public from requesting or obtaining copies of records.

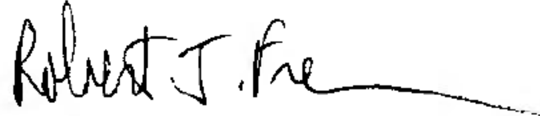
To remedy that type of situation, the Committee has for several years recommended in its annual reports that the word "law" appearing in the last clause of §87(1)(b)(iii) be replaced with the term "statute". By replacing "law" with "statute", an agency would be restricted to assessing a fee of up to twenty-five cents per photocopy, unless a statute, an act of the State Legislature, so permits.

Most recently, Governor Carey signed into law Chapter 73 of the Laws of 1982, which contains the change recommended by the Committee. As such, when the legislation becomes effective on October 15 of this year, all agencies, including towns, cities and villages, will be precluded from assessing fees in excess of twenty-five cents per photocopy, unless there is statutory authority to do so.

Lastly, it may be true that various costs imposed upon agencies increase over the course of time. However, it appears that the actual cost of photocopying has been reduced over the last decade due to improvements in technology and competition. When the Freedom of Information Law was enacted in 1974, the Office of General Services indicated that the average cost for photocopying was slightly above six cents per photocopy; nevertheless, many agencies now use photocopy machines which produce photocopies at a cost of approximately one-cent per page. Consequently, although your concerns are appreciated, it is in my view unlikely that the Committee will propose a change in the Freedom of Information Law to increase the fees for photocopies.

I hope that 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

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ROBERT J. FREEMAN

June 29, 1982

Mr. John Scull
#79C264
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. Scull:

I have received your letter of June 16.

You have written regarding difficulties you have encountered in gaining access to records involving "detainers". Apparently, you have requested information from the head clerk of the facility at which you are housed, but as yet, you have been unsuccessful in obtaining copies of records.

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records 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 of the Committee.

In this regard, the Department of Correctional Services has promulgated regulations concerning access to its records. It is noted that §5.20 through §5.25 deal specifically with inmate records. It is suggested that you review those provisions of the regulations.

Second, §89(3) of the Freedom of Information Law states in part that an applicant for records is required to submit a request for records "reasonably described". As such, when making a request under the Freedom of Information Law, it is suggested that you provide as much detail as possible, including names, dates, file designations,

index or identification numbers and similar information that will enable a records access officer to locate the records sought. It is also noted that §5.11 of the regulations designates the Department's records access officer and that §5.20 of the regulations states that a present inmate "shall direct his request to the facility superintendent or his designee".

Third, you sought advice regarding arrest records which you believe were sealed by court order under §160.50 of the Criminal Procedure Law (CPL). YOu have requested guidance regarding the procedure by which the head clerk can seal certain records. Since the jurisdiction of the Committee on Public Access to Records is limited to providing advice under the Freedom of Information Law, I cannot advise you with respect to the procedure by which you may request that records be sealed. It is suggested, however, that you contact your attorney or a representative of Prisoners' Legal Services, for example, at your facility in order to obtain legal advice regarding that issue.

Enclosed for your consideration are copies of the regulations promulgated by the Department of Correctional Services regarding access to records and a pamphlet concerning the Freedom of Information 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
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-2527

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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MMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 29, 1982

Mr. Bill Johnson

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 June 23 as well as the attached proposed application for public access to records.

You have asked whether the form in question meets the legal requirements of a request form under the Freedom of Information Law. You have also asked what procedure may be followed if an agency refuses to accept the form and whether there are any requirements under the Freedom of Information Law requiring that you show two forms of identification when requesting records.

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records has never devised a specific form for the purpose of making requests under the Freedom of Information Law. As you may be aware, §89(3) of the Freedom of Informaton Law (see attached) merely requires that a request be made in writing "for a record reasonably described". Although several agencies have prepared and/or required the completion of their own forms, it has consistently been advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for withholding records. On the contrary, again, any request made in writing that reasonable describes the records sought should suffice.

Second, the Committee has prepared an explanatory pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door". The pamphlet, a copy of which has been enclosed, contains a sample letter of request. In addition, it contains a sample letter of appeal in the event that a request for records is denied.

From my perspective, the sample letter appearing in the pamphlet may be preferable to the proposed application for records attached to your letter for a number of reasons. For instance, the language in the sample letter regarding the scope of the request as well as fees may be clearer than the language in the proposed application. Further, although a denial of access must indicate the reasons therefor, I do not believe that "specific exemptions" must be cited by a records access officer in an initial denial. In the event of a denial on appeal, §89(4)(a) of the Freedom of Information Law requires that the appeals person or body "fully explain" in writing the reasons for further denial. It is also noted that the procedure by which an applicant for records may appeal is stated in the Freedom of Information Law, §89(4)(a), and the regulations promulgated by the Committee (see attached, §1401.7). In brief, if an initial request is denied, the agency is required to indicate the name and address of the person or body to whom an appeal should be directed. I would also like to point out that §89(3) of the Law and §1401.5 of the regulations require that an agency respond to a request within five business days of receipt of a request, rather than seven business days as indicated in your proposed form.

Third, if an agency refuses to accept a request for records, it is suggested that you seek to describe the provisions of the Freedom of Information Law and the regulations to which reference was made in the previous paragraph. In the alternative, you could seek an advisory opinion from this office.

Lastly, you asked whether there is any requirement that an applicant for records "show two forms of identification" when a request is made under the Freedom of Information Law. In my view, as a general rule, identification is not necessary. In this regard, it has been held judicially that if records are accessible under the Freedom of Information Law, they 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]. As such, the identity of a person who requests records is generally irrelevant to rights of access.

Similarly, the reason for which a request is made is largely irrelevant to rights of access. The only instance in which the purpose for making a request may be determinative of rights of access would involve a request for a list of names and addresses. Section 89(2)(b) of the Freedom of Information Law provides five examples of unwarranted invasions of personal privacy, one of which involves "...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)]. From my perspective, the only instance in which an agency may question the purpose for which a request is made would involve a request for a list of names and addresses in an effort to ascertain whether or not a list is being sought for commercial or fund-raising purposes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2528

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

July 1, 1982

Sherman J. Warshum
#81 A 3312
Clinton Correctional Facility
Post Office Box 367
Dannemora, New York 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. Warshum:

I have received your letter of June 23.

You have requested assistance in making a request for a "master index" of personal records which you believe are in possession of the New York City Police Department and Department of Corrections.

I would like to offer the following comments in response to your inquiries.

First, I would assume that the master index to which you referred is actually the "subject matter list" required to be compiled by agencies subject to the Freedom of Information Law under §87(3)(c) of the Law. Please note, however, that the subject matter list is required to indicate in reasonable detail by subject matter the types of records in possession of an agency, whether or not the records are available under the Freedom of Information Law. Consequently, a subject matter listing would not allow you to determine in detail the exact nature of personal records that may be maintained regarding yourself; but it would likely indicate topics relevant to your search.

In order to obtain a subject matter index from the New York City Police Department and Department of Corrections, it is suggested that you submit written requests to the records access officers of those agencies for them under the Freedom of Information Law. To assist you, I have enclosed an explanatory pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" which contains sample letters of request and appeal.

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations of a procedural nature (see attached). Section 87(1) of the Freedom of Information Law requires each agency to adopt its own regulations consistent with those of the Committee.

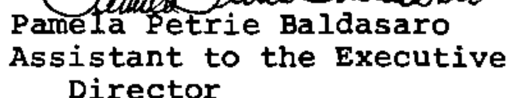
Third, you have requested advice concerning the submission of a request for records pertaining to you to the Federal Bureau of Investigation (FBI). The Committee on Public Access to Records is responsible for providing advice under the New York Freedom of Information Law which applies to records in possession of state and local government. Any records you are seeking from a federal agency, such as the FBI, would be subject to the federal Freedom of Information Act. Also enclosed is a copy of "Your Right to Federal Records", which may be helpful to you in making a request for records to the FBI.

Lastly, without greater knowledge of the particular records in which you are interested, specific direction regarding the applicable provisions of the Freedom of Information Law cannot be given. Nevertheless, the focal point of the Law (see attached) is §87(2), which states in brief that all agency records are available, except to the extent that records fall within one or more among eight 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

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2529

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

July 1, 1982

Dennis Shipman (DIN)
81-A-4066
Box 500
Elmira, NY 14902-500

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. Shipman:

I have received your letter of June 28 in which you requested from this office various directives which apparently have been issued by the Department of Correctional Services.

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 to grant or deny access to records.

Nevertheless, I would like to offer the following suggestions regarding your request.

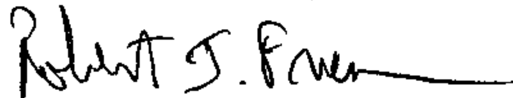
First, requests for records should generally be directed to the agency that maintains the records. Under the circumstances, since the records appear to be in possession of the Department of Correctional Services, a request should be sent to that agency.

Second, pursuant to the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, each agency is required to designate one or more records access officers. In this

regard, I have enclosed a copy of the regulations of the Department of Correctional Services regarding access to records. It is suggested that you review sections 5.11 of the Department's regulations concerning the designation of a records access officer for the Department, and 5.15 concerning the custodians of departmental records located at a 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

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2530

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

July 2, 1982

Michael Hale
82 C 425
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. Hale:

I have received your letter of June 26 in which you requested advice under the Freedom of Information Law.

You have sought assistance in making a request for an "index" of records in possession of the Buffalo Police Department. Additionally, you are interested in obtaining a transcript of a judicial proceeding from the Office of the Erie County District Attorney.

I would like to offer the following comments in response to your inquiries.

First, it is assumed that the index to which you referred may be the "subject matter list" required to be compiled by agencies subject to the Freedom of Information Law under §87(3)(c) of the Law. The subject matter list is required to indicate in reasonable detail by subject matter the types of records in possession of an agency, whether or not the records are available under the Law.

Second, with respect to the application of the Freedom of Information Law to records of the Erie County District Attorney, it is noted that the definition of "agency" appearing in §86(3) of the Law includes any governmental entity performing a governmental function. Therefore, in my opinion, police departments as well as district attorneys' offices and records are subject to the Freedom of

Information Law. Further, several courts have so held [see e.g., New York Public Interest Research Group v. Greenberg (Sup. Ct., Albany Cty., April 27, 1979); Dillon v. Cahn, 79 Misc. 2d 300, 359 NYS 2d 981 (1974); Westchester-Rockland Newspapers v. Vergari, Sup. Ct., Westchester County, New York Law Journal, June 24, 1982)]. Therefore, if you believe the records in question may be in possession of the Office of the Erie County District Attorney, it is suggested that you direct your inquiry to the records access officer of that agency. To assist you, I have enclosed an explanatory pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" which contains sample letters of request and appeal.

Third, the Freedom of Information Law provides access to certain existing records. Generally, if information does not exist in the form of a record, an agency would have no obligation to create a record on your behalf [see attached Freedom of Information Law, §89(3)]. Therefore, if the Office of the District Attorney does not have possession of a transcript that you are seeking, it would have no obligation to create or obtain such a record in response to a request.

And fourth, the definition of "agency" cited earlier specifically excludes the "judiciary", which is defined in §86(1) of the Law to mean the courts. It is possible that the transcript you are seeking may be in possession of the court in which a proceeding occurred. In this regard, §255 of the Judiciary Law grants broad rights of access to records in possession of a court clerk. If the transcript is part of a court file, it is suggested that you submit a request to the clerk of the appropriate court.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2531

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 2, 1982

Mr. Hoe

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based sc.ely upon the facts presented in your correspondence.

Dear Mr. Hoe:

I have received your letter of June 29 in which you requested information regarding a position designated by a town as "communications consultant".

Specifically, you have requested information regarding the qualifications for the position, the age bracket, duties, salary, and whether t' position is elective or appointed.

I would like to offer the following comments regarding your inquiry.

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 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 a towr, to grant o deny access to records.

Second, since the information in question would likely be in possession of the town that has employed the communications consultant, it is suggested that a request be made under the Freedom of Information Law to the town's "records access officer". To assist you in making a request, I have enclosed a copy of an explanatory pamphlet regarding the Freedom of Information Law that contains sample letters of request and appeal.

Third, although I am unfamiliar with the facts regarding the position in question, I would like to offer several points.

If the communications consultant is a town employee, that person's salary would be available to the public. Section 87(3)(b) of the Freedom of Information Law requires that each agency, including a town, prepare a payroll record including the name, public office address, title and salary of all employees of the agency. As such, the salaries of all public employees in New York are available.

In terms of duties, as a general rule, I believe that the parameters of most positions are defined by means of a job description or a similar document. In order to obtain or review a job description, you might want to contact the appropriate municipal civil service commission or personnel office. I would conjecture that a job description might also indicate the manner in which the position is filled, i.e., by means of a civil service examination, by appointment, or by election, for example.

Fourth, if the communications consultant is not a town employee, but rather an individual who performs his or her responsibilities pursuant to a contract with the town, the contract between the consultant and the town would in my view be accessible under the Freedom of Information Law and provisions of the General Municipal Law that have long been in effect (see General Municipal Law, §51). If there is such a contract, it might describe the duties and salary of the consultant in question.

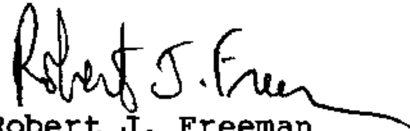
Fifth, your letter to the Committee raised a series of questions. In this regard, when making a request under the Freedom of Information Law, it is suggested that you seek records, rather than asking questions. The Freedom of Information Law is not a vehicle by which a member of the public may cross-examine public officials; it is, however, a vehicle by which a member of the public may request records. Once again, I would like to point out that the enclosed pamphlet contains a sample letter of request which may be particularly useful to you.

Lastly, at the end of your letter, you requested that the answers to the questions raised be "kept confidential". Here I would like to point out that the Freedom of Information Law provides broad rights of access to records to the

public. In brief, the Law states that all records of an agency, including a town, are accessible, except to the extent that records fall within one or more grounds for denial appearing in §87(2)(a) through (h) (see attached). Therefore, if a record is accessible under the Law, a request for confidentiality may be irrelevant. For instance, as noted earlier, the salary of a public employee is accessible, even if a particular public employee might object to the disclosure of his or her salary.

I hope that 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- 2532

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 6, 1982

Patricia B. Adduci, CMC
County Clerk
County of Monroe
Office of the County Clerk
County Office Building
Rochester, New York 14614

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. Adduci:

I have received your letter of June 28 in which you raised questions in your capacity as Monroe County Clerk regarding records of incompetency proceedings.

I would like to offer the following comments regarding your inquiry.

First, as you are aware, the Freedom of Information Law is applicable to records of an "agency" as defined by §86(3) of the Law. It is noted that the definition of "agency" specifically excludes the judiciary, which is defined in §86(1) to mean the courts.

Under the circumstances, it is possible that a county clerk maintains records of an agency subject to the Freedom of Information Law, as well as court records that would fall outside the scope of the Freedom of Information Law. Since the records in question likely emanated from courts by means of judicial proceedings, I would conjecture that they do not fall within the provisions of the Freedom of Information Law.

Second, I have searched unsuccessfully for specific statutory direction regarding the treatment of records of incompetency proceedings. I have been unable to locate any

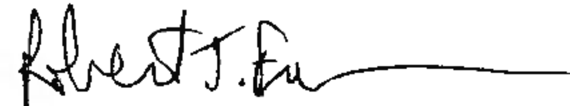
specific provisions in the Mental Hygiene Law, the Judiciary Law, the Civil Practice Law and Rules, or any other body of statutory law that might be applicable to the records in question.

Nevertheless, I have found regulations promulgated by the Appellate Division, Fourth Department, that may be relevant to your inquiry. Enclosed for your consideration is Part 1023 of the Rules of the Appellate Division, Fourth Department, which are found in 22 NYCRR. It is noted that §1023.6(a)(1) states that "[A]ll records, reports and files...and all papers and files of the court in any proceedings covered by these regulations shall be confidential". Section 1023.6 also refers to the capacity to "exhibit" such records only under specified circumstances. Since I am not familiar with the specific types of records in your possession, the extent to which the cited rules may be applicable is unknown to me. They may, however, be a useful starting point for further inquiry.

Lastly, the agency that likely has the most information on the subject is the Office of Court Administration. As such, it is suggested that you might want to contact the Office of Court Administration to attempt to obtain additional direction.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 789
FOIL-AO- 2533

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 6, 1982

Mary L. Esch
Reporter
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 staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Esch:

As you are aware, I have received your letter of June 30 in which you requested an advisory opinion regarding a denial of access to records by the Rensselaer County Civil Service Commission.

Specifically, you requested "employment applications and resumes of appointed assessors in the towns of Rensselaer County". You indicated that the County Civil Service Commission reviews those records "to ascertain if the assessors appointed by the Town Boards are qualified, according to state guidelines, to serve in that position".

In response to your request, Thomas C. Hendry, an employee of the Civil Service Commission, denied access to the records based upon the "policy" of the Commission. He wrote that "[T]his policy is based on Section 95, Sub-Division F of the New York State Freedom of Information Law which identifies information that is considered confidential".

I would like to offer the following comments regarding the situation.

First, Mr. Hendry in his denial cited provisions of the Open Meetings Law, rather than the Freedom of Information Law. As you are aware, the Freedom of Information Law

pertains to rights of access to records, while the Open Meetings Law pertains only to meetings of public bodies. As such, I do not believe that Mr. Hendry offered an appropriate basis for withholding.

I would like to add that the provision cited by Mr. Hendry was the so-called "personnel" exception for entry into executive session under the Open Meetings Law. However, the provisions of the Open Meetings Law were renumbered and amended several years ago. Although §95(1)(f) dealt with discussions of "personnel" in the original Open Meetings Law, that provision is now found in §100(1)(f) of the Law.

It is also noted that the grounds for executive session appearing in the Open Meetings Law are not necessarily consistent with the grounds for denial of access to records found within §87(2)(a) through (h) of the Freedom of Information Law. Stated differently, in some instances, although the discussion of a particular topic might justifiably be conducted during an executive session, records related to that topic would not necessarily fall within any ground for denial appearing in the Freedom of Information Law. For instance, if a public body discusses the possible appointment of a particular individual to a position, an executive session would likely be proper, for §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..."

Since such a discussion would involve matters "leading to the appointment...of a particular person", an executive session would in my view be appropriate. Nevertheless, if a public body chooses to appoint an individual to a position, records reflective of the appointment would be made available as minutes required to be prepared under §101 of the Open Meetings Law. Moreover, §87(3)(b) of the Freedom of Information Law requires each agency to maintain and make available a payroll record indicating the name, public office address, title and salary of all officers or employees of the agency. As such, even though a discussion resulting in the appointment of an individual to a position might be closed under the Open Meetings Law, records related to the appointment of the individual might be accessible under the Freedom of Information Law.

Second, with respect to rights of access to the records in question, 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 of the grounds for denial appearing in §87(2) (a) through (h) of the Law.

It is emphasized that the introductory language in §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. From my perspective, the capacity to withhold portions of records results in two conclusions. First, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Second, the cited language in my view requires that an agency must review records sought in their entirety to determine which portions, if any, fall within one or more of the grounds for denial.

Third, under the circumstances, there may be three relevant grounds for denial with respect to employment applications and resumes. However, I believe that only one of those grounds may justifiably be cited to withhold portions of such records.

The first potentially relevant ground for denial 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 other words, an agency may withhold records under §87(2)(a) if an act of Congress or the State Legislature precludes the disclosure of certain records.

In this regard, I direct your attention to §71.1 of the rules and regulations promulgated by the Department of Civil Service, which states in relevant part that:

> "[A] candidate's application for examination may be exhibited, upon request, to the appointing officer to whom his name is certified, or to his representative; provided, however, that information therein relating to the candidate's national origin or indicating whether his citizenship is by birth or naturalization shall not be divulged".

Although the language quoted above apparently prohibits the disclosure of a candidate's application for an examination, I do not believe that the provision in question could be cited to withhold the employment applications that you are seeking. It has been held in the past that regulations promulgated by an agency do not constitute a statute and fall outside the scope of §87(2)(a). Therefore, unless there is specific statutory direction requiring that records be kept confidential, an agency cannot in my view require confidentiality by means of a regulation [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405]. Consequently, §71.1 of the regulations promulgated by the State Civil Service Department would in my view be of no effect to the extent that they conflict with whatever rights of access might be granted under the Freedom of Information Law. Moreover, under the circumstances, it does not appear that the assessors in question take an examination. If that is so, I do not believe that §71.1 would be applicable. In view of the foregoing, I do not believe that §87(2)(a) of the Freedom of Information Law could be cited to withhold the records in question.

A second potentially relevant ground for denial is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". It is important to note that §89(2)(b) lists five examples of unwarranted invasions of personal privacy, the first of which includes:

> "...disclosure of employment, medical or credit histories or personal references of applicants for employment..." [§89(2)(b)(i)].

In my view, although §§87(2)(b) and 89(2)(b)(i) of the Freedom of Information Law may be cited to withhold portions of an application or a resume, I do not believe that they could be cited to withhold those documents in their entirety.

Although it is often difficult to determine whether disclosure of particular records would result in an unwarranted invasion of personal privacy, for subjective judgments must often be made regarding privacy, the courts have provided substantial guidance regarding the privacy of public employees. As a general rule, the courts have found in various contexts that public employees enjoy a lesser capacity to protect their privacy than others, for it has been found that public employees are required to be more accountable than others. Further, in

terms of records that identify public employees, it has been held in essence 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 rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905, (1985); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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 identifiable to public employees are irrelevant to the performance of their duties, they may be withheld, for disclosure in such instances would result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Under the circumstances, some aspects of both an application and a resume might be irrelevant to the performance of one's official duties. For instance, if either of those documents contains the home address, social security number, marital status, military service or other personal details regarding individuals' lives, those portions of the records likely are irrelevant to the performance of one's official duties. As such, those aspects of the records might justifiably be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

However, other aspects of the records relevant to their official duties might be available. If, for example, an individual must have certain types of experience or educational accomplishments as a condition precedent to serving as an assessor, those aspects of the records would in my view be relevant to the performance of the official duties of not only the individuals to whom the records pertain, but also the appointing agencies or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications might serve as conditions precedent to employment.

In the context of your request, if there are certain conditions precedent or requirements that must be met or accomplished before a person may serve as an assessor, I believe that records indicating those conditions or requirements would be available, for disclosure would in my view and under those circumstances result in a permissible rather than an unwarranted invasion of personal privacy. Moreover, a review of such records would appear to be the only method by which the public could determine that the qualifications required to be met have indeed been met. It is also possible that many aspects of the records in question pertain to previous public employment. Once again, payroll information described earlier would have indicated to the public at the time of one's employment that person's name, title and salary. If that information was available in the past, it would in my opinion be difficult to justify a denial of the same information now.

One judicial determination of which I am aware involved somewhat similar considerations. Specifically, when teachers were given salary increases due to the completion of particular courses of study, records pertaining to the teachers were initially withheld by a school district on the ground that they were found within the teachers' personnel files. Nevertheless, the court found that records indicating approval for courses taken, the names of the courses and the verification of satisfactory completion of those courses were available, even though they identified particular employees and were found within the personnel files of those employees (see Steinmetz, supra).

The third potentially relevant ground for denial is §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, records prepared by the Civil Service Commission as well as communications between the Commission and towns might be characterized as inter-agency or intra-agency materials. Nevertheless, the contents of those materials, i.e., resumes and employment applications, would likely constitute factual information in their entirety. Since §87(2)(g)(i) requires that statistical or factual information found within inter-agency or intra-agency materials must be made available, I do not believe that §87(2)(g) of the Freedom of Information Law could be cited as a basis for withholding 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

cc: Thomas C. Hendry
Harold E. Coleman
Gerald J. Mineham

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2534

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 8, 1982

Mr. Marty Datz

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. Datz:

I have received your correspondence of June 23 concerning a request sent to the State Education Department under the Freedom of Information Law.

Specifically, you have requested a series of briefs submitted by the parties to the Education Department in conjunction with proceedings conducted under §3020-a of the Education Law.

In this regard, I have made several calls on your behalf to determine the status of your request. In my initial conversation with Eugene Snay, Records Access Officer for the Education Department, he informed me that you were advised that the briefs in question need not be made available because they are not required to be submitted or prepared. I would contend, however, that the briefs constitute "records" 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, I believe if the briefs are in possession of the Education Department, they constitute "records" as defined by the Law and, therefore, are subject to whatever rights of access might exist.

With respect to rights of access, 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 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.

Of relevance under the circumstances is the direction provided in §3020-a of the Education Law. Much of the information leading to a final determination rendered pursuant to a proceeding conducted under §3020-a may likely be withheld due to privacy considerations relative to persons charged [see Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, although a record indicating charges that are upheld is likely available, subdivision (4) of §3020-a states in part that:

> "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".

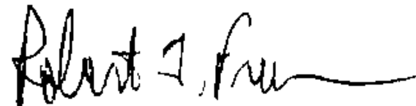
Consequently, if charges are dismissed and the employee is acquitted, records pertaining to the charges are expunged, presumably in an effort to protect that person's privacy.

In the context of your request, the extent to which the briefs that you are requesting pertain to proceedings in which the charges were upheld or in which persons charged were acquitted is unspecified. Based upon the direction given in §3020-a, those briefs involving persons who are acquitted might likely be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)]. If, however, the briefs pertain to persons against whom charges have been upheld, the determinations would be available, and privacy considerations regarding the briefs would in my view likely be minimized.

Without specific knowledge of the contents of the briefs, however, it would be inappropriate to conjecture as to whether they must be made available in their entirety or in part. For instance, reference to specific students or others might be included in the briefs. In such cases, it is possible that privacy considerations might arise with respect to those individuals, as well as the persons charged.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Eugene Snay

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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ROBERT J. FREEMAN

July 8, 1982

Douglas Ritter

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. Ritter:

I have received your letter of June 23 in which you requested advice with respect to an initial denial of access to a certificate of compliance by the Director of Code Enforcement for the City of Binghamton.

In this regard, a copy of a determination following your appeal by Mayor Juanita M. Crabb dated June 28 has been received by this office. As indicated in the correspondence from you and Mayor Crabb, the certificate of compliance that you are requesting is no longer in possession of the City of Binghamton. According to Mayor Crabb's letter, "...the original certificates dated May 26, 1982 were presented to the Department of Social Services at a fair hearing in your presence and at your request".

I would like to offer the following comments in response to your inquiry.

Section 89(3) (see attached) of the Freedom of Information Law states in relevant part that, as a general rule, an agency is not required to create a record on behalf of an applicant. As such, if an individual requests a record that no longer is in possession of an agency, the agency is not obligated to replace the original record or

create a new record on behalf of the applicant. Since the Code Enforcement Department of the City of Binghamton permits only one certificate to be issued, there is no obligation on the part of that department of which I am aware to reissue a certificate it no longer possesses.

Further, it appears that Mayor Crabb sought to respond to your appeal by proposing what may constitute an equitable solution. Since a new certificate apparently cannot be issued, the Mayor has offered to provide you with a copy of a file memorandum which certifies compliance with the housing code. Although the City is not obligated to create a new record, it appears that the Mayor is willing to accommodate your needs in this matter in as reasonable a manner as possible. It is suggested that if you still want to obtain a copy of the original certificate, you might want to contact the appropriate office of the Department of Social 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

PPB:RJF:ss

cc: Mayor Crabb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 8, 1982

Mr. Ronald Babchak
#68-C-9
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. Babchak:

I have received your letter of June 23, as well as the correspondence attached to it.

According to your letter, you have been incarcerated for fifteen years for a crime in which you stated that you had no involvement. Having requested various records from the Buffalo Police Department, you were denied for a number of reasons by means of a letter prepared by James B. Cunningham, Commissioner of Police.

I would like to offer the following comments and suggestions regarding your inquiry.

First, having read Commissioner Cunningham's response to your request of May 27, I cannot disagree with the Commissioner's bases for withholding records. It is emphasized that the Committee on Public Access to Records is authorized to advise with respect to the Freedom of Information Law; it has no authority to review records of another agency, such as the Buffalo Police Department, nor does it have the authority to compel an agency to grant or deny access to records.

Under the circumstances, to the extent that the records fall within the grounds for denial identified by Commissioner Cunningham, I believe that the denial would be proper.

Second, it is noted that a request for records must "reasonably describe" the records sought [see attached, Freedom of Information Law, §89(3)]. In this regard, Commissioner Cunningham expressed the contention that:

> "...your request suffers from overbreadth; your request does not specify in any detail the information sought, but only the persons from whom sought. It seeks information from a wide variety of city and county agencies (all employees of the E.J. Meyer Memorial Hospital, all correspondence with the Oakland, California Police Department relative the Payne Homicide) information which obviously is not totally within the possession of the Buffalo Police Department."

Having reviewed your request, a great deal of specific information was requested. Whether it is sufficiently specific in relation to existing records is unknown to me. Further, based upon the Commissioner's response, not all of the information requested is in possession of the Buffalo Police Department. As such, it is suggested that you might want to submit additional requests to the agencies that might have possession of the records in which you are interested.

Third, Commissioner Cunningham indicated that some of the records consist of "court documents". If that is so, it is suggested that you might want to submit a request to the court in which the proceeding or proceedings may have been conducted. Although the Freedom of Information Law does not include the courts or court records within its scope, various provisions of the Judiciary Law and other court acts provide substantial rights of access to court records [see e.g., Judiciary Law, §255]. As such, requests for court records should be sent to the clerks of the courts maintaining the records that you are seeking.

Fourth, the introductory language of §87(2) of the Freedom of Information Law refers to the capacity of an agency to withhold "records or portions thereof" that fall within one or more among eight grounds for denial that follow. In my view, since the Law permits an agency to withhold "records or portions thereof", it is possible that some records might be both available and deniable in part. Moreover, I believe that the quoted language requires that an agency review records sought in their

entirety to determine which portions, if any, might justifiably be withheld. In terms of your request, it is possible that the records may be withheld in their entirety based upon the grounds for denial expressed by Commissioner Cunningham. However, perhaps a review of the records could result in a finding that portions may justifiably be withheld, while other aspects of the records might be available. As noted earlier, however, without knowledge of the contents of the records sought, I could not conjecture as to the extent to which the denial may have been proper.

Fifth, §89(4)(a) of the Freedom of Information Law states in 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."

Based upon the language quoted above, a person denied access to records may within thirty days of the denial appeal the denial to the head or governing body of an agency or whomever may be designated to render determinations on appeal. Since the denial is dated May 27, more than thirty days have transpired. In the future, following an initial denial of a request, it is suggested that an appeal be made within thirty days of the denial.

Lastly, it is suggested that you might want to discuss the matter with your attorney or a representative of an advocacy organization, such as Prisoners' Legal Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Commissioner Cunningham

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 9, 1982

Mr. Fred M. Anderson

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. Anderson:

I have received your letter of July 1 in which you requested assistance regarding a request made under the Freedom of Information Law.

Attached to your letter is a copy of a request dated June 19 directed to the Montgomery County Sheriff, Mr. Emery. The information requested involves the "inclusive volume numbers" of various series of reported judicial decisions and McKinney's at the Montgomery County Jail Library "from 8/16/81 to 9/3/81".

I would like to offer the following comments regarding your inquiry.

First, the title of the Freedom of Information Law is somewhat misleading, for it is not a law that grants access to information, but rather a law that pertains to rights of access to records. As such, the Freedom of Information Law is not in my view a vehicle by which a person may essentially cross-examine public officials or request "information" by means of a series of questions. It is a vehicle under which records may be requested.

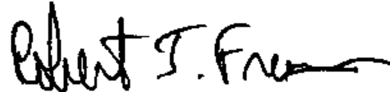
Second, as a general rule, an agency, such as a sheriff's office, is not required to create a record in response to a request [see Freedom of Informtion Law, §89(3)]. Therefore, if, for example, records containing information sought do not exist, an agency would have no

obligation to create records on behalf of an applicant. Moreover, I do not believe that the Sheriff would be required to perform research in order to determine exactly which volumes were present at the library during the time period that you specified.

If, however, the Sheriff's office maintains a filing system of its library, for example, which contains records specifying which volumes were at the library during the period identified, such records would in my view likely be available. If such records exist, I believe that they would constitute factual information accessible under §87(2)(g)(i) of the Freedom of Information Law. Nevertheless, I would conjecture that records might not be kept in such a way that the information sought could be retrieved in the form of a record or records, particularly in view of the fact that your request concerns a specific and brief period of time.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff Emery

STATE OF NEW YORK

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 12, 1982

Mr. David A. Schlissel
Counsel
State Consumer Protection Board
99 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. Schlissel:

I have received your letter of July 9 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the correspondence attached to it, on July 1 you requested various monthly "Construction Monitoring" reports prepared by the staff of the Public Service Commission (PSC) with respect to the status of construction at Nine Mile 2 and forwarded to the PSC. Attached to your letter is a denial by William F. Barnes, Deputy Secretary to the Department of Public Service in which Mr. Barnes wrote that he was:

> "...denying your request for these inter-office memoranda consistent with the permissive provisions as provided in Article 6, Section 87 2(g) of the Public Officers Law."

I would like to offer the following comments regarding your inquiry and the denial.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the PSC, 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 is important to note that the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within one or more among the eight ensuing grounds for denial. Since the cited provision permits an agency to withhold "records or portions thereof" falling within one or more of the grounds for denial, it would appear that the Legislature envisioned situations in which a single record or report might be both available and deniable in part. Moreover, I believe that the language of §87(2) requires that an agency review records sought in their entirety to determine which portions, if any, fall within one or more of the grounds for denial.

Third, the basis for withholding cited by Mr. Barnes, §87(2)(g) of the Freedom of Information Law, in my view requires that inter-agency and intra-agency materials be reviewed to determine which portions fall within the three categories of accessible information found within the cited provision. 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. 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, reports furnished by staff to the Commission could in my opinion be characterized as inter-agency or intra-agency materials. Nevertheless, to the extent that the reports in question contain any of the three types of accessible information listed in subparagraphs (i), (ii), or (iii) of §87(2)(g), they would in my view be accessible. Further, due to the nature of the reports, it would appear that portions of such reports would be reflective of "statistical or factual tabulations or data" that are accessible. However, the extent to which the reports contain statistical or factual information is unknown to me.

And fourth, §89(6) of the Freedom of Information Law states that:

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

Stated differently, if rights of access to records have been established by means of judicial determination or other provisions of law, nothing in the Freedom of Information Law could be construed to limit or abridge those rights of access. In this regard, another provision of law that might grant rights of access to records of the PSC in excess of those granted by the Freedom of Information Law is §16 of the Public Service Law. Specifically, subdivision (1) of §16 of the Public Service Law states that:

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

As you are aware, the scope of §16 was reviewed recently by the Court of Appeals in New York Telephone v. Public Service Commission [___ NY 2d ___ (1982)]. Although the Court of Appeals did not find that §16 should be interpreted literally, thereby granting access to all records in possession of the Public Service Commission, it is possible that the restrictions upon §16 found by the Court would not be applicable to the records in which you are interested. In New York Telephone, supra, an analogy was drawn between the Judiciary Law and §16 of the Public Service Law, and the Court stated that:

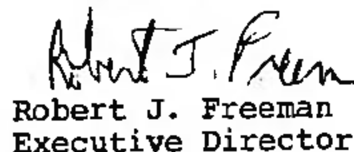
> "[F]or the same reason that Judiciary Law, section 4 (providing that court sessions shall be public) does not preclude a court's exclusion of the public when such exclusion is necessary or appropriate to the protection of confidential trade information, Public Service Law, section 16, subdivision 1 (providing that proceedings of the Public Service Commission shall be public records) does not foreclose restriction

> by the Commission of access to its proceedings when such restriction is necessary or appropriate for protection of similar confidential material. Indeed, absent an express statutory prohibition (of which there is none and as to the validity of which we have no occasion to comment), no rationale is suggested why the Commission should not extend the same evidentiary privileges and protection to trade secrets that a court would in a judicial proceeding..."

From my perspective, two terms used by the Court of Appeals provide direction regarding the scope of the capacity to withhold records under §16. One of those terms is "confidenital"; the other concerns evidentiary "privileges". Under the circumstances, it does not appear that the materials sought could be characterized as "confidential". The records did not come into the possession of PSC via a third party, as in the case of trade secrets submitted to the PSC by the New York Telephone. On the contrary, they are staff memoranda, portions of which might justifiably be withheld under the Freedom of Information Law, but which might nonetheless be available under §16 of the Public Service Law. Similarly, based upon the correspondence, it does not appear that the materials sought would fall within any evidentiary privilege, i.e., an attorney-client privilege, for example. As such, again, it is possible that none of the bases for withholding described by the Court in conjunction with §16 of the Public Service Law might be applicable with respect to the records in question. If that is so, §87(2)(g) of the Freedom of Information Law could not likely be cited to withhold records otherwise available under §16 of the Public Service 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: Samuel Madison, Secretary
William Barnes, Deputy Secretary

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 12, 1982

Ms. Ann Booth
Journal Newspapers
72 West High Street
Ballston Spa, NY 12020

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. Booth:

I have received your letter of July 7, in which you requested an advisory opinion regarding "two recent actions by the Ballston Spa Central School Board of Education."

Your first area of inquiry concerns a secret ballot vote taken by the Board with respect to the election of Board president and vice president. In this regard, when you asked the clerk of the Board for a record indicating "how the members voted", you were informed that "only the tally would be recorded as that was the purpose of a secret ballot."

Your second area of inquiry concerns an executive session held at the request of a former superintendent. The executive session was held on the ground that it involved a "personnel matter", even though the nature of the issue was not in any way described.

I would like to offer the following comments regarding your questions.

First, with respect to the secret ballot vote, the Freedom of Information Law since its enactment in 1974 has effectively precluded public bodies from taking action by means of a secret ballot. Specifically, §87(3) states that:

> "[E]ach agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Since the School Board is clearly an "agency" as defined by §86(3) of the Freedom of Information Law, in any instance in which the Board votes, I believe that a voting record must be compiled in which each member who voted is identified by means of the manner in which his or her vote is cast. Based upon the clear direction provided by §87(3)(a) of the Freedom of Information Law, I believe that secret ballot voting by members of public bodies is prohibited and that a voting record identifying each member who voted and the manner in which he or she voted must be prepared whenever a final vote is taken.

With respect to your second area of inquiry, §100(1) of the Open Meetings Law prescribes a procedure that must be accomplished 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, I believe that three steps must be accomplished by a public body during an open meeting before it may enter into an executive session. Those steps include a motion made by a member of the public body to enter into an executive session; a general description of the subject to be considered during the executive session; and passage of the motion by a majority vote of the total membership of a public body.

Further, a public body may not enter into an executive session to discuss the subject of its choice. On the contrary, an executive session may be held to discuss only those matters deemed appropriate for executive session, which are indicated in paragraphs (a) through (h) of §100(1) of the Law.

From my perspective, the only ground for executive session of possible relevance in terms of the subject described would have been the so-called "personnel" exception. While the scope of that exception has been the subject of conflicting interpretations as it appeared in the Open Meetings Law as originally enacted, I believe that its language as amended has been significantly clarified.

The original §100(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Based upon the exception quoted above, public bodies often entered into executive sessions to discuss "personnel" generally or to consider matters that might tangentially or indirectly affect public employees. As stated in the Committee's third annual report to the Legislature on the Open Meetings Law dated February 27, 1979:

> "It is the Committee's contention that paragraph (f) is not intended to shield discussions regarding policy under the guise of privacy. Clear distinctions may be made between situations in which 'personnel' are discussed directly and indirectly. For example, when a municipal board considers the dismissal of public employees for budgetary reasons, the discussion should be public, for issues regarding policy, not the privacy of public employees, would be at issue. Conversely, when the same board considers the dismissal of a particular employee because that person has not performed his or her duties adequately, the discussion could properly be discussed in executive session, for it would deal with the privacy of a named individual."

To clarify the "personnel" exception, the Committee recommended amendments to §100(1)(f) that were enacted in 1979 and which became effective on October 1 of that year.

Currently, §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..." (emphasis added).

As such, it is in my view clear that a motion to enter into an executive session to discuss "personnel" without a greater description of the topic would be insufficient. Further, I believe that the applicability of §100(1)(f) is limited to those situations in which a discussion involves a "particular person" in conjunction with one or more of the topics indicated in §100(1)(f).

I hope that I 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: Paul Giacobbe, Superintendent
Robert Rhubin, President

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2540

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

July 13, 1982

Mr. Carl Roemer

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. Roemer:

I have received your letter of June 29 in which you requested an advisory opinion under the Freedom of Information Law.

You have written with respect to difficulties you continue to encounter in making requests for records under the Freedom of Information Law from the Town of Otsego. Although this office some time ago prepared an advisory opinion on your behalf, a copy of which was sent to the Town Board, your most recent letter indicates that you remain frustrated in your efforts due to an apparent failure of Town officials to comply with the procedural requirements of the Law.

I would like to offer the following comments in response to your inquiry.

First, you wrote that confusion exists among Town officials regarding the responsibility for the procedural administration of the Law. You also wrote that you "again requested information from the Town Clerk in writing and got a rather rough disclaimer of responsibility from both the Town Clerk and the Supervisor...There seems to be no formal procedure on Freedom of Information." In the previous advisory opinion of June 2, §87(1) of the Freedom

of Information Law was cited, for it requires every agency, including the Town of Otsego, to adopt regulations consistent with those promulgated by the Committee. In order to assist units of government in fulfilling procedural requirements, the Committee has developed model regulations (see attached). By filling in the appropriate blanks, model regulations can be adopted by a town board. I am sending a copy of this letter as well as the model regulations to the Town Board for its review.

Second, you have inquired as to the remedies that are available if the advice of the Committee is not followed. In this regard, it is emphasized that the Committee has no authority to enforce the Freedom of Information Law; its authority is advisory and is not binding. The Freedom of Information Law sets forth various procedural steps which may be taken whan a denial of access has occurred. 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)].

In my view, whether or not the Town Clerk or the Supervisor disclaims responsibility for providing access to records under the Freedom of Information Law, from the facts you have described, it appears that a failure to respond to your request constituted a "constructive" denial as noted above.

Lastly, you may be interested to learn that a new provision of the Freedom of Information Law will permit a court to award reasonable attorney fees to a member of the public in certain circumstances when that person successfully challenges a denial of access to records. This legislation, which was recommended by the Committee, was signed into law on May 3, 1982 by Governor Carey and will become effective on October 15 of this year. Additionally, another provision will preclude agencies from assessing fees in excess of twenty-five cents per photocopy, unless a statute specifically authorizes a higher fee. I have enclosed a copy of the legislation, Chapter 73 of the Laws of 1982, 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
Assistant to the Executive Director

RJF:PPB:jm

Encs.

cc: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2541

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 14, 1982

Martha Jacovides, Editor
The Malverne Times
P. O. Box 116
Malverne, New York 11565

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. Jacovides:

I have received your letter of July 8, in which you requested advice with respect to the use of the Freedom of Information Law.

According to your letter, you have encountered a series of difficulties regarding the capacity to obtain or review records of the Malverne Police Department. In terms of background, several years ago, the police blotter was withheld; when the amended Freedom of Information Law was enacted, an arrangement was made whereby you could conditionally inspect the blotter. Most recently, due to a series of articles regarding the Police Department, you were informed that you could no longer read or inspect the police blotter. In lieu of the blotter, you indicated that the Police Chief's secretary "will type out what he feels [you] need to have and give it to [you] weekly."

Upon questioning this new procedure, the Chief "flatly" stated that you could not review the police blotter. Further, he expressed the opinion that under the Freedom of Information Law "anything [you] wanted to see must be preceded by a letter specifically spelling out same, and delivered 48 hours previous to...getting any response."

You have asked for guidance regarding "your rights" under the Freedom of Information Law, as well as the "Chief's rights".

I would like to offer several comments regarding the situations you described.

First, there are judicial interpretations concerning both the content and access to police blotters. Specifically, in Sheehan v. City of Binghamton [59 AD 2d 808 (1977)] it was held that a police blotter constitutes a log or diary in which any event reported by or to a police department is recorded. The court stressed that a police blotter contains no investigative information, that it is merely a summary of events or occurrences, and therefore concluded that a police blotter is accessible.

The Sheehan decision was rendered under the original Freedom of Information Law, which differed in structure from the existing Freedom of Information Law, which went into effect on January 1, 1978. The original law granted access to specified categories of records to the exclusion of all others. One of the categories of accessible records included "police blotters and booking records" [see original Freedom of Information Law, §88(1)(f)]. The new Law reverses the scheme of the original Law. Instead of providing access to specified categories of records to the exclusion of all others, the Law now states that all records are available, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

From my perspective, the fact that the Freedom of Information Law no longer specifically directs that police blotters and booking records be made available does not constitute a basis for withholding those records under the amended statute. Section 89(6) of the current Freedom of Information Law states that:

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

Stated differently, nothing in the Freedom of Information Law may be cited to limit or abridge rights of access granted either by other provisions of law or by means of judicial determinations. In this instance, there is a judicial determination, the Sheehan case cited earlier, which directs that police blotters are available. The effect of the decision in my view is to preserve rights of access to police blotters. Consequently, even if a police blotter or a booking record makes reference to names, for instance, the record in my view, as a general rule, remains available.

Second, with regard to the amended Law generally, there are several provisions that may relate to your inquiry. It is noted that most of the grounds for denial appearing in the amended Freedom of Information Law are based upon potentially harmful effects of disclosure. Unless disclosure of records would result in significant harm either to an individual or a governmental process, it is likely that records must be made available.

Perhaps the most relevant is §87(2)(e), which states that an agency may withhold records or portions thereof that:

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

The language quoted above permits an agency, such as a police department, to withhold records compiled for law enforcement purposes only under specified conditions. For instance, disclosure of a police blotter or booking record would not in my view likely interfere with an investigation or deprive a person of a right to a fair trial, for it is merely a summary of events. If such a record contains reference to a confidential informant, that portion of the record could be deleted. The remainder, however, would be required to be made available. Further, it might be contended that a police blotter is compiled in the ordinary course of business and not for "law enforcement purposes". If that is so, §87(2)(e) would not be applicable to police blotters.

Another ground for denial that could arise in rare instances is §87(2)(f), which states that an agency may withhold records or portions of records when disclosure would "endanger the life or safety of any person." Again, that provision likely would arise most often if a record identifies a confidential informant, for if the identity of such an individual is disclosed, it is conceivable that his or her life or safety could be placed in jeopardy.

The last ground for denial that could be relevant may also be cited as a basis for disclosing. Section 87 (2)(g) of the Law states that an agency may withhold records that:

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

It is emphasized that the language quoted above contains what in effect is a double negative. Although the Law states that inter-agency and intra-agency materials may be withheld, it also provides that portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. It is likely that a police blotter would constitute "intra-agency" material developed by the Police Department. However, the information in a police blotter consists of factual information which is available under §87(2)(g)(i).

In short, it is reiterated that the Freedom of Information Law is based upon a presumption of access and that records must be made available, except to the extent that one or more of the grounds for denial may appropriately be cited to withhold.

Third, it is important to point out that the Freedom of Information Law places the burden of proof in a judicial challenge to a denial of access upon government. If a judicial challenge to a denial of access is initiated, the agency has the burden of proving that the

records withheld fall within one or more of the grounds for denial appearing in the Law. Further, the Court of Appeals, the state's highest court, has held that an agency cannot merely assert a ground for denial and prevail; on the contrary, the agency must demonstrate that the harmful effects of disclosure described in the grounds for denial would indeed arise [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978), 46 NY 2d 906 (1979); Fink v. Lefkowitz, 63 AD 2d 610 (1978), modified in 47 NY 2d 567 (1979)].

Fourth, you stated in your letter that the Chief informed you that you must submit a request under the Freedom of Information Law which "specifically" indicates the records in which you are interested. In this regard, I would like to point out that the original Freedom of Information Law, §88(6), required that an applicant for records submit a request for "identifiable" records. That provision often resulted in difficulty on the part of members of the public, for without knowledge of the specific types or contents of records sought, it may have been all but impossible to seek an "identifiable" record. However, among the amendments to the Freedom of Information Law that became effective in 1978 is a new standard regarding the degree to which records sought must be described. Section 89(3) of the Freedom of Information Law states in relevant part that an agency may require that a request be made in writing for a record "reasonably described". As such, I believe that it is clear that a request need not identify particular aspects of a police blotter, for example, in detail. On the contrary, a request reasonably describing the record or records sought should suffice. For instance, a request to inspect the police blotter for a particular date or dates would in my view "reasonably describe" the records sought.

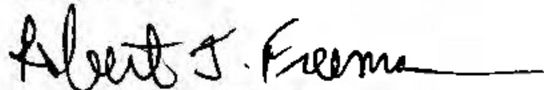
Lastly, with respect to the Chief's contention that a request must be delivered forty-eight hours prior to the receipt of a response, I am unaware of any such provision. Moreover, I have enclosed a copy of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law. Relevant under the circumstances, is §1401.4 entitled "Hours for public inspection". Section 1401.4(a) 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."

In order to provide the same advice to the Police Chief, a copy of this opinion will be sent to Chief Garrigan. Further, for future reference, enclosed for both you and the Police Chief are copies of the Freedom of Information Law and an explanatory pamphlet on the subject.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Police Chief Raymond Garrigan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2542

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 14, 1982

Mr. John Batts
81-A-6050, B-8-29
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. Batts:

I have received your letter of July 13 in which you requested assistance from this office.

Specifically, you indicated that you are trying to locate personal property that was apparently lost at the Ossining Correctional Facility. In this regard, you asked whether this office could provide a property claim form. You also expressed your belief that, although you are being housed in a "Maximum A" correctional facility, you belong in a "Minimum A" facility. You have asked that I attempt to "look into this matter".

I would like to offer the following comments regarding your request for assistance.

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 does not have possession of records generally, such as a property claim form, nor does it have the authority to compel an agency to grant or deny access to records. Further, the Committee has no jurisdiction or influence with respect to the administration of a correctional facility or the placement of inmates. Consequently, this office does not have the form in which you are interested, nor could it intercede with respect to your incarceration.

Second, the Freedom of Information Law might nonetheless be useful to you regarding inquiries related to lost property. It is suggested that you might want to request records regarding your property as well as the form in question from your facility superintendent. In this regard, enclosed is a copy of the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services. Parts 5.20 through 5.25 make specific reference to inmate records. In addition, §5.15 indicates that requests for records at a facility should be directed to the facility superintendent.

Lastly, it is suggested that you might want to contact your attorney or a representative of a legal aid group, such as Prisoners' Legal Services. It is likely that such individuals could provide you with much greater and more specific direction than this 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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2593

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 15, 1982

Mr. Paul Hellmers
Assistant Superintendent
for Business
Port Jefferson Public Schools
High Street
Port Jefferson,NY 11777

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. Hellmers:

I have received your letter of July 12 and appreciate your interest in complying with the Freedom of Information Law.

You have asked for "further information" concerning Chapter 73 of the Laws of 1982, which amends the Freedom of Information Law. You also requested information regarding suggested forms to be used by applicants for records sought under the Freedom of Information Law.

With respect to the legislation, enclosed are copies of the bill signed by the Governor, the Committee's memorandum to the Governor's Counsel in support of the bill, and, for purposes of background, the Committee's latest annual report on the Freedom of Information Law, which discusses both aspects of the legislation.

Your second area of inquiry concerns forms used for the purpose of making requests under the Freedom of Information Law. In this regard, the Committee has never devised or prescribed a particular form to be used for the purpose of submitting requests. On the contrary, §89(3)

of the Freedom of Information Law (see attached) merely states that an agency may require that a request be made in writing that "reasonably describes" the records sought. As such, it has been advised that any request made in writing that reasonably describes records requested by an applicant should suffice. Moreover, it has also been advised that a failure to complete a form prescribed by an agency cannot diminish one's procedural or substantive rights of access under the Freedom of Information Law.

Also enclosed for your consideration is a pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" which may be useful to you. It is noted that the pamphlet 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-2544

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

July 15, 1982

Ms. Lark J. Shlimbaum
Assistant Town Attorney
Town of Islip
Office of the Town Attorney
Town Hall
Islip, New York 11751

Dear Ms. Shlimbaum:

I have received your letter of July 8 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns situations in which a property owner seeks to obtain information in preparation for filing a grievance with the Town Board of Assessment Review or a tax certiorari petition. Your inquiry is whether in such circumstances form No. EA-5217, a real property transfer form prepared by the Board of Equalization and Assessment, should be made available. In a related vein, you have asked "[H]ow far can and should a Town go in determining the purposes for which a request for access to this record is made?"

It is noted at the outset that the issues raised do not clearly fall within the ambit of the Freedom of Information Law or, therefore, the Committee's duties. Nevertheless, having discussed the matter in the past with various state and local government representatives, as a service to the Town, I would like to offer the following comments.

The form in question was developed pursuant to §574 of the Real Property Tax Law, which in subdivision (5) 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 of copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

With respect to the language quoted above, 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.

With regard to "how far" the Town may go to determine the purpose for which a request for a form may be made, I do not believe that a clear answer can be given. As you are aware, as a general rule, if a record is accessible under the Freedom of Information Law, it should be made equally available to any person, without regard to status or interest [Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Nevertheless, the specific language of §574 of the Real Property Tax Law conditions access upon the purpose for which a request is made, i.e., whether or not it is made in conjunction with an administrative or judicial review. I would conjecture that if real property has been reassessed and a request is made during the period in which an administrative proceeding may be initiated, it might be assumed that the request is made for the purpose of initiating an administrative review of an assessment. I would also suggest, however, that it would not likely be improper to attempt to ascertain the reasons for seeking such forms when requests are made.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-795
FOIL-AO-2545

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 15, 1982

Mr. Robert H. Weiner

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. Weiner:

I have received your letter of June 29, in which you requested an advisory opinion regarding compliance by a school board's subcommittee under the Open Meetings Law.

I would like to offer the following comments in response to your inquiry.

First, you stated in your correspondence that the subcommittee in question is one of two such entities appointed by the president of the Yonkers Board of Education. You further stated that "[E]ach committee is comprised of three Trustees of the Board. The Superintendent of Schools and or staff members attend all meetings and act in an advisory capacity...The sub-committees may conduct such business that can only be deemed advisory in nature to the full Board."

On the basis of the facts presented, it is my view that the subcommittee in question is a public body required to comply with the provisions of the Open Meetings Law.

In terms of background, questions often arose under the Open Meetings Law as originally enacted concerning the scope of the Law with respect to committees, subcommittees and similar advisory bodies. However, in 1979, the definition of "public body" was amended. Section 97(2) currently 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 noted that the language quoted above makes reference to entities that "conduct" public business, including committees, subcommittees and similar bodies. Further, a recent decision by the Appellate Division, Fourth Department, dealt with similar issues in conjunction with the meetings and records of an advisory body created by the Mayor of the City of Syracuse [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. In Syracuse United Neighbors, supra, the court held that the advisory nature of the appointed body did not preclude that entity from falling within the definition of "public body" found in §97(2).

From my perspective, based upon the amendments to the Open Meetings Law and their judicial interpretation, the subcommittee designated by the president of the Board of Education is a public body subject to the Open Meetings Law in all respects.

Second, your major inquiry focuses upon requirements concerning minutes of the subcommittee. In this regard, the Open Meetings Law provides direction regarding what may be considered as minimum requirements with respect to the contents of minutes. Section 101(1) of the Open Meetings Law states that:

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

In a letter to this office dated July 8 which makes reference to your request for an advisory opinion, Martin G. Fareri, Jr., President of the Yonkers Board of Education wrote that:

> "[T]he minutes of a subcommittee do not have to consist of a record or summary of the general discussion at each subcommittee meeting. In essence, the minutes do not have to consist of a verbatim transcript of all comments made at such meetings."

In my view, given the language of §101(1) of the Open Meetings Law, I would agree with the contentions made by Mr. Fareri in his letter. The Open Meetings Law does not require that minutes contain a verbatim account of every statement made at a meeting. On the contrary, minutes are required to make reference only to those items mentioned in §101(1). You indicated in your correspondence, however, that subcommittee meetings "were announced as open to the public and unofficial consensus voting takes place." To the extent that discussions during subcommittee meetings resulted in motions, proposals or resolutions, any consensus reached by the subcommittee would in my opinion be required to be contained in the minutes.

Third, you also expressed concern regarding notes taken at subcommittee meetings which appear to be of a "personal" nature. Although I cannot determine the nature of such "personal notes" on the basis of either your correspondence or that of Mr. Fareri, such records would not appear to constitute "minutes" as required by §101. Nevertheless, those "notes" might be subject to rights of access under the Freedom of Information Law if they are created by a committee or a staff member in the course of his or her official duties. In this regard, §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."

Additionally, in Warder v. Board of Regents [410 NYS 2d 742 (1978)], it was held that personal notes created during a meeting of the Board of Regents by the secretary to the Board were records subject to rights of access granted by the Freedom of Information Law, even though official minutes were also prepared.

I hope 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: Martin G. Fareri, Jr., President
John Couzens, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2546

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

July 16, 1982

Mr. John Robert DeZimm
P.O. Box 367 - 82 C 127
Dannemora, New York 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. DeZimm:

I have received your letter of July 12 in which you asked for various materials from this office.

As requested, enclosed are copies of a pamphlet entitled "The Freedom of Information and Open Meetings Laws ...Opening the Door" and the regulations promulgated by the Committee that govern the procedural aspects of the Freedom of Information Law.

You also requested information regarding the procedures under which you may obtain information from the State Legislature.

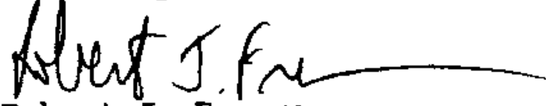
In this regard, it is noted that records of the State Legislature are treated differently from those of agencies of government subject to the Freedom of Information Law. With respect to agencies generally, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

With respect to the State Legislature, however, §88(2)(a) through (h) of the Freedom of Information Law specify the categories of records that must be made available by the State Legislature to the exclusion of all others. In addition, §88(1) indicates that the Temporary

president of the Senate and the Speaker of the Assembly must promulgate rules and regulations pertaining to the availability, location and nature of records in possession of their respective houses. To obtain additional information regarding the procedures adopted by the Senate and the Assembly, it is suggested that you might want to write to the Secretary to the Senate regarding Senate records and to the Assembly Public Information Office regarding records of the Assembly.

I hope that I 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-2547

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ROBERT J. FREEMAN

July 16, 1982

Mr. Salvatore M. Lucchesi

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. Lucchesi:

I have received your letter of July 9, in which you requested advice under the Freedom of Information Law.

According to the correspondence attached to your letter, you requested records regarding a complaint that you submitted to the Board for Professional Medical Conduct at the State Health Department. Specifically, having submitted the complaint in 1979, you were informed in July of 1980 that the Board found neither "unprofessional conduct" not "professional misconduct" and, therefore, dismissed the case. On June 4, 1982, you requested "copies of all documents relevant to the 'investigation'" conducted in response to your complaint.

Since you have not received any response to your request as of July 9, you requested advice on the matter.

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.

Second, under the circumstances, notwithstanding rights granted by the Freedom of Information Law, it appears that the records in which you are interested may be kept confidential.

Here I direct your attention to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". In this regard, §230 of the Public Health Law pertains specifically to the State Board for Professional Medical Conduct. Subdivision (6) of the cited provision makes reference to committees that investigate 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, reports and patient records of any committee remain confidential, unless specific direction is given to the contrary.

In addition, the Court of Appeals has held that records in possession of the Board, including medical records and patient interviews, are confidential and must be withheld under §87(2)(a) of the Freedom of Information Law as well as Article 31 of the Civil Practice Law and Rules [see John P. v. Whalen, 75 AD 2d 1021 (1980); aff'd 54 NY 2d 89 (1981)].

Third, even though records may be withheld under the Freedom of Information Law, agencies must nonetheless in my opinion respond to requests within the time limits specified in the Freedom of Information Law and the regulations promulgated by the Committee.

In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one 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 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: Thaddeus J. Murawski, M.D.
Steve Krill

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2548

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 16, 1982

Mr. Paul LoGalbo
NYS Division for Youth
State Office Building - 3rd Floor
44 Hawley Street
Binghamton, New York 13901

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. LoGalbo:

I have received your letter of July 7 and the enclosures attached to it, in which you requested an advisory opinion regarding a denial of access to records by the Department of Civil Service.

You have enclosed a copy of the letter from Civil Service in which you were denied access to five of eight items you requested under the Freedom of Information Law. Specifically, the records you sought include both questions and answers regarding an examination administered by the Department of Civil Service, as well as objections to the examination you transmitted to the Department and their response to those objections.

I would like to offer the following response 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 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 we discussed during a recent conversation §87(2)(h) of the Freedom of Information Law states that an agency may withhold records or portions of records that:

> "...are examination questions or answers which are requested prior to the final administration of such questions."

As such, I believe that §87(2)(h) is intended to permit agencies to withhold examination questions or answers if the questions are to be administered at some time in the future. Consequently, if the questions on the examination in which you are interested will be given in the future, the questions and answers for that examination may in my view be withhold pursuant to §87(2)(h) of the Freedom of Information Law.

Second, you were also denied access to copies of objections to the Civil Service examination that you submitted to the Department on October 10, 1981, and the response by the Department to your letter. With regard to rights of access to both of those records, it does not appear that any grounds for denial could be cited with regard to those records.

Although §87(2)(b) of the Law states that an agency may withhold records or portions of records the disclosure of which would result in "an unwarranted invasion of personal privacy, §89(2)(c)(iii) states that disclosure would not result in an unwarranted invasion of personal privacy "when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him". Assuming that you wrote the objections and the response to them was forwarded to you, I cannot envision how any ground for denial would be applicable.

Lastly, you inquired as to the manner in which you may appeal the denial of access to records. As indicated in Mr. Costanzo's response to you, a denial of access may be appealed within thirty days to the Executive Deputy Commissioner of the New York State Department of Civil Service [see also, 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

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

cc: Anthony Costanzo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2549

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ROBERT J. FREEMAN

July 16, 1982

Mr. William Watson

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. Watson:

I have received your letter of July 9 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, according to your letter, you were advised earlier this month by phone by Ms. Baldasaro of this office that §87(3)(a) of the Freedom of Information Law essentially prohibits school board voting by a secret ballot. You indicated in this regard that in a vote for the election of school board president, the members of the North Tonawanda Board of Education cast their votes by means of secret ballot. When you expressed your point of view based upon the Freedom of Information Law and Ms. Baldasaro's advice to the School District attorney, you were apparently informed that the vote was not a "public issue" but rather a "board issue" and that the members of the Board could, therefore, vote by means of a secret ballot.

In my opinion, the Freedom of Information Law precluded a secret ballot vote under the circumstances described.

Section 87(3) states that:

> "[E]ach agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Since a school board is an "agency" as defined by §86(3) of the Freedom of Information Law, I believe that the language quoted above is applicable to proceedings in which a school board votes. Moreover, §87(3)(a) requires that a voting record be prepared in every instance in which a vote is taken and the manner in which each member cast his or her vote.

In addition, I disagree with the contention of the School District attorney that a vote for the election of school board president is not a "public issue". On the contrary, in my opinion, such a vote would clearly be taken by members of the School Board in the performance of their official duties. Therefore, while the vote may have constituted a "board issue", I believe that it nonetheless also constituted a "public issue" for which a record of votes should have been prepared pursuant to §87(3)(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:jm

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-796
FOIL-AO-2550

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 16, 1982

Mr. Lawrence Roman

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. Roman:

Your letter of July 8 addressed to Robert J. Morgado, Secretary of the Governor, has been forwarded to the Committee on Public Access to Records. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

You have raised a series of questions regarding the procedures that may be implemented regarding the capacity of members of the public to participate at town and county board meetings. You also asked whether you may "be stopped from perusal of submitted bills".

I would like to offer the following comments regarding your inquiry.

First, the provision of law that generally deals with the conduct of meetings of public bodies, such as a town board or a county legislative body, is the Open Meetings Law. Although the Open Meetings Law permits the public to attend and listen to the deliberations of public bodies, it is silent with respect to public participation. As a consequence, it has been advised that a public body is not required to permit public participation at meetings. However, the Open Meetings Law does not prohibit a public body from permitting public participation. Therefore, it has also been advised that if a public body chooses to permit members of the public to participate at meetings, it should do so based upon reasonable rules that treat all members of the public equally.

Second, with respect to bills, the vehicle that is generally applicable regarding rights of access to records is 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

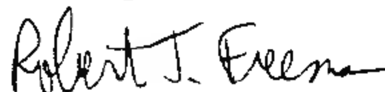
Bills, ledgers, books of account and similar records regarding the finances of local governments are generally available under the Freedom of Information Law. Moreover, such records have long been available under various other provisions of law (see e.g., County Law, §208; General Municipal Law, §51; and Town Law, §29). Therefore, as a rule, bills submitted to a unit of local government are in my view available for inspection and copying by any person.

Third, the Freedom of Information Law states in §89 (3) that an agency may require that a request be submitted in writing and that the request "reasonably describe" the records sought. Therefore, when making a request, a member of the public need not identify requested records in detail. Nevertheless, it is suggested that a request provide as much specificity as possible, such as names, dates, file designations and other information that would enable agency officials to locate records sought.

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, which in §100(1) specifies and limits the topics that may be considered by a public body in a closed or executive session, and an explanatory pamphlet regarding 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.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2551

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 2, 1982

Russell Scott
#78-C-217
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. Scott:

As you are aware, I have received your letter and apologize for the delay in response.

You have requested advice regarding a denial of access to personal medical records you requested from the Niagara Falls Memorial Medical Center. A copy of a letter from the Medical Center advised you that its policy authorized release of medical information to a patient's attorney or physician. Consequently, you have requested that this office provide direction regarding a course of action in obtaining such records.

I would like to offer the following comments in response to your inquiry.

The Freedom of Information Law does not appear to be applicable to the hospital to which you directed your request for records. The definition of "agency" [see §86(3) of the Freedom of Information Law, see attached] includes any unit of government "performing a governmental or proprietary function for the state". The letter you received from the Medical Center, a copy of which you attached to your correspondence, stated that the Niagara Falls Memorial Medical Center is a private, not-for-profit hospital. Therefore, in my view, that hospital is not subject to the Freedom of Information Law.

Nevertheless, rights of access to medical records are referenced in provisions of the Public Health Law. Section 17 of the Public Health Law states that:

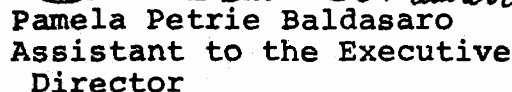
> "[U]pon the written request of any competent patient, parent or guardian of an infant, or committee for an incompetent, an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records 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 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".

On the basis of the language quoted above, there may be no direct right of access on the part of an individual to medical records pertaining to himself. However, as suggested in the letter from the Medical Center, you might indirectly gain access to medical records pertaining to you by authorizing your attorney or physician in writing to request these records on your behalf from the hospital.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

Enclosure
PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2552

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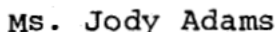
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 2, 1982

Ms. Jody Adams



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. Adams:

As you are aware, I have received your letter of July 21, to which my assistant, Ms. Baldasaro, responded in part on July 26.

With respect to your specific inquiry, you indicated that the Southampton Police Department assesses a fee of five dollars for copies of police accident reports. In addition, having discussed the matter with officials of the Police Department, a question was raised regarding the assessment of search fees.

In this regard, I would like to offer the following comments.

First, as you are aware, §87(1)(b)(iii) of the Freedom of Information Law states in brief that an agency may charge up to twenty-five cents per photocopy for records not in excess of nine by fourteen inches, "except when a different fee is otherwise prescribed by law". Based upon the quoted language, if a provision of law other than the Freedom of Information Law established a fee in excess of twenty-five cents per photocopy, such a provision of law would in my opinion currently be effective and valid.

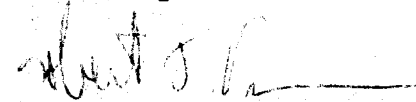
Second, notwithstanding the existence of local laws, ordinances, regulations or resolutions establishing fees in excess of twenty-five cents per photocopy, such provisions will, as indicated by Ms. Baldasaro, become ineffective shortly. On October 15 of this year, legislation recently

signed by Governor Carey (Chapter 73 of the Laws of 1982) will amend §87(1)(b)(iii) of the Freedom of Information Law by permitting an agency to charge more than twenty-five cents per photocopy only when "a different fee is otherwise prescribed by statute (emphasis added). As such, when the amendment becomes effective, agencies will be permitted to charge in excess of twenty-five cents per photocopy only when a statute, an act passed by the State Legislature and signed by the Governor, specifically so provides. Since an enactment by a town, such as a local law or an ordinance, would not be considered a "statute", fees established by such provisions would become invalid to the extent that they establish fees in excess of twenty-five cents per photocopy.

Lastly, there is nothing in the Freedom of Information Law that would permit an agency to assess or establish fees for searching for records. Again, the only instances in which search fees might justifiably be assessed would involve situations in which such fees have been established by statute. Moreover, §1401.8(a)(2) of the regulations promulgated by the Committee states that "[T]here shall be no fee charged for...search for records..."

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Wayne Allen

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2553

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 2, 1982

Fred W. Thiele, Jr., Esq.
Town Attorney
Town of Southampton
Town Hall
Hampton Road
Southampton, NY 11968

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. Thiele:

As you are aware, your letter of July 16 addressed to Attorney General Abrams 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.

You have requested an advisory opinion regarding §87(1)(b)(iii) of the Freedom of Information Law, which states in brief that an agency can charge no more than twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by law". In this regard, you indicated that a provision of the Town Code of the Town of Southampton adopted on April 1, 1975, states that fees for photocopies of records shall be established by law, rule, regulation or resolution. In 1972, the Town Board apparently adopted a resolution establishing a fee of five dollars for copies of records which remains in effect. Your question concerns the legality of the fee of five dollars established by resolution in 1972.

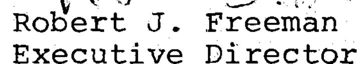
I would like to offer the following comments regarding your inquiry.

First, it is in my view questionable whether a fee established by resolution could be equated with a fee prescribed by "law" as envisioned by §87(1)(b)(iii) of the Freedom of Information Law. It has been advised in the past that a fee established by means of a local law or ordinance, for example, is valid, for such provisions would clearly constitute "laws". Nevertheless, a determination rendered by the Court of Appeals appears to indicate that a resolution may have the effect of an ordinance or a local law only if it is adopted in the same manner as an ordinance. Specifically, in Jewett v. Luau-Nyack Corp. [31 NY 2d 298, 338 NYS 2d 874, 291 N.E. 2d 123 (1972)], it was held that a resolution may have the force of an ordinance if its adoption was preceded by a public hearing, publication, and proper posting. Only if those conditions precedent are met could a resolution likely be equated with a "law". Therefore, if the conditions precedent to which the Court of Appeals referred were met with regard to the resolution adopted prior to September 1, 1974, the effective date of the Freedom of Information Law as originally enacted, a fee higher than twenty-five cents per photocopy may remain in effect. Conversely, if the conditions were not met, I believe that the maximum that may be charged is twenty-five cents per photocopy.

Second, whether or not the fee established by resolution in 1972 is currently valid, I believe that it will become invalid on October 15 of this year. It is emphasized that Chapter 73 of the Laws of 1982, which will become effective on October 15, amends §87(1)(b)(iii) by permitting agencies to charge more than twenty-five cents per photocopy only when "a different fee is otherwise prescribed by statute" (emphasis added). By replacing the term "law" with "statute", agencies will in my view essentially be precluded from charging fees in excess of twenty-five cents per photocopy, unless a statute specifically so prescribes.

I hope that 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-2554

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

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[illegible]MAS H. COLLINS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 2, 1982

Mr. Warren Jay Grossman

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. Grossman:

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

According to your letter, the Village of Scarsdale has promulgated rules and regulations pursuant to the Freedom of Information Law. You have requested an opinion regarding Section 6(a) of the regulations in question, which indicate that an appeal of a denial of access to records must be made within thirty days of the date of the denial. Your question is whether the Village may establish what you characterized as an "arbitrary time period for appeal".

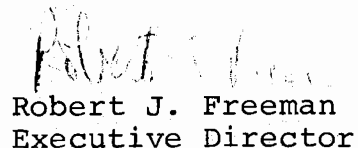
In my view, the period established by the Village for the submission of appeals following denials of access complies with the Freedom of Information Law. In this regard, §89(4)(a) of the Freedom of Information Law states in relevant part that:

> "...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 records for further denial,or provide access to the record sought."

Based upon the language quoted above, which contains reference to a period of thirty days within which a person denied access to records may appeal, I believe that the time period in question is consistent with the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Lowell Tooley, Village Manager

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2555

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

August 3, 1982

Ms. Karen M. Wigle
Assistant District Attorney
Office of the District Attorney
Kings County
Municipal Building
Brooklyn, NY 11201

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. Wigle:

As you are aware, I have received your letter of July 7, which reached this office on July 20. Please accept my apologies for the delay in response.

According to your letter, as records access officer for the Kings County District Attorney's Office, you received a request for records of the current salary of every assistant district attorney employed by your office. Also requested were records of "all actual or anticipated salary increases, including merit bonuses, for the 1982-83 fiscal year". You expressed the belief that disclosure of the records sought might constitute an unwarranted invasion of personal privacy under §89(2)(a) or (b)(i) of the Freedom of Information Law. In this regard, you requested any "rules or decisions" rendered by the Committee related to this issue.

I would like to offer the following comments regarding your inquiry.

First, as a general rule, the Freedom of Information Law is applicable to existing records. Stated differently, an agency need not create a record in response to a request unless specific direction to the contrary is provided. As stated in the last sentence of §89(3):

> "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."

Second, under the circumstances, payroll information must in my view be prepared and made available. Specifically, §87(3)(b) 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..."

Since the office of a district attorney is in my opinion an agency [see Dillon v. Cahn, 79 Misc. 2d 300, 359 NYS 2d 981 (1974); New York Public Interest Research Group v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979; and Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., NYLJ, June 24, 1982], I believe that the office of a district attorney is required to prepare the payroll listing envisioned by §87(3)(b) of the Freedom of Information Law.

Third, with respect to privacy, in view of the specific direction provided by §87(3)(b) as well as case law, it has consistently been advised that the payroll information described above must be made available even though particular employees are identified. Even before the passage of the Freedom of Information Law, it was found that the names and pay scales of public employees must be made available [see e.g., Winston v. Magan, 338 NYS 2d 654 (1972)]. Further, it has been found in several judicial determinations that records relevant to the performance of a public employee's official duties, i.e., payroll information, should be made available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; 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].

In view of the foregoing, I believe that it is clear that the Office of the District Attorney is required to prepare and make available a payroll record pursuant to §87 (3)(b) of the Freedom of Information Law.

Fourth, if, as you indicated, the request involves records of the current salaries of assistant district attorneys only, and if no such record exists, I do not believe that a record involving only assistant district attorneys must be created. Nevertheless, a record indicating the name, public office address, title and salary of all employees of the Office of the District Attorney must in my opinion be prepared.

Fifth, as you may be aware, the introductory language in §87(2) of the Freedom of Information Law indicates that all records of an agency are available, except to the extent that records "or portions thereof" fall within one or more among the eight grounds for denial.

In this regard, if, for example, the Office of the District Attorney has employed persons "undercover" or in some fashion in which disclosure of the identities of those persons could result in jeopardy, §87(2)(f) might be applicable. The cited provision states that an agency may withhold records or portions thereof which if disclosed would "endanger the life or safety of any person". If such persons are employed by the Office of the District Attorney and are identified in the payroll record required to be compiled, names or other identifying details might justifiably be deleted. However, I do not believe that reference to assistant district attorneys could appropriately be deleted.

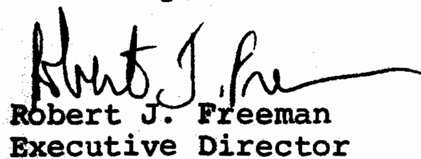
Finally, the other aspect of the request involves actual or anticipated salary increases, including merit bonuses for the current fiscal year. In my view, actual salary increases would be found within the payroll record discussed earlier. Information concerning anticipated salary increases might be found within collective bargaining agreements or similar documents.

With respect to merit bonuses, if such bonuses have been awarded, records reflective of such awards would in my view be available. Again, based upon case law, it does not appear that the identity of those in receipt of merit bonuses would if disclosed result in an unwarranted invasion of personal privacy. Further, such records would likely be reflective of final determinations made by an agency which would in my opinion be available under §87(2)(g)(iii) of the Freedom of Information Law.

Ms. Karen Wigle
August 3, 1982
Page -4-

I hope that I 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-2556

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

August 3, 1982

Mr. David Flynn

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. Flynn:

As you are aware, I have received your letter of July 11. Please accept my apologies for the delay in response.

According to your letter, you submitted a request to the Department of Environmental Conservation for records regarding a hazardous waste site selection. Although the request was granted, the records in question are apparently voluminous and are kept only in Albany. Since you reside in Williamsville and because you indicated that "a trip to Albany is not feasible", you have inquired into the possibility of the Department forwarding the records in question to its Buffalo office. You have asked for assistance from this office in conjunction with your suggestion.

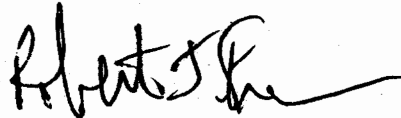
I have contacted the Department of Environmental Conservation and its records access officer on your behalf in order to obtain additional information regarding the records in question. In this regard, I was informed that the records are indeed voluminous, that Albany is the central repository for the records, and that the records are in continual use. As such, it appears that forwarding the records to its Buffalo office, even temporarily, would not be possible.

From my perspective, you have two options. First, the Freedom of Information Law provides that an applicant may inspect and/or copy accessible records. If copies of records are requested, an agency may require that fees for photocopying be paid in advance of photocopying. As such, you could request that the Department of Environmental Conservation estimate the cost of photocopying the materials in order that you might determine whether you would like photocopies of the records in question.

The second alternative as suggested by Mr. Harmon of the Department would involve traveling to Albany to inspect the records personally. After having made an inspection, you could likely determine the specific records for which copies might be desired.

I regret that there appear to be no remaining alternatives and hope that I have been of some assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Graham Greeley

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2557

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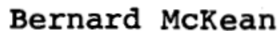
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 3, 1982

Bernard McKean


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. McKean:

As you are aware, I have received your letter of July 12. Please accept my apologies for the delay in response.

Your inquiry once again concerns an attempt to gain access to records apparently involved in a compensation case in 1975. In all honesty, your handwriting is difficult to read and I am not sure that I completely understand your question. Nevertheless, I would like to offer the following comments.

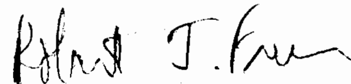
First, it is noted that the Freedom of Information Law applies to records of government in New York. As such, records of the Workers' Compensation Board, for example, would be subject to rights of access granted by the Law. If you believe that the records in which you are interested are in possession of the Workers' Compensation Board, it is suggested that you submit a request to that office at the address identified in my earlier letter to you dated May 7.

Second, the Freedom of Information Law does not include within its scope organizations or persons that are not part of government. For instance, neither a private doctor nor a medical society would be subject to the Freedom of Information Law.

If you are interested in obtaining medical records pertaining to your wife from physicians or hospitals, while there may be no direct right to gain access to those records, a physician of your choice might have the capacity to request and obtain copies of medical records pertaining to a patient with the consent of that patient pursuant to §17 of the Public Health Law. I have enclosed a copy of that Law for your consideration.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-798
FOIL-AO-2558

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 3, 1982

Arthur Z. Schwartz, Esq.
Hall, Clifton & Schwartz
Attorneys at Law
401 Broadway, Suite 310
New York, NY 10013

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. Schwartz:

As you are aware, I have received your letter of July 14 as well as the materials attached to it. Please accept my apologies for the delay in response.

According to your letter, on February 10, 1981, Ms. Jo Anne Wright Chadwick, a resident and teacher in the Garrison Union Free School District, requested copies of minutes of the Garrison Board of Education since 1977 and all principal's reports since 1977. Although the superintendent of schools indicated initially that principal's reports "were not public information", when it was determined that he testified that the reports were "public documents", the school district's attorney agreed that they were public. Notwithstanding the apparent agreement and a great deal of correspondence between yourself and Ms. Chadwick and the District, it appears that the records have not yet been made available.

Having reviewed the correspondence attached to your letter, I would like to offer the following comments in response to your request for assistance.

First, the Freedom of Information Law and the regulations promulgated by the Committee prescribe specific time limits for responding to requests made under the Law.

In this regard, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The 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 has been 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 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.

Third, as you suggested in a letter to the School District's attorney, the introductory language in §87(2) refers to the capacity to withhold records "or portions thereof" that fall within one or more of the eight grounds

for denial that follow. As such, I believe that the Legislature envisioned situations in which a single record might be both available and deniable in part. Further, due to the cited language, I believe that an agency is required to review records sought in their entirety to determine which portions, if any, might justifiably be withheld.

Fourth, with respect to the records in question, minutes of meetings have long been available and are required to be prepared and made available under the Open Meetings Law. Section 101(1) of the Open Meetings Law states that:

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

Further, §101(3) requires that minutes of open meetings be prepared and made available within two weeks of such meetings.

With respect to the principal's reports, it is noted that some of the correspondence refers to the fact that the reports are available "unless marked confidential". From my perspective, the characterization or marking of records as "confidential" without more may be all but meaningless. In my view, a record may be considered confidential only if a statute specifically prohibits disclosure of particular records. In such cases, §87(2)(a) of the Freedom of Information Law would be applicable, for it involves the capacity to withhold records that are "specifically exempted from disclosure by state or federal statute". Therefore, only in cases in which a record is "specifically exempted" could records be characterized as "confidential". Moreover, it appears that the Court of Appeals may have ended what has been known as the "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. 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).

As such, it appears that the court found that records may justifiably be withheld only to the extent that they fall within one or more of the grounds for denial listed in the Freedom of Information Law.

One ground for denial of potential relevance to the principal's reports 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 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.

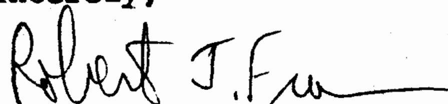
Under the circumstances, a principal's report could likely be considered as "intra-agency" material. Nevertheless, to the extent that they contain any of the three types of available information, such as statistical or factual information, they would in my view be available.

It is also noted that even though the reports might refer to particular employees of the District, that factor alone would not in my view necessarily result in a denial in whole or in part. As you may be aware, §87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Nevertheless, the courts have in several situations found that public employees enjoy lesser protection of privacy than others, for they are required to be more accountable than others. Several decisions rendered under the Freedom of Information Law have held 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 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); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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]. As such, while the reports in question might refer to particular public employees, those aspects of the report would not in my opinion of necessity result in an unwarranted invasion of personal privacy if disclosed.

Lastly, I have enclosed copies of the Freedom of Information Law, regulations promulgated by the Committee, which govern the procedural aspects of the Law, and an explanatory pamphlet that might be useful. It is suggested that the procedures prescribed in the Law and the regulations be followed. If the District fails to respond appropriately and in accordance with legal requirements, it would appear that the initiation of litigation would be necessary.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Jo Anne Wright Chadwick
Anthony L. Mazzullo
John M. Donognue

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2559

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 4, 1982

Barbara Keith
Social Service Employees Union
Local 371
817 Broadway
New York, NY 10003

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. Keith:

As you are aware, I have received your letter of July 19. Please accept my apologies for the delay in response.

According to your letter and the correspondence attached to it, the Director of the New York City Department of Personnel informed you orally that he would deny a request for particular examinations administered by the Department. It is your view that it is impossible to file a protest without reviewing the questions and providing documentation regarding the correctness or incorrectness of the answers.

You have requested an advisory opinion regarding the denial.

First, 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.

Second, of relevance 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".

From my perspective, the language quoted above is intended to permit an agency to withhold examination questions and answers when the questions will be used in the future. I have no knowledge as to the extent to which the questions appearing in the examinations in which you are interested may be used in the future. To the extent that such questions will be used, however, it would appear that a denial would be appropriate.

Enclosed for your consideration is a copy of a judicial decision in which your organization was involved that contains a lengthy discussion of rights of access to examination questions and answers [see attached, Matter of Social Services Employees Union, Sup. Ct., New York Cty., April 7, 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

Enclosure

cc: Juan Ortiz

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2560

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 4, 1982

The Honorable Maurice D. Hinchey
Member of the Assembly
District Office
243 Fair Street
Kingston, New York 12401

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 Assemblyman Hinchey:

I have received your letter of July 30 and appreciate your interest in the Freedom of Information Law.

You have asked for an opinion regarding correspondence attached to your letter which consists of a request made under the Freedom of Information Law by a constituent and the ensuing response.

The letter of request was sent to a police department and contains a series of questions. The questions involve the number of police officers who passed a civil service examination, the qualifications for hiring, whether a particular individual is "an experienced detective", whether the public may inspect police records and whether the police chief considers that an eight hour course qualifies a particular individual to be a supervisor.

The Police Chief responded by stating that the request did not provide "reasonable specificity" with respect to the information sought. The Chief also indicated that his decision could be appealed by filing a request with the town clerk.

I would like to offer the following comments regarding the request, as well as the response.

First, it is emphasized that the Freedom of Information Law is an access to records law. Stated differently, I do not believe that it is a vehicle under which a member of the public may ask questions or otherwise cross-examine public officials; it is, however, a law that permits any person to request records from government in New York.

Second, as you may be aware, §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 applicant requests "information" that does not exist in the form of a record or records, an agency, such as a town, would have no obligation to create a new record on behalf of an applicant. Consequently, rather than asking questions, it has been advised that an applicant request records. To assist the public, the Committee has published the enclosed explanatory pamphlet regarding the Freedom of Information and Open Meetings Laws. It is noted that the pamphlet may be particularly useful in situations similar to those described in the correspondence, for the pamphlet contains sample letters of request and appeal.

Third, assuming that the information requested exists in the form of a record or records, there are likely various records which would be available under the Freedom of Information Law.

With respect to the first question regarding police officers who passed a civil service examination, eligible lists identifying those who passed examinations have long been available under rules promulgated by the Department of Civil Service. Therefore, it has been advised that such lists are available under the Freedom of Information Law.

The second question concerns qualifications for the position of police officer and for promotion to sergeant. In this regard, materials distributed or posted prior to an examination often specify the qualifications that must be met. In such cases, the qualifications would in my view clearly be available. Relevant under the circumstances would be a ground for denial appearing in the Freedom of Information Law, which, due to its structure, directs that such records be made available. Specifically, §87(2)(g) states that an agency may withhold records that:

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

It is 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.

From my perspective, records indicating the qualifications for a position or promotion would represent the policy of an agency and would, therefore, be accessible.

The third question raised in the letter is whether a named individual is an "experienced detective". Although an answer to that question might involve the making of a subjective judgment, there may be methods of determining the experience of a particular individual under the Freedom of Information Law. 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 the agency [see §87(3)(b)]. A review of payroll records developed over a period of years could serve to indicate the level of a particular employee's experience.

The fourth question is whether the public may inspect police records "and advise themselves...of the calls made each day". Here 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 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). With regard to police records generally, there are various grounds for denial that might be applicable, depending upon the nature and contents of records sought. Further, the grounds for denial are based largely upon potentially harmful effects of disclosure. Therefore, if an individual requests records pertaining to an ongoing criminal investigation, §87(2)(e) might be appli-

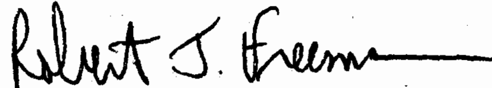
of specificity, one among a series of amendments to the Law that became effective in 1978 altered the standard. Currently §89(3) requires that an applicant must merely "reasonably describe" the records sought. As such, an applicant for records need not provide a great deal of specificity when requesting a record.

Further, although the Chief provided a response, I do not believe that his response could be equated with a denial of access. As such, it does not appear that an "appeal" to the Town Clerk would have been the most appropriate step in terms of procedure or remedy. The clerk as legal custodian of all Town records under §30 of the Town Law, might, however, be the designated records access officer. If that is so, the clerk would have the responsibility of responding initially to requests made under the Freedom of Information Law and assisting applicants in identifying records sought, if necessary [see regulations, §1401.2].

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 the explanatory pamphlet 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-2561

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

August 4, 1982

Mr. Dean S. Page

<u>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.</u>

Dear Mr. Page:

As you are aware, I have received your letter of July 17. Please accept my apologies for the delay in response.

According to your letter, you submitted a complaint to a dog control officer on the appropriate form regarding the enforcement of a local leash law. You have asked whether you have "the right to know the results...of the action taken, and outcome of this matter" under the Freedom of Information Law. In your letter, you questioned whether disclosure of such information would if disclosed result in an unwarranted invasion of personal privacy.

I would like to offer the following comments regarding your inquiry.

First, it is emphasized that the Freedom of Information Law is an access to records law. Stated differently, the Law pertains to existing records, and an agency is generally not required to create a record in response to a request [see attached, Freedom of Information Law, §89(3)]. As such, if, for example, detailed records were not prepared in response to or in conjunction with your complaint, the agency in receipt of the complaint would be under no obligation to create such records on your behalf.

Second, to the extent that records exist, the Law is based upon a presumption of access. As indicated in the pamphlet with which you are familiar, all records are available, except to the extent that records or portions thereof fall within one or more among eight grounds for denial listed in §87(2)(a) through (h) of the Freedom of Information Law.

Under the circumstances, if a violation was found, a record reflective of the violation would in my view be available. In similar situations, it has been advised that disclosure would not constitute an unwarranted invasion of personal privacy.

Another potentially relevant ground for denial is §87(2)(e) concerning records compiled for law enforcement purposes. The cited provision permits the withholding of such records only under specified circumstances. From my perspective, based upon a review of §87(2)(e), it is unlikely that those circumstances would arise with respect to a complaint made under a leash law.

The only other ground for denial that I can envision as applicable is §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. 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, if a report was filed regarding action taken and it contains what might be characterized as a determination following the complaint, I believe that the determination would be available under §87(2)(g)(iii). On the other hand, however, if, for instance, a report contains advice, opinion, or a recommendation, that type of information found within inter-agency or intra-agency materials could in my view be withheld.

Lastly, since you have not yet apparently requested records regarding the complaint, it is suggested that you might want to do so. In this regard, you might recall that the pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" contains sample letters of request and appeal that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2562

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 6, 1982

Mr. John Agnant
331462A
Rt. 1 Box 1
Huntsville, TX 77340

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. Agnant:

I have received your recent letter in which you indicated that you are in need of your previous arrest records. You have asked for the assistance of this office in obtaining those records.

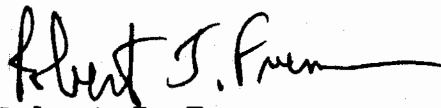
Please be advised that the Committee on Public Access to Records is responsible for providing advice under the Freedom of Information Law. As such, this office does not maintain possession of records generally, such as those in which you are interested, nor does it have the authority to compel an agency to provide or withhold records.

Nevertheless, it is suggested that you write to the New York State Division of Criminal Justice Services to request your criminal history records. That agency maintains criminal history information and I believe that it could likely provide you with the information in which you are interested.

In order to determine the appropriate procedure and the information needed from you to request and obtain criminal history information, it is suggested that you write to the Division of Criminal Justice Services, Bureau of Identification and Data Systems, Stuyvesant Plaza, Executive Park Tower, Albany, NY 12203.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2563

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 6, 1982

James L. Carter
Box B 80A2617
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. Carter:

I have received your letter of July 30 in which you requested copies of "...the rules and procedures for the obtaining of Records that rest within the New York State Appellate Division Fourth Judicial Department Legal Library of Records" (emphasis yours).

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records has the authority to advise with respect to the Freedom of Information Law. This office does not maintain possession of records generally, such as those in which you are interested, nor does it have the capacity to compel an agency to provide or deny access to records.

Second, the Freedom of Information Law specifically excludes from its scope the courts and court records. Section 86(3) of the Law defines "agency" to include:

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

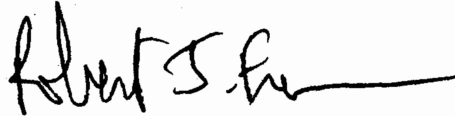
Further, §86(1) defines "judiciary" to mean "...the courts of the state, including any municipal or district court, whether or not of record". As such, the Freedom of Information Law would not apply to the records in which you are interested.

Nevertheless, in order to obtain information with respect to the records that you are seeking, it is suggested that you might want to write directly to the Director of the library at the Appellate Division, Fourth Department. His name and the address are as follows:

Robert Gutz
Appellate Division Library
525 Hall of Justice
Rochester, NY 14614

I hope that 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-799
FOIL-AO-2564

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

August 9, 1982

Mr. Charles Theophil

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. Theophil:

As you are aware, I have received your letter of July 14. Please accept my apologies for the delay in response.

According to your letter, community boards often vote during executive sessions and record the votes of action taken "to show the totals of 'For', 'Against', and 'Abstentions'". You wrote further that a majority vote carries motions, but that the names of the members are not recorded in such a way that the minutes of the executive session indicate the manner in which they voted, or whether they abstained.

You have asked whether the public has the right to know "how the individual members of the community board vote on any matter during an executive session". You also asked whether a community board may take a vote if a quorum is no longer present "due to early departures of the members". Your final area of inquiry concerns whether a quorum is defined "...as being fifty (50) percent plus one (1) of the total appointed membership of the Community Board".

In terms of background, community boards were created initially be 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 law 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 borough 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. Section, 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.

With respect to the record of votes, 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. It is also noted that §101(3) of the Open Meetings Law states that "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law..." Since §101(2) of the Open Meetings Law requires that minutes of executive sessions make reference to a vote taken in an executive session, a record of votes required to be created under §87(3)(a) of the Freedom of Information Law must in my view be included in minutes of the executive sessions to which you referred.

Your remaining questions concern quorum requirements. In this regard, §41 of the General Construction Law has long provided direction regarding the definition of "quorum". The cited provision 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."

Based upon the language quoted above, I believe that if a quorum is no longer present, a community board would not have the capacity to carry out its duties, for as indicated in §41 of the General Construction Law, a public body may perform its duties only by means of a vote carried by a majority of the whole number of its members.

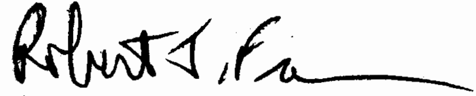
In the case of a community board, §2800(a) of the New York City Charter indicates that a community board:

> "...shall consist of (1) not more than fifty persons appointed by the borough president for staggered terms of two years, one-half of whom shall be appointed from nominees of the council members elected from council districts which include any part of the community district and the council members at large from the borough in which the community district is located, and (2) all such council members as non-voting members.

In view of the language quoted above, it would appear that a quorum would be a majority of the voting members.

I hope that I 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 - 2565

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 9, 1982

Mr. Karriem Pough
#81-A-969 - #1 East
Box 307
Beacon, NY 12508

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. Pough:

As you are aware, I have received your recent letter. Please accept my apologies for the delay in response.

According to your letter, you have tried several times without success to inspect or obtain records pertaining to you in central office, parole and institutional folders. You have asked for the assistance of this office in obtaining the records in question.

I would like to offer the following comments regarding 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 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, §89(1) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations pertaining to the precedural implementation of the Freedom of Information Law. In turn, each agency, such as the Department of Correctional Services, is required to adopt its own regulations consistent with those of the Committee. In this regard, I have enclosed for your consideration a copy of the regulations promulgated by the Department of Correctional Services regarding access to its records.

It is noted that specific reference to examination of an inmate record by an inmate is made in §5.20 of the enclosed regulations. The provision also states that an inmate should direct a request to the facility superintendent or his designee.

Third, based upon the cited provision of the regulations, it is suggested that you submit a request in writing to the facility superintendent. Section 89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. As such, it is recommended that a request provide as much detail as possible including names, dates, case or identification numbers and similar information that will enable agency officials to locate the records sought.

Fourth, the Freedom of Information Law permits an agency to assess fees for photocopying records [see attached, Freedom of Information Law, §§87(1)(b)(iii) and 89(3)]. However, if an applicant requests to inspect a record, no charge may be assessed. Consequently, in view of your financial situation, it might be worthwhile to request to inspect rather than photocopy records that you are seeking.

Lastly, §5.36 of the regulations promulgated by the Department of Correctional Services indicates that the fees for photocopies of Department records "shall be 25 cents per page". However, the cited provision also states that "[N]otwithstanding the provisions of this section, the custodian of the record may, in his discretion, waive all or any portion of the fees authorized by this section for any department record". Based upon the language quoted above, it is suggested that you request that fees be waived if photocopies are sought. However, it is important to emphasize that the custodian of records may, but need not waive 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2566

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 9, 1982

Mr. Anthony M. Mauro

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. Mauro:

I have received your letter of August 5 in which you requested various materials regarding the Freedom of Information Law and its use, as well as assistance regarding the manner in which you should proceed in order to obtain information.

Specifically, according to your letter, you wrote on June 2 to Mr. George Schoepfer, Executive Officer and Chief Engineer of the Triborough Bridge and Tunnel Authority, and requested information regarding the Authority's family protection plan. In brief, you requested a summary plan, an annual report, reports on benefit rights, and a copy of a recent audit.

I would like to offer the following comments regarding your inquiry.

First, in conjunction with your request, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects of the Freedom of Information Law, and an explanatory pamphlet on the subject. The pamphlet may be particularly useful to you, for it reviews the Freedom of Information Law and describes the manner in which the Law may be used. The pamphlet also contains sample letters of request and appeal.

Second, it is noted that §1401.2 of the enclosed regulations requires that the head or governing body of each agency 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 determine who the records access officer or officers for the Authority might be.

Third, since you submitted your request on June 2 but received no response, I would like to point out that the Freedom of Information Law and the regulations prescribe time limits for responding 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 tens days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

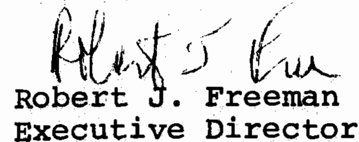
In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Fourth, 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 appearing in §87(2)(a) through (h) of the Law. As such, if records sought are withheld, a denial would only be appropriate to the extent that records withheld fall within one or more of the grounds for denial.

Lastly, it is emphasized that the Freedom of Information Law pertains to existing records. As a general rule, if information requested does not exist in the form of a record or records, an agency would have no obligation to create a new record on behalf of an applicant [see Freedom of Information Law, §89(3)]. As such, if, for example, in the context of your request, there is no record indicating an explanation of the reasons for changes in particular appointees, the Authority would not be required under the Freedom of Information Law 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:jm

Encs.

cc: George Schoepfer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2567

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 9, 1982

Mr. Jack Pollack
Secretary
Baldwin Association of Independent
Taxpayers
Box 300, North Baldwin Station
Baldwin, New York 11510

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. Pollack:

As you are aware, I have received your letter of July 20. Please accept my apologies for the delay in response.

According to your letter, you have directed several requests under the Freedom of Information Law to the Baldwin School District's records access officer as well as the superintendent for a copy of "the 1981-82 computer printout regarding budget appropriations, expenditures and unencumbered balances". You indicated further that a request was made as early as May 18, but that you have not obtained the requested information as yet. As such, you have requested advice regarding your "next move in obtaining this information".

I would like to offer the following comments regarding your inquiry.

First, the Freedom of Information Law and the regulations prescribe 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 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)].

Second, as a general rule, an agency is not required to create a record in response to a request [see attached, Freedom of Information Law, §89(3)]. As such, if, for example, information requested does not exist in the form of a record or records, an agency would not be obligated to create a record in response to a request.

Third, it would appear that the information in which you are interested is required to be prepared, and that it would be available under the Freedom of Information Law.

Specifically, I have enclosed a copy of §170.2 of the regulations promulgated by the Commissioner of Education. In brief, the cited provision sets forth the rules regarding financial recordkeeping by union free school districts. One among several provisions that may be relevant to your request indicates that a board of education has the duty:

> "[T]o require the treasurer to render a report, at least quarterly (monthly in the event that budget transfers have been made since the last report), for each fund including no less than the revenue and appropriation accounts required in the annual State budget form. This report shall show the status of these accounts in at least the following detail:

(1) Revenue accounts.

(i) Estimated revenues.

(ii) Amounts received to date of report.

(iii) Revenues estimated to be received during balance of the fiscal year.

(2) Appropriation accounts.

(i) Original appropriations.

(ii) Transfers and adjustments.

(iii) Revised appropriations.

(iv) Expenditures to date.

(v) Outstanding encumbrances.

(vi) Unencumbered balances."

In addition, enclosed is a copy of §1721 of the Education Law, which requires, at certain times of the year, the publication of 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..."

Lastly, with respect to rights of access, to the extent that the records in which you are interested or those required to be prepared pursuant to the cited regulations exist, they would in my view be available under the Freedom of Information Law. Here I direct your attention to §87(2)(g), which due to its structure, in my opinion would require that such materials be made available. Section 87(2)(g) states that an agency may withhold records that:

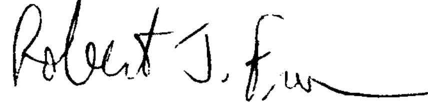
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency 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, records prepared by or for a board of education or a district treasurer, for example, could likely be characterized as "intra-agency" material. Nevertheless, it also appears that the materials in question would consist solely of "statistical or factual tabulations or data" accessible under §87(2)(g)(i).

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Dr. Rolland W. Jones

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2568

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 10, 1982

George Aiken
73 A 5175
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. Aiken:

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, on June 6 and 9, you requested various records from Dolores Allen, Area Coordinator of Hearings for the Division of Parole at its New York City Office. Since you have apparently not received a response to your requests, you "appealed" to the Committee on Public Access to Records.

I would like to offer the following suggestions and comments regarding your correspondence.

First, when a request for records is denied either in writing or by means of a failure to respond, an appeal should be directed to the head or governing body of the agency in possession of the records, or whomever has been designated to render appeals. The Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. It has no authority to require an agency to grant or deny access to records, nor does it maintain possession of records generally, such as those in which you are interested. Consequently, the Committee has no jurisdiction to make a determination in response to your appeal. On the contrary, an appeal would most appropriately be forwarded to the head of the agency maintaining the records sought, in this case, the Division of Parole.

Second, §89(1)(b) of the Freedom of Information Law requires the Committee to promulgate regulations governing the procedural aspects of the Freedom of Information Law. In turn, each agency, such as the Division of Parole, is required to adopt its own regulations consistent with those of the Committee. One of the provisions of the Committee's regulations (see §1401.2) requires that the head or governing body of an agency designate one or more records access officers responsible for answering requests. I would conjecture that the records access officer is located at the Division's Albany office, and it is suggested that you submit a new request to the Records Access Officer at the Division of Parole at 1450 Western Avenue, Albany, NY 12203.

Third, the Freedom of Information Law and the regulations promulgated by the Committee contain 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 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)].

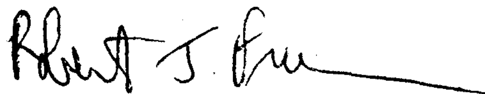
Lastly, it is possible that some of the information in which you are interested might be found within the records maintained at the facility in which you are now located. In this regard, §5.20 of the regulations promulgated by the Department of Correctional Services makes specific reference to inmate records. The cited provision also indicates that a present inmate should direct a request to the facility superintendent or his designee.

In addition, §5.22 states that the "DCJS Report", which I believe consists of a summary of arrests and convictions, may be made available at a facility to an inmate.

In sum, once again, it is suggested that a new request be directed to the records access officer of the Division of Parole at its Albany office and that some of the records in which you are interested might be in possession of the Department of Correctional Services. Consequently, a request to your facility superintendent might also 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
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2569

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 10, 1982

Ms. Vivian Acevedo

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. Acevedo:

As you are aware, your letter of July 10 addressed to Attorney General Abrams was forwarded on August 9 to the Committee on Public Access to Records. The Committee is responsible for advising with respect to the New York Freedom of Information Law.

In terms of background, in your letter to Attorney General Abrams, you indicated that you read an article concerning a "computer discrepancy" pertaining to a traffic violation. In this regard, you expressed interest in knowing how you may be able to obtain information pertaining to yourself in order to ensure that the information is correct.

I would like to offer the following comments regarding your inquiry.

First, the Freedom of Information Law is generally applicable to records of state and local government in New York.

Second, 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.

Third, it is emphasized that 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" [see §86(4)].

Based upon the language quoted above, it is in my view clear that the Freedom of Information Law is applicable to information found within computer tapes or discs, as well as paper files.

Fourth, under regulations promulgated by the Committee concerning the procedural implementation of the Freedom of Information Law, 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. Consequently, if, for example, you are interested in gaining information pertaining to yourself from a particular agency, a request should be addressed to the records access officer of that agency.

Fifth, §89(3) of the Law states in part that a request should be made in writing for records "reasonably described". As such, when making a request, as much detail as possible should be provided, including names, dates, file designations, identification numbers and similar information that will enable agency officials to locate the records sought.

Sixth, assuming that you obtain records pertaining to yourself and that information found within the records is inaccurate, it is noted that there is no general provision that provides a right on the part of a member of the public to amend or correct information that may be inaccurate. Many agencies, however, do so to ensure accuracy.

Lastly, in order to provide you with additional information, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee to which reference was made earlier, an explanatory pamphlet containing sample letters of request and appeal,

and a special report prepared by the Committee concerning systems of records maintained by state agencies from which personal information may be retrieved. I would like to point out that one of the recommendations made in that report involved legislation designed to provide the right to seek amendment or correction of a record.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

cc: Gilbert Abramson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2570

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 10, 1982

Mr. Thomas Friel

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. Friel:

As you are aware, I have received your letter of July 26 and the correspondence attached to it. Please accept my apologies for the delay in response.

Once again, your inquiry concerns the implementation of the Freedom of Information Law by the Suffolk County Water Authority. In terms of background, although you had once been advised that the Authority was not subject to the Freedom of Information Law, it was advised by this office in an opinion dated March 29 that §1077 of the Public Authorities Law indicates that the Authority would in my view be subject to the Freedom of Information Law. According to your latest letter, you have "failed to receive any of the requested records, notwithstanding various requests and appeals to the Executive Director of the Authority".

I would like to offer the following comments regarding your letter and the materials attached to it.

First, it is emphasized that the following comments will not deal specifically with rights of access to particular records that you may have requested. Since it appears that final determinations have in some instances been rendered by the Executive Director of the Authority, based upon a recent decision of the Court of Appeals, this office could not appropriately provide advice. In that

decision, it appears that the Court found that the jurisdiction of the Committee ends following a determination made by an agency in response to an appeal, for the next legal step would involve the initiation of a judicial proceeding [John P. v. Whalen, 75 AD 2d 1021 (1980); aff'd 54 NY 2d 89 (1981)].

Second, based upon a review of the correspondence, it appears that there may be some misunderstanding regarding the scope and utility of the Freedom of Information Law.

Notwithstanding the nature of the responses to your requests, I believe that it is clear that officials of the Authority believe that the Authority's records are subject to the Freedom of Information Law. For instance, its application form refers to a records access officer as well as the right to appeal a denial of access.

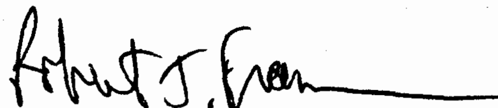
It is also noted that the Freedom of Information Law is an access to records law. Stated differently, the Freedom of Information Law is not in my view a vehicle by which members of the public may essentially cross-examine public officials or request "information" that may not appear in the form of a record or records. Section 89(3) of the Law states in part that, as a general rule, an agency is not required to create a record in response to a request. In some instances, it appears that you have requested answers to questions rather than records. To the extent that records do not exist that would be responsive to your questions, the Authority would not in my view be obligated to create records or answers on your behalf.

Third, §89(1)(b) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate general regulations regarding the procedural implementation of the Law. In turn, each agency, including the Suffolk County Water Authority, is required to adopt its own regulations consistent with those of the Committee. Based upon the correspondence, which includes the application form referring to a records access officer and the responses to your appeals, it is likely that the Authority has devised regulations designed to implement the Freedom of Information Law. It is suggested that you request such regulations in order to ensure that you are following the procedures prescribed by the Authority.

And lastly, if a request for records is denied by a records access officer, an appeal is made and the denial is upheld, as indicated earlier, the remaining step would involve the initiation of a proceeding challenging a denial of access to records under Article 78 of the Civil Practice Law and Rules. It is emphasized that §89(4)(b) of the Freedom of Information Law specifies that the burden of proof is on the agency in such a 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: Walter C. Hazlitt

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2571

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

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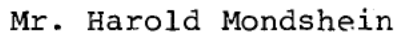
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 11, 1982

Mr. Harold Mondshein



Dear Mr. Mondshein:

I have received your letter of July 29 as well as the correspondence attached to it. You have requested an advisory opinion regarding rights of access to "records, policies and determinations" made by the New York City Off-Track Betting Corporation.

Having reviewed your letter as well as other correspondence forwarded to this office, I do not believe that an advisory opinion should now be rendered regarding rights of access to the specific records that you are seeking. In a decision rendered by the Court of Appeals, the Court appears to have found that this office could not appropriately advise following a determination rendered on appeal by an agency [see John P. v. Whalen, 75 AD 2d 1021 (1980); aff'd 54 NY 2d 89 (1981)]. Since a determination on appeal was rendered by Lois A. White, Acting Appeals Officer for the Corporation on June 18, and followed by another letter sent to you by Henry T. McCabe, Chairman and President of the Corporation, on July 12, I do not believe that it would be proper to render an advisory opinion at this juncture.

However, I would like to offer one comment regarding the Freedom of Information Law which might serve to clarify the situation.

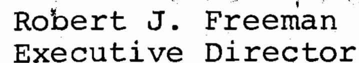
It is emphasized that the Freedom of Information Law is not an access to "information" law, but rather an access to records law. The Freedom of Information Law is not in my view a vehicle that would require government officials to respond to questions; on the contrary, it is a vehicle under which the public may request and obtain accessible records. Further, it is noted that §89(3) of the Freedom

of Information Law (see attached) provides that, as a general rule, an agency is not required to create a record in response to a request.

In the context of your correspondence, it appears that much of the information requested does not exist in the form of a record or records. Consequently, the Corporation would in my view be under no obligation to create records on your behalf in response to requests.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Lois A. White
Henry T. McCabe

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-800
FOIL-AO-2572

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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MARCELLA MAXWELL
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 11, 1982

Harold King

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. King:

As you are aware, I have received your letter of July 26. Please accept my apologies for the delay in response.

According to your letter, the three elected commissioners of the Garden City Park Water District "are constantly violating the New York Open Meetings Law". By means of example, you indicated that the Board of Commissioners refused to discuss a summer job program during an open meeting "simply by stating that it was a personnel matter". You wrote that the Board of Commissioners is currently working on its 1983 budget but that the deliberations regarding the budget "will be conducted behind closed doors". You also attached an article concerning a decision by the United States Court of Appeals which held that federal agencies may not exclude the public from budget meetings.

You have asked that this office intervene regarding rights of access to materials used in the preparation of a budget as well as the meetings held to discuss the budget.

I would like to offer the following comments regarding your inquiry.

It is noted at the outset that the authority of this office is advisory only. As such, the Committee and its staff do not have the capacity to compel a public body to conduct open meetings or disclose records. Nevertheless, a copy of this opinion will be sent to the Board of Water Commissioners in an effort to describe applicable provisions of law and persuade the Board to comply with those provisions.

With respect to the Open Meetings Law, I believe that it is clear that the Board of Commissioners of the Water District is a "public body" subject to the Open Meetings Law. Section 97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to 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".

From my perspective, the Board in question is an entity consisting of at least two members that is required to conduct public business by means of a quorum pursuant to §41 of the General Construction Law and performs a governmental function for a public corporation, in this case the Water District. Further, §66 of the General Construction Law indicates that a district corporation, such as the Water District, is itself a "public corporation". As such, the Board in question is in my view a "public body" subject to the Open Meetings Law in all respects.

It is emphasized that a public body cannot hold closed meetings or otherwise enter into executive sessions to discuss the subject or subjects of its choice. Section 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, the only ground for executive session of relevance with respect to either of the two areas of discussion that you mentioned would be §100(1)(f), the so-called "personnel" exception. Nevertheless, I believe that it is doubtful that §100(1)(f) would be applicable.

While the scope of §100(l)(f) had been the subject of conflicting interpretations as it appeared in the Open Meetings Law as originally enacted, I believe that its language as amended would preclude the holding of an executive session for the purpose of discussing the budgetary matters described.

The original §100(l)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Based upon the exception quoted above, public bodies often entered into executive sessions to discuss "personnel" generally or to consider matters that might tangentially or indirectly affect public employees. As stated in the Committee's third annual report to the Legislature on the Open Meetings Law dated February 27, 1979:

> "It is the Committee's contention that paragraph (f) is not intended to shield discussions regarding policy under the guise of privacy. Clear distinctions may be made between situations in which 'personnel' are discussed directly and indirectly. For example, when a municipal board considers the dismissal of public employees for budgetary reasons, the discussion should be public, for issues regarding policy, not the privacy of public employees, would be at issue. Conversely, when the same board considers the dismissal of a particular employee because that person has not performed his or her duties adequately, the discussion could properly be discussed in executive session, for it would deal with the privacy of a named individual".

To clarify the "personnel" exception, the Committee recommended amendments to §100(1)(f) that were enacted in 1979 and which became effective on October 1 of that year. Currently, §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..." (emphasis added).

With respect to the discussion of a summer job program, such a topic would likely pertain to policy concerns rather than any "particular person". In my view, §100(1)(f) would have been applicable only when the discussion focused upon particular individuals who might be considered for employment.

Similar reasoning would apply to discussions of budget. The manner in which a public corporation spends public monies generally involves policy considerations that might have a bearing upon "personnel" generally. In addition, even before the enactment of the amendments to §100(1)(f), it was held that budgetary matters are not among the enumerated personnel subjects appearing in §100 (1)(f) and that, therefore, an executive session held to discuss layoffs violated the Open Meetings Law (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).

With respect to records, I direct your attention to the Freedom of Information Law. That statute 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.

Relevant to your inquiry is §87(2)(g), which may be cited to withhold records in some instances, but which may also be cited as a basis for disclosing records in others. 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.

In the context of your question, I believe that statistical or factual materials developed in the budget process are accessible under the Freedom of Information Law [see Dunlea v. Goldmark, 380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754 (1977)].

I would also like to point out that §215 of the Town Law concerning the duties of improvement district commissioners, such as water district commissioners, contains various areas of direction regarding the duties of district commissioners relative to financial accountability. For instance, §215(9) requires the submission to a town clerk of a report which factually indicates monies on hand at the beginning of the year, receipts from all sources, an itemized statement of amounts paid during the year, outstanding indebtedness of the district, and similar information. Subdivision (10) of §215 requires that an estimate of proposed expenditures for and revenues of a district must be filed with a town budget officer. I have enclosed a copy of §215 of the Town Law for your review and consideration.

Lastly, you made reference to a United States Court of Appeals decision regarding meetings of the Nuclear Regulatory Commission. I believe that the decision in question was rendered under the federal "Government in the Sunshine Act", which is applicable to certain collegial bodies operating within the federal government. The Open Meetings Law, however, is applicable to public bodies in

New York. As such, although the principles upon which the federal court ruled may be similar to those found in the New York Open Meetings Law, I do not believe that the federal court's decision is legally relevant to the situations described.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, and an explanatory pamphlet on 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

cc: Board of Water Commissioners

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-801
FOIL-AO-2573

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 12, 1982

Irving Branman

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. Branman:

I have received your letter of August 4 in which you requested an advisory opinion, as well as the correspondence attached to it.

Specifically, you have requested an opinion regarding a situation described in a letter that you sent to Dr. Anthony Tocco, Supervisor of the Town of Marbletown, on Autust 4. According to that letter, an open meeting was scheduled and held beginning at 7:30 on the evening of July 29. After its adjournment at approximately 8:40, the members of the Town Board left the meeting room. However, soon thereafter, without notice to the public, you indicated that "the Town Board returned to the meeting room and...convened a special meeting to discuss matters relating to the landfill". You also wrote that the Town Board excluded you from the special meeting, but invited several residents of the Town named in your letter. Following a short public discussion, "this group adjourned to executive session to speak about 'litigation'".

It is your contention that the second meeting held on the evening of July 29, the so-called "special meeting", should have been preceded by notice given in conjunction with §99 of the Open Meetings Law. You also raised questions regarding the basis for closing the meeting as well as rights of access to documents that may have been read "in whole or in part" at the special meeting.

I would like to offer the following comments regarding your inquiry.

First, it is emphasized that the definition of "meeting" appearing in §97(1) of the Open Meetings Law has been expansively interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the definition of "meeting" includes any gathering of a quorum of a public body convened 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)]. Consequently, although the gathering in question might have been called a "special meeting", it was in my view clearly a "meeting" as defined by the Open Meetings Law and therefore was subject to the requirements of the Open Meetings Law in all respects.

Second, I agree with your contention concerning notice requirements. As you indicated, §99(1) of the Open Meetings Law concerning meetings scheduled at least a week in advance 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. Section 99(2) concerns meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings.

In the context of facts as you presented them, I believe that notice of the "special meeting" was required to have been given to the news media and posted as required by §99 of the Open Meetings Law, for the cited provision requires that notice be given prior to all meetings, whether they are regularly scheduled or otherwise.

Third, you wrote that an executive session was convened to discuss "litigation". Without additional knowledge of the subject under discussion, I could not conjecture as to the legality of the executive session. However, several points should be made.

In terms of procedure, §100(1) of the Open Meetings Law indicates that several steps must be accomplished during an open meeting before an executive session may be held. 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, it is in my view clear that the subject matter proposed for discussion in executive session must be indicated in a motion to enter into an executive session. In this regard, it has been held under similar circumstances that a "regurgitation" of the statutory language of the Open Meetings Law reciting a ground for executive session is insufficient. In Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill [444 NYS 2d 44 (1981)], a public body merely cited the language of §100(1)(d) concerning "proposed, pending or current litigation" as the basis for entry into an executive session. The court, however, stated that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularly, the pending, proposed or current litigation to be discussed during the executive session" (id. at 46; emphasis supplied by the court).

In view of the direction provided by the court, it does not appear that a motion to enter into an executive session to discuss "litigation" without greater description would be sufficient.

Also of potential significance was the presence of several members of the public at the executive session. In this regard, §100(2) of the Open Meetings Law states that:

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

While the quoted provision permits a public body to authorize others to participate in an executive session, the cited provision must in my view be given a reasonable interpretation. In other situations in which many members of the public attended a meeting, but in which all but a few in attendance were permitted to join the members of a public body in an executive session, it was advised that the exclusion of those few members of the public was unreasonable. It is unclear in your letter whether you were the only person excluded or whether those members of the public permitted to attend were included in the executive session due to some special or particular status or knowledge they might have had with respect to the discussion.

In your letter to Supervisor Tocco, you asked that all documents "referred to" or read at the special meeting "be read in full" at the August meeting of the Town Board. Here 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 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.

Without knowledge of the nature of the documents in question or their contents, it is impossible at this juncture to provide specific direction regarding rights of access.

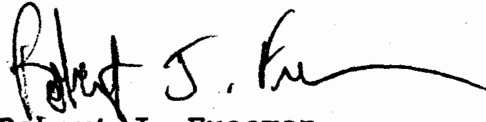
It is also emphasized that the grounds for executive session appearing in the Open Meetings Law and the bases for withholding records under the Freedom of Information Law are not necessarily consistent. While a public body may have a basis for entry into an executive session to discuss a particular matter, it is possible that records related to the discussion might nonetheless be available under the Freedom of Information Law. Conversely, while records might justifiably be withheld under the Freedom of Information Law, in some instances, there may be no ground

for executive session in the Open Meetings Law. For example, if studies were performed regarding the landfill, including statistical or factual materials regarding substances found within the landfill or perhaps statistics concerning its use and capacity, it is likely that such records would be available under the Freedom of Information Law. However, if the Town engages in a discussion of the study as it relates to ongoing litigation or litigation strategy, it is likely that an executive session could justifiably be held.

In short, to reiterate, without additional information regarding the nature of the records in question, specific advice cannot be given at this time.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Anthony Tocco

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 13, 1982

Mr. Bernard McKean

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. McKean:

I have received your most recent letter.

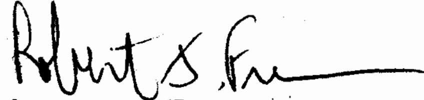
In all honesty, I do not believe that I can add anything significant beyond what was advised in my letter to you of August 3. Specifically, if your believe that records in which you may be interested are in possession of an agency subject to the Freedom of Information Law, a request should be directed to that agency.

It is noted that §89(3) of the Law requires that an applicant submit a request for records "reasonably described". As such, if you make a request, it is suggested that you provide as much detail as possible, including names, dates, file designations and other identifiers that would permit an agency to locate the records sought.

If, for example, medical records are in possession of a private physician or hospital, I refer you once again to §17 of the Public Health Law, a copy of which was sent to you on August 3. While that provision does not grant direct rights of access to records on the part of a patient to records pertaining to him or her, it does generally permit the patient to designate the physician of his or her choice to request and obtain medical records from other physicians or hospitals.

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-802
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 13, 1982

Edward T. Kroczynski
West Elmira Volunteer
  Fire Department, Inc.
Fire District No.1
Town of Elmira
1299 West Water Street
Elmira, New York 14905

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. Kroczynski:

I have received your recent letter concerning the application of the Freedom of Information and Open Meetings Laws to a volunteer fire department.

Specifically, you have asked whether regular monthly meetings of the Board of the Fire Department must be open to all members. Your question has apparently arisen because the Department keeps separate books of account regarding its monies and those that are paid in part from other sources. Your question in relation to that issue involves whether issues pertaining one set of books may be discussed in private, while issues pertaining to the other may be discussed in public.

In my opinion, any person may attend the meetings of the Board under the Open Meetings Law, including members or the public. Similarly, based upon a decision rendered by the state's highest court, it is my view that both sets of books of account are likely available to any person under the Freedom of Information Law.

With respect to the Open Meetings Law, it is noted at the outset that 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".

I believe that each of the conditions necessary to a finding that the board of a volunteer fire company is a public body can be met.

The board of 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, as indicated earlier, 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.

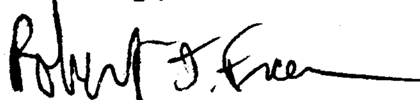
In view of the decision rendered in Westchester Rockland Newspapers v. Kimball, it is in my view clear that a volunteer fire company also falls within the definition of "public body" and is required to comply with the Open Meetings Law.

Lastly, although the types of discussions to which you made reference would in my opinion generally be required to be open, it is noted that §100(1) of the Open Meetings Law lists eight areas of discussion that may appropriately be considered during a closed or executive session. Similarly, 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 among eight grounds for denial listed in §87(2) of the Law.

To provide you with additional information on the subject, enclosed are copies of the Freedom of Information Law, the Open Meetings Law, an explanatory pamphlet dealing with both subjects, and a copy of the judicial decision to which reference was made in the preceding paragraphs.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 13, 1982

George D. Cochran
Associate Counsel
Office of General Services
Tower Building
Empire State Plaza
Albany, New York 12242

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. Cochran:

As you are aware, I have received your request for an advisory opinion, as well as the correspondence attached to it.

Your inquiry concerns a request made under the Freedom of Information Law for various items of correspondence at the Office of General Services (OGS) concerning the possible move of the current New York City offices of the New York State Workers' Compensation Board at Two World Trade Center to a new location or locations.

Among sixteen areas of correspondence requested, the records access officer for OGS indicated that records with respect to five of those areas do not exist. Access was granted with respect to one item. The remainder was withheld pursuant to §§87(2)(c) and (g) of the Freedom of Information Law.

As Associate Counsel to OGS, you have asked for an advisory opinion regarding rights of access to the records in question in conjunction with an appeal.

Without greater knowledge of the contents of the records sought, specific advice cannot be given. Nevertheless, it would appear that the bases for withholding indicated in the correspondence are likely appropriate. In this regard, I would like to offer the following comments.

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. It is also noted that several of the grounds for denial describe potentially harmful effects of disclosure.

Perhaps most relevant under the circumstances is the first ground for denial cited by the records access officer. Specifically, §87(2)(c) states that an agency may withhold records or portions thereof that:

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

Based upon the facts as I understand them, OGS is involved in ongoing negotiations regarding the possibility of moving the offices of the Workers' Compensation Board to one or more locations. As such, it is likely that negotiations are in process in order to obtain the most desirable new quarters for the Board in terms of both economic feasibility and impact upon a community. If my understanding is accurate, to the extent that disclosure may be premature and would impair the capacity of OGS to engage in an optimal contractual arrangement, §87(2)(c) could justifiably be asserted.

The other ground for denial cited by the records access officer is likely also significant. Several of the areas of correspondence requested involve communications among officials of OGS and between those officials and representatives of other agencies. Here, as indicated by the records access officer, §87(2)(g) would likely be applicable, at least in part. 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. Viewing the language of §87(2)(g) from a different perspective, I believe that it permits an agency to deny inter-agency or intra-agency materials reflective of advice, recommendation, opinion and the like. To that extent, I believe that §87(2)(g) could properly be cited to withhold the records in question.

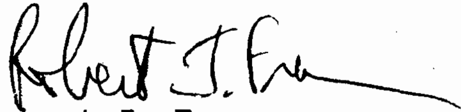
Lastly, although §87(2)(d) was not cited as a basis for withholding by the records access officer, it might be applicable, depending upon the nature of records submitted to OGS by commercial enterprises that might be involved in the negotiation process. Section 87(2)(d) states that an agency may withhold records that:

> "...are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Once again, without greater knowledge of the contents of records in possession of OGS, it is unknown to me whether any materials that might be characterized as trade secrets may have been submitted to OGS. However, if, for example, a corporation submitted detailed financial information to OGS concerning the corporation, it is possible that such records might in part fall within the scope of §87(2)(d).

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Philip J. Rooney

STATE OF NEW YORK

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 16, 1982

The Honorable Nanette Dembitz
Judge
Family Court of the State of New York
60 Lafayette Street
New York, New York 10013

Dear Judge Dembitz:

I have received your letter of August 13 and thank you for your kind words.

You have raised questions regarding the possibility of creating an administrative board to review denials of access to records. In addition, you requested information regarding the privacy provisions of the Freedom of Information Law, particularly with respect to their relationship to §202(3)(b) of the Vehicle and Traffic Law concerning the sale of registration information to the highest bidder.

With regard to the creation of an administrative board having quasi-judicial authority, the Committee has considered the approach as a method of enhancing compliance with the Freedom of Information Law. As a matter of fact, in the Committee's third annual report to the Governor and the Legislature on the Freedom of Information Law, an administrative mechanism similar to that which you suggested was presented as a possible means of enforcing the Law. There is one state which operates under that type of mechanism. In Connecticut, the Freedom of Information Law Commission has quasi-judicial authority and renders determinations.

Nevertheless, as the Committee pointed out in the report, it is questionable whether such a program would work effectively in New York in view of the population and physical size of the state. In Connecticut, the budget for the Commission is approximately $225,000; the

Committee's budget is slightly less than $100,000 annually. Further, the New York Freedom of Information Law includes within its scope more than 10,000 agencies, including state agencies, cities, counties, towns, villages, school districts, public authorities and the like. From my perspective, the cost of implementing an administrative review provision would be more than the Legislature would be willing to appropriate.

It may also be worth noting that I received today a copy of a final report by the California Freedom of Information Commission, which is a coalition of professional journalism groups and institutions of higher education. In that report, it was indicated that the Connecticut Commission has a backlog of approximately nine months. In contrast, more often than not, this office can prepare a written advisory opinion in response to an inquiry within two weeks of its receipt. While an opinion from this office is not binding, I have been led to believe that the opinions are often persuasive. In view of the cost of the Connecticut Commission and its backlog, as well as the apparent success of this office, the California group has recommended the creation of a body similar to the Committee on Public Access to Records.

In all honesty, I feel personally that an administrative review mechanism would represent the best of all possible worlds. However, to be able to render timely determinations, I believe that the cost would be staggering. Questions might also arise with regard to an administrative board's capacity to engage in *in camera* inspections of records as well as the capacity of this office to provide oral adivce by telephone in response to questions. As you may have gathered from the Committee's annual report, the staff responds to thousands of oral inquiries each year. In my view, giving advice quickly is among the most important of my functions. However, would it be appropriate or ethical to provide oral advice if the Committee had quasi-judicial power?

With regard to the second question concerning privacy, although §89(2)(b) permits the Committee to prepare guidelines concerning unwarranted invasions of personal privacy, the Committee has not done so for several reasons.

First, there are virtually thousands of records in possession of state and local governments containing personal information. In this regard, it might be difficult, if not impossible, to devise guidelines with respect to each record which gives rise to questions regarding the protection of privacy.

Second, determining what constitutes an unwarranted invasion of personal privacy of necessity involves the making of subjective judgments. Stated differently, while one reasonable person might contend that disclosure of a record would be offensive, thereby resulting in an unwarranted invasion of personal privacy, an equally reasonable person might consider disclosure of the same record to be innocuous, thereby resulting in a permissible rather than an unwarranted invasion of personal privacy. In short, I believe that the Committee feels that it cannot justifiably impose its subjective judgments on others when there may be grounds for disagreement among reasonable people.

And third, since there are thousands of records containing personal information, often the agencies that maintain custody of particular records are in the best position to gauge the effects of disclosure.

For those reasons, the Committee has not developed guidelines concerning privacy under §89(2)(b) of the Freedom of Information Law.

You raised a question regarding the relationship between §202(3) of the Vehicle and Traffic Law and the Freedom of Information Law. Specifically, if the Committee promulgated guidelines regarding the registration information now sold to the highest bidder under the Vehicle and Traffic Law, you asked whether in my view those guidelines "would or should control the Commissioner of Motor Vehicles".

In my opinion, such guidelines could not prohibit disclosure by the Commissioner for the following reasons.

First, as a general rule, the Freedom of Information Law is permissive. While an agency may withhold certain records pursuant to §87(2), there is generally no requirement that an agency must withhold records, even though one or more grounds for denial might be applicable. More specifically, the introductory language of §87(2) states that an agency "may deny access to records or portions thereof that..." fall within one or more among the eight ensuing grounds for denial.

Second, the only instances in which an agency must withhold records would involve those situations in which a statute prohibits the disclosure of particular records. In those cases, §87(2)(a) of the Freedom of Information Law would be applicable. The cited provision pertains to records that are "specifically exempted from disclosure by state or federal statute".

Third, if indeed guidelines issued by the Committee are merely "guidelines" that do not have the force of law, I believe that they would be advisory in nature. Consequently, an agency would not be compelled to follow a guideline.

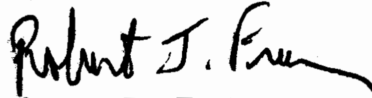
And fourth, from my perspective, neither the Freedom of Information Law nor a guideline issued by the Committee could effectively supersede §202 of the Vehicle and Traffic Law. The Freedom of Information Law is in my view a "general" statute that deals with rights of access to government records. However, §202(3)(b) of the Vehicle and Traffic Law pertains to particular records and carves out a specific right of access on the part of the highest bidder and, by implication, exempts the same information if requested by others. As such, I believe that §202(3)(b) might be characterized as a "special" statute that supersedes the Freedom of Information Law.

Finally, you asked whether there are any other government agencies that sell information from their records. My experience indicates that practices vary among state agencies. Further, often disclosing or withholding lists is based upon custom or policy rather than any specific statutory direction. In the Department of State, for example, various professions are licensed. While lists of some licensees are generally not disclosed if they are requested for commercial or fund-raising purposes, there are some publications that list licensees and are widely distributed each year. In short, while some agencies withhold lists under §89(2)(b)(iii) of the Freedom of Information Law, others essentially sell lists containing similar information.

I hope that I have not been too wordy and that, as a judge, you concur with my responses.

Should any further questions arise, I am at your service.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 16, 1982

Bro LeRoy Williams
82 A 0202 - D.3.17
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. Williams:

I have received your letter of August 6 in which you raised questions regarding the Freedom of Information Law.

According to your letter, you wrote to the Administrative Officer of the Department of Correctional Services to request a "master index" concerning records specifically pertaining to you. In response, you were informed that "no such document exists", notwithstanding your contention that a manual that you read indicates that a "master index" should exist.

In my view, there may be some confusion regarding the scope of the contents of a master index.

I believe that the so-called "master index" is the title that may be used for what is generally characterized as a "subject matter list". In this regard, §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 the regulations promulgated by the Department of Correctional Services, reference is made in §5.13 to the "subject matter list". The cited provision states that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in his possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.
>
> (b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.
>
> (c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such lists shall be mailed or delivered".

Based upon the provisions of the Freedom of Information Law and the regulations quoted above, it is in my view clear that a subject matter list or master index is required to make reference to the categories of records in possession of an agency. There is no requirement of which I am aware that would compel the Department of Correctional Services to create a master index with respect to each inmate.

In order to provide further clarification, enclosed for your consideration are copies of the Freedom of Information Law, the regulations concerning access to records promulgated by the Department of Correctional Services, and an explanatory pamphlet on the Freedom of Information Law that may be useful to you. It is noted that §5.20 of the enclosed regulations makes specific reference to examination of inmate records by the inmate or his attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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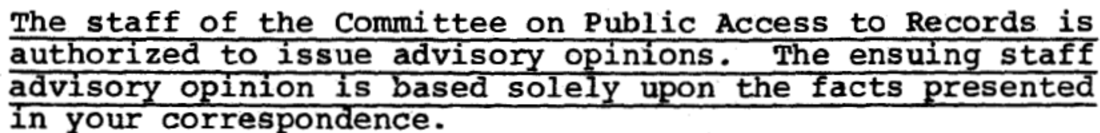
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 17, 1982



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 Reverend Starkey:

As you are aware, I have received your letter of June 30. Please accept my apologies for the delay in response.

You have written to request assistance from this office with respect to numerous requests for records under the Freedom of Information Law. Although you requested records from both state and municipal agencies, you indicated that there have been unsatisfactory responses to many of your inquiries.

Please note that the Committee on Public Access to Records has no authority to compel an agency to comply with the Freedom of Information Law; nevertheless, I would like to offer the following comments.

First, you wrote that some of the agencies from which you received replies did not adequately respond to your requests. In this regard, it is emphasized that §89(3) of the Freedom of Information Law, a copy of which is attached, states that an agency is not obligated to create a record in response to a request. Having reviewed your correspondence, in some instances, it appears that you raised questions rather than asking for records. If, for example, records do not exist containing information responsive to your questions, an agency would have no

obligation under the Freedom of Information Law to create a record or an answer to a question in response to an inquiry. Further, several of your requests dealt with incidents that may have occurred nearly twenty years ago. Here I would like to point out that agencies often routinely destroy or dispose of records. In cases in which records no longer exist, again, I do not believe that an agency would be required under the Freedom of Information Law to recreate records in conjunction with your requests.

Second, you made reference to the manner in which you should file an appeal regarding a refusal of unemployment insurance benefits. As indicated in an early opinion of this office of May 24, the Committee on Public Access to Records is authorized to advise only with respect to the Freedom of Information and Open Meetings Law. While I am unable to provide guidance regarding your appeal, it is suggested that you contact the Unemployment Insurance Division at the Department of Labor at the following address:

New York State Department of Labor
Unemployment Insurance Division
State Campus
Department of Labor Building
Albany, New York 12240
(518) 457-2177

Third, you expressed concern that you have been overcharged by an agency that advised you that a fee of $11.50 would be required before records were released. On the basis of case law which you cited, it is apparently your belief that a transcript of a disciplinary hearing and determination should be made available without charge. In this regard, §75(3) of the Civil Service Law entitled "Removal and other disciplinary action", provides in relevant part that:

> "If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge."

On the basis of the provision quoted above, if the hearing to which you made reference was held pursuant to §75 of the Civil Service Law, it would appear that the transcript of the hearing should be available to you as the subject of the hearing free of charge.

However, any other records that you requested would be subject to the provisions of §87(1) of the Freedom of Information Law, which generally permit an agency to charge a maximum of twenty-five cents per photocopy.

Fourth, you requested advice as to your next course of action due to a lack of response by many of the agencies to which you directed requests for 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

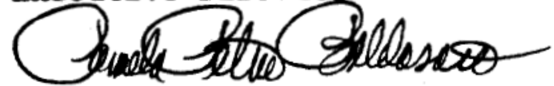
In addition, it was held recently that when an appeal is made but a determination is not rendered within seven business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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, you indicated that you have been unsuccessful in obtaining records from District Council 37. As indicated in a previous opinion from this office, records of unions are not in my view subject to rights of access granted by the Freedom of Information Law. Although a union may exist due to its relationship with government, I do not believe that it could be characterized as an "agency" as defined by §86(3) of the Freedom of Information Law. Therefore, union officers are not in my opinion obligated to respond to your requests.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Enc.

cc: Richard Cunningham
John P. McNamara
Joseph Maguire
Richard Chady
Florence Dreizen
NYC Human Resources, Bureau of Management Services

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2580

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 17, 1982

Mr. Warren Jay Grossman

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. Grossman:

I have received your letter of August 10 as well as the correspondence attached to it.

You asked that I review correspondence sent to you by the Village of Scarsdale's Freedom of Information Appeals Officer, Mr. Galloway. According to Mr. Galloway's letter to you, you submitted two appeals on August 3 concerning requests submitted on July 21 and 22 to Lowell Tooley, Village Manager and Records Access Officer. Mr. Tooley apparently explained that the records that you requested do not exist. As such, Mr. Galloway indicated that he would continue his investigation in order to be able to "grant your request" or "give a more complete written opinion explaining the reasons for affirming the denial". In this regard, Mr. Galloway indicated that he could not complete his investigation for several weeks due to an upcoming vacation as well as a family health problem. As such, he wrote that he did not believe that he could complete his review until September 8. Your question is whether "the delay in determining" your two appeals "is allowable under the law".

I would like to offer the following comments regarding your question.

First, and perhaps most importantly, I do not believe that the response by Mr. Tooley should be characterized as a denial. From my perspective, if after having searched for the records sought, the records access officer could not locate the records in question, I do not believe that a response to that effect would be subject to an appeal, for records were not in my view denied.

As indicated in §89(4)(a) of the Freedom of Information Law, "any person denied access to a record may within thirty days appeal..." (emphasis added) the denial to the designated appeals officer or body. Once again, if the Village does not maintain the record or records that you requested, I do not feel that Mr. Tooley's response could be considered a denial of access to records.

Second, I believe that there is a more appropriate vehicle in the Law that may be used concerning the situation that you described. Specifically, §89(3) of the Freedom of Information Law states in relevant part that in response to a request for records, an agency shall, upon request, "certify that it does not have possession of such record or that such record cannot be found after diligent search". Similarly, the regulations promulgated by the Committee pertaining to the duties of a records access officer state in §1401.2(b)(6) that a records access officer shall:

> "[U]pon failure to locate records, certify that:
>
> (i) The agency is not the custodian for such records, or
>
> (ii) The records of which the agency is a custodian cannot be found after diligent search."

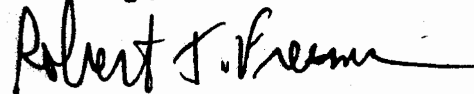
To reiterate, since the records sought could not be located, a request for a certification pursuant to the cited provision of the Freedom of Information Law and the regulations, rather than an appeal, would in my view represent the appropriate course of action.

Lastly, although Mr. Galloway described extenuating circumstances regarding a possible delay in response, it would appear that an agency cannot extend the statutory time limits for responding to an appeal beyond the seven business day limitation prescribed in §89(4)(a) of the

Freedom of Information Law, unless the appellant consents to such extension. Nevertheless, when a date certain regarding a response is given, often it may be more appropriate to agree to such an extension, for it may be mutually beneficial to both parties to avoid litigation. It is reemphasized, however, that Mr. Galloway as Appeals Officer would not in my view be bound in this instance by the seven business day limitation for responding to an appeal, for records were not in my opinion denied. As such, I do not believe that an appeal could justifiably be submitted.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Lowell Tooley
John Galloway, III

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2581

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 17, 1982

Ms. Arlene M. Ferrante
Taconic Newspapers
P.O. Box 316
Millbrook, NY 12545

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. Ferrante:

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

Specifically, according to your letter, on August 6, you requested a copy of the financial statement of the Town of Pleasant Valley for 1981. Upon making your request, the deputy town clerk indicated that you would be charged for photocopies and also "for her labor involved". Subsequently, on August 9, you were informed that the documents in question consisted of forty-nine pages letter sized and that you would be charged $12.50 for photocopies. The deputy clerk, however, also indicated that she would not provide you with copies until you paid for labor, "which totaled $7.00 for one hour." You included with your letter a copy of a resolution adopted by the Town Board on October 9, 1974, which states that:

> "[T]he Town officer or employee charged with the custody and keeping of the record shall upon request make a copy or copies of any record subject to such inspection upon a payment of a fee of $.25 per page for letter size or legal size items. Records of a size requiring special handling, such as maps or drawings, shall be handled at the cost of reproduction plus a handling fee of $7.00 per hour and any postage required."

Your inquiry concerns the legality of the assessment of a fee of $7.00 per hour for labor costs.

I would like to offer the following comments regarding your letter as well as the resolution adopted by the Town Board in 1974.

First, although the Town may assess a fee for photocopies, I do not believe that the fee of $7.00 for labor costs may properly be assessed. In this regard, §87(1)(b)(iii) of the Freedom of Information Law states that an agency, such as a town, may establish procedures pertaining to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law."

In conjunction with the language quoted above and pursuant to §89(1)(b) of the Freedom of Information Law, the Committee on Public Access to Records has promulgated regulations that further clarify issues relative to the assessment of fees. In this regard, §1401.8 of the regulations, which have the force and effect of law, states 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; or
>
> (3) Any certification pursuant to this Part."

In view of the provisions quoted above, I do not believe that any fee may be assessed for what may be characterized as labor costs. In addition, I would also like to point out that judicial determinations have in essence confirmed that labor and similar fixed costs of an agency may not be

passed on to users of the Freedom of Information Law. For instance, in a situation in which an applicant requested the reproduction of a tape recording, it was found that "the agency may not include personnel salaries in assessing reproduction costs" [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, December 27, 1978]. Further, the Court of Appeals, the state's highest court, found 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" [Doolan v. BOCES, 48 NY 2d 341, at 347].

Even the terms of the resolution of the Town would appear to preclude the assessment of labor costs. According to the resolution, the Town could charge a fee of twenty-five cents per photocopy "for letter size or legal size items". The ensuing provision that permits a fee of $7.00 per hour apparently pertains only to "records of a size requiring special handling, such as maps or drawings..." Since the records for which you paid are, according to your letter, letter size, they would not in my view fall within the scope of the provision concerning a handling fee of $7.00 per hour.

It is also noted that the handling fee to which reference is made in the resolution might conflict with §87 (1)(b)(iii) of the Freedom of Information Law, which was quoted earlier, and which permits an agency to assess a fee for records, other than those subject to conventional photocopying methods, based upon the actual cost of reproduction. Such a fee would not in my opinion include fixed costs of an agency, such as personnel salaries.

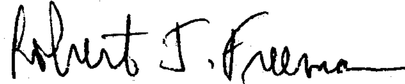
Lastly, as noted previously, the resolution adopted by the Town Board became effective on October 9, 1974. The Freedom of Information Law as originally enacted became effective on September 1, 1974, and the Committee's initial set of regulations went into effect on November 15, 1974. More importantly, the Freedom of Information Law was substantially amended in 1977 and the changes in the Law became effective on January 1, 1978. Updated regulations promulgated by the Committee went into effect shortly thereafter.

Having reviewed the Town's resolution, there are several provisions which in my view are out of date and might fail to comply with existing provisions of law. For instance, once provision refers to requests to be completed on a form prescribed by the State Comptroller. Although reference to a form prepared by the State Comptroller was found in the original Freedom of Information Law, no such requirement has existed since 1978. Another provision refers to a fee for certification. As indicated earlier, existing regulations preclude the assessment of such a fee. Reference is also made to a subject matter list concerning records "produced, filed or first kept or promulgated after the effective date..." of the Freedom of Information Law. Nevertheless, §87(3)(c) of the Freedom of Information Law currently requires that a subject matter list make reference to all records of an agency, regardless of the time in which they may have been created or first kept by an agency.

In order to provide you and Town officials with current information regarding the Freedom of Information Law, a copy of this opinion will be sent to Town officials with copies of the Freedom of Information Law, the Committee's regulations, model regulations designed to assist units of government in complying with the procedural aspects of the Law, and an explanatory pamphlet on the subject.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Jean Van Leuvan
Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2582

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

August 18, 1982

Mr. John Stone
82-A-1575
Downstate Separation Center
Red Schoolhouse Road
Box 445 - 3H-26
Fishkill, New York 12524

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. Stone:

As you are aware, I have received your letter of July 12 addressed to Ms. Baldasaro of this office. Please accept my apologies for the delay in response.

According to your letter, you recently wrote to the New York State Division of Probation in order to request copies of your probation records. In response to your request, you were informed that you "must contact the judge who tried [you] to receive his permission". You have asked for assistance in your efforts in obtaining the records in question.

I would like to offer the following comments regarding your inquiry.

First, if the records in which you are interested consist of a presentence report, I believe that the response by the Division of Probation was accurate. In this regard, §390.50(1) of the Criminal Procedure Law generally requires that presentence reports be kept confidential. Further, I believe that the only means by which such records may be released would involve permission from the judge of the trial court. Section 390.50(1) states in part that:

> "[I]n general. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, 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".

Subdivision (2) of §390.50 states in part that:

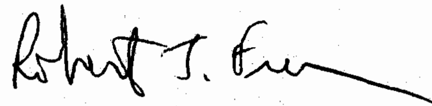
> "[N]ot less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination 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".

Second, in terms of the relationship between the quoted provision of the Criminal Procedure Law and the Freedom of Information Law, the Freedom of Information Law would not in my view expand your rights of access to a presentence report. Although the Freedom of Information Law is based upon a presumption of access, §87(2)(a) permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". Moreover, the Freedom of Information Law does not include within its scope the courts and court records.

Lastly, I have contacted the Division of Probation on your behalf in order to obtain additional information regarding probation records. I was informed that there is often confusion concerning records related to probation, such as presentence reports, and records pertaining to parole. It is possible that you may be interested in obtaining records regarding parole, in which case a request should be directed to the Division of Parole at 1450 Western Avenue, Albany, New York 12203. In addition, I will forward a copy of your letter to the Counsel to the Division of Probation for further consideration.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

cc: Counsel, Division of Probation

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2583

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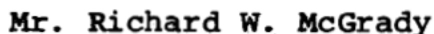
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 18, 1982

Mr. Richard W. McGrady


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. McGrady:

I have received your recent inquiry in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you have asked that I review and comment with respect to a response to an application to inspect records sent to you by J. Richard Vingiello, Town Attorney of the Town of Tuxedo.

According to Mr. Vingiello's letter, your first area of request involved "the dollar figure that the Town is in debt". Your second request involved "how much money was spent from the Town coppers that was not budgeted for". Mr. Vingiello indicated that no such records exist "per se". He did indicate, however, that the information is available through the Town's published budget and will also be available in the form of a tentative budget that will be filed with the Town Clerk on or before September 30. Your third request concerned the Town's "[T]otal payroll for 1982". Mr. Vingiello indicated that minutes kept by the Town Clerk reflect the payroll of 1982 and that you should make an appointment with the Clerk to inspect the minutes.

I would like to offer the following comments regarding Mr. Vingiello's response.

As explained to you by phone, the Freedom of Information Law is an access to records law. Stated differently, as a general rule, an agency, such as the Town of Tuxedo, is not required to create or prepare a record in response to a request.

In the context of your requests, if, for example, the Town has not prepared a record indicating "the dollar figure that the Town is in debt" or a specific amount regarding monies expended that were not budgeted, I would agree with Mr. Vingiello that the Town is under no obligation to create such a record or totals on your behalf.

There may, however, be other vehicles by which you might review detailed records for the purpose of creating your own totals. For instance, §29 of the Town Law concerning the powers and duties of a supervisor states that the supervisor:

> "[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."

By reviewing the account books kept by the Supervisor, it is possible that you could prepare totals for the purpose of arriving at the dollar figures in which you are interested.

Lastly, with respect to your request for the "[T]otal payroll for 1982", once again, if there is not record that specifically indicates the amount expended for payroll purposes in 1982, the Town would not be obligated to create such a record or total in response to your request. Nevertheless, one of the few instances in the Freedom of Information Law in which a record must be prepared pertains to

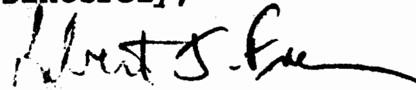
payroll information. Specifically, §87(3)(b) of the Freedom of Information Law requires that each agency shall maintain:

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

Based upon the language quoted above, I believe that the Town must have in existence a record listing Town employees by name, public office address, title and salary. Such a record would not likely include a total amount expended for salaries. However, once again, you might be able to create a total on your own after having reviewed the Town's payroll record prepared pursuant to §87(3)(b) of the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: J. Richard Vingiello

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML - AO - 803
FOIL - AO - 2584

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

August 18, 1982

Walter J. Forman
President
Cohoes Board of Education
2 Johnston Avenue
Cohoes, NY 12047

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. Forman:

I have received your letter of August 13 in which you requested an advisory opinion.

In terms of background, you, as President of the Cohoes Board of Education, and the Vice President visited the District's office to seek to review vouchers for phone bills, travel and conference expenses for District employees. You indicated that your concerns related to what appeared to have been the unauthorized use of District telephones for private and long distance calls as well as payments made to District employees for travel and conferences without adequate documentation. Approximately a week after having submitted your request to the Assistant Superintendent for Fiscal Management, you were informed that he was directed by the Superintendent not to fulfill your request until you had spoken with the Superintendent personally. You wrote further that there is no District policy that would mandate such a procedure. Following that series of events, the Board conducted an executive session:

> "1. To review the actions of the individual administrators involved in the above described sequence of events and to discuss concerns revolving around the appropriateness of their

> actions in light of their responsibilities in the District; this not only in light of the manner in which they had chosen to respond to a rightful request for information from Board members, but also as regards the implications of the potentially serious matter of the manner of use of public funds and equipment.
>
> 2. To request the Board to directly instruct the individual administrators involved to comply with the request for information and consider the appropriateness and implications of their actions regarding this matter to date".

Following the meeting during which the executive session was held, a member of the Board who was not present at the meeting charged that the Board violated the Open Meetings Law. You have asked for an advisory opinion regarding the situation.

I would like to offer the following comments regarding your inquiry.

First, as you are aware, the Open Meetings Law generally requires that all meetings of public bodies be conducted open to the public.

Second, the Law contains eight grounds for entry into an executive session. From my perspective, only one of the grounds for executive session is relevant. Specifically, I direct your attention to §100(1)(f) of the Open Meetings Law, which 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..."

It is emphasized that the provision quoted above would not in my view permit a public body to enter into an executive session to discuss matters of policy or issues that relate to personnel generally or tangentially. On the contrary, I believe that §100(1)(f) may be cited to enter into an executive session only to discuss matters relating to a particular person, and only in conjunction with one or more of the topics listed in the cited provision.

Under the circumstances, since you indicated that the discussion pertained to a review of the actions of "individual administrators" and "the appropriateness of their actions in light of their responsibilities...", it would appear that the executive session was proper, for such a discussion would likely involve the "employment history...of a particular person" as well as matters that might lead to the "...demotion, discipline, suspension, dismissal or removal of a particular person..." Consequently, notwithstanding the objections of a member of the Board regarding the executive session, once again, it would appear that the executive session was conducted in compliance with the Open Meetings Law.

With respect to your request for records, based upon your description of the records sought, i.e., vouchers and similar records reflective of the expenditures of public monies, it would appear that such records should be made available not only to you as President of the Board, but also to any person under the Freedom of Information Law.

As in the case of the Open Meetings Law, 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.

Under the circumstances, I believe that two of the grounds for denial in the Freedom of Information Law may be relevant. Nevertheless, I do not believe that either could be cited as a basis for withholding expense vouchers.

One possibly relevant ground for denial is §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In this regard, although vouchers and similar records might identify particular public employees, several judicial determinations indicate that those types of records are available. In brief, the courts have found that records related to public employees that are relevant to the performance of their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1979); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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, it has been found that records pertaining to public employees that are irrelevant to the performance of their duties may be withheld on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy (see e.g., Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

Since the expenditure of public monies for the use of telephones, travel and attendance at conferences relates to the performance of District employees' duties, disclosure of vouchers would not in my view constitute an unwarranted invasion of personal privacy. Consequently, I do not believe that §87(2)(b) of the Freedom of Information Law could be cited as a basis for withholding.

The remaining ground for denial of potential significance is §87(2)(g), which, due due to its structure, would in my view require that the records in question be made available. 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..."

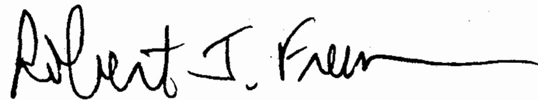
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Under the circumstances, it would appear that information contained in the travel vouchers and similar records would consist of "statistical or factual tabulations or data" that must be made available.

In view of the foregoing, it is reiterated that the records that you requested are in my view available to you as President of the Board and to members of the public generally 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-2585

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

August 20, 1982

Mr. Freddie Michaelson
80-A-4502
Maximum Security Unit F-14
Great Meadow Correctional Facility
Box 51
Comstock, New York 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. Michaelson:

As you are aware, I have received your letter of July 6. Please accept my apologies for the delay in response.

According to your letter, you requested copies of physical and mental health records pertaining to yourself from the Division of Health Services at the Department of Correctional Services on June 21. However, to date, you have not received a response to your request.

I would like to offer the following comments in response to your inquiry.

First, you indicated that you requested the records under the Freedom of Information Act, 5 USC §552. That statute applies only to records in possession of federal agencies. As such, the federal Freedom of Information Act is not applicable to records in possession of agencies of New York State. Therefore, any future requests for records should be referenced under the Freedom of Information Law, which applies to records of entities of government in New York, when contacting state or local agencies.

Second, this office has been advised by a representative of the Division of Health Services that Dr. Ian Loudan is no longer employed by the Division. Further, since the regulations of the Department of Correctional Services provide that requests by inmates should generally be directed to the facility superintendent, if you wish to renew your request, it is suggested that you direct your request for records pertaining to yourself to the superintendent of the facility in which you are located.

In order that you may become familiar with the procedures for requesting records, I have enclosed a copy of the regulations concerning access to records promulgated by the Department of Correctional Services. In particular, you should note the procedure for access to inmate medical records as set forth in §5.24 of the enclosed regulations.

And third, this office has 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 medical and/or psychological diagnoses and advice 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)].

I hope 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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2586

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 23, 1982

Mr. John W. Hollowell

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. Hollowell:

Your letter of August 8 addressed to Lieutenant Governor Cuomo has been forwarded to the Committee on Public Access to Records. As you are aware, 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 correspondence, you have requested that various items of information regarding the state Common Retirement System be provided by the Comptroller by completing forms that you prepared. In addition to the correspondence forwarded by the Lieutenant Governor, I have also received a copy of a response to your request by Marvin G. Nailor, Records Access Officer for the Department of Audit and Control. In Mr. Nailor's letter, which is dated August 13, specific reference was made to your request that forms you prepared be completed. In this regard, Mr. Nailor wrote that:

> "[W]ith respect to filling in the blanks appearing on your forms, we must mention that the Freedom of Information Law provides that individuals may personally inspect public records; that they may copy records which they inspect, and that, upon payment of the copying fee, they may have photocopies of public records prepared for them.

> However, the statute does not require that a new record be prepared or created by transcribing information from existing records such as would be involved in your request that we fill in the blanks on the forms you have prepared. That is what was meant in our letter of August 2, 1982 which stated that your request would entail the creation of a new record. Therefore, we are not obligated by the Freedom of Information Law to grant such a request nor, as mentioned by our earlier letter, do we have staff time available for such an undertaking".

I concur with Mr. Nailor's analysis of your request as well as his response regarding the Freedom of Information Law. To be more specific, §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 or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight".

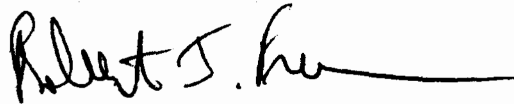
Records required to be prepared puruant to §87(3) of the Freedom of Information Law involve records of votes, a payroll listing and a subject matter list of records in possession of an agency. The information that you requested would not fall within any of the three types of records required to be prepared. As such, I do not believe that the Department of Audit and Control would in any way be required to provide you with information by means of filling in a series of blanks on the forms that you prepared.

As indicated by Mr. Nailor, the Freedom of Information Law provides rights of access to existing records. In my view, the Freedom of Information Law is not a vehicle for obtaining "information" that does not exist in the form of a record or records. Therefore, I do not believe that your request falls within the intended scope of the Freedom of Information Law.

To assist you in the future, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject that may be useful to you. It is noted that the pamphlet 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

cc: Hon. Mario M. Cuomo
Marvin G. Nailor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-804
FOIL-AO-2587

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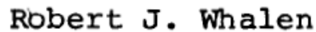
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 23, 1982

Robert J. Whalen



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. Whalen:

I have received your letter of August 11 as well as the correspondence attached to it.

According to your letter, you have directed "numerous requests" for records to the Board of Fire Commissioners of the Brentwood Fire District. However, you wrote that "with the exception of one minor request", the records sought have not been furnished. You also made reference to a recent communication from the District's records access officer in which he stated that he "has never refused to furnish...copies of information requested". It is your view, however, that the records access officer "plays on words", for you have not apparently received the records that you requested.

I would like to offer the following comments regarding the situation.

First, I believe that a board of fire commissioners is clearly both an "agency" subject to the Freedom of Information Law and a "public body" subject to the Open Meetings Law. In this regard, §86(3) of the Freedom of Information Law defines "agency" to include:

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

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".

Since §174(6) of the Town Law states in part that "a fire district is a political subdivision of the state and a district corporation:..", which is a "public corporation", a fire district in my opinion clearly falls within the definition of "agency". In addition, the board of commissioners of a fire district in my view meets all of the conditions necessary to a finding that it is a "public body" subject to the Open Meetings Law.

Second, having reviewed your correspondence with Mr. Schwarz, Secretary and Records Access Officer for the Board of Fire Commissioners, it is difficult to envision the cause of your complaint. For instance, in his letter to you of March 24, Mr. Schwarz stated the hours during which an appointment could be made for the purpose of inspecting records. He also wrote on August 5 that "copies would be provided if requested, by this Office". In view of Mr. Schwarz's remarks, it appears that the Fire District is willing to make copies of accessible records available to you upon payment of the appropriate fee.

Third, with respect to the hours during which the public may inspect and request copies of records, the regulations promulgated by the Committee, which have the force and effect of law, make specific reference to hours for public inspection. Section 1401.4 of the regulations (see attached) states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment".

If, for example, the Board does not have regular business hours, it is required to establish a written procedure by which an individual may arrange an appointment for the purpose of inspecting and/or copying records. If such a procedure has not been established, I believe that the Board would be required to do so. Nevertheless, the correspondence from Mr. Schwarz appears to indicate that records may generally be inspected and/or copied during certain specified hours. If my analysis of his correspondence is inaccurate, I would appreciate hearing from you.

Fourth, since some of the information that you requested consists of minutes of meetings of the Board, I direct your attention to §101(3) of the Open Meetings Law. The cited provision states that:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session".

Stated differently, minutes of open meetings are required to be prepared and made available within two weeks of such meetings; minutes reflective of action taken during executive sessions must be prepared and made available within one week of the executive sessions during which action was taken.

Lastly, you asked whether, if you initiate legal action against the Fire District, the Fire District must "assume the burden of [your] legal expenses". In this regard, an amendment to the Freedom of Information Law regarding attorney fees was signed by Governor Carey during this year's legislative session (Chapter 73, Laws of 1982). The provision, which will become effective on October 15, will provide that a court may award reasonable attorney fees to a person who has substantially prevailed in a proceeding brought under the Freedom of Information Law, but only when the records in question would be of clearly significant interest to the general public and when the agency lacked a reasonable basis for withholding. It is emphasized that the award of attorney fees would not be mandatory, but rather discretionary on the part of a court. It is also stressed that the two conditions specified above would have to be present for a court to award attorney fees in a case brought under the Freedom of Information Law.

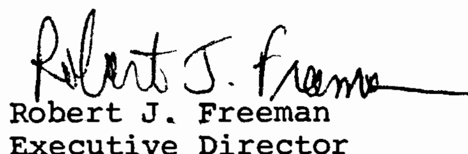
The Open Meetings Law also contains a provision regarding attorney fees. Section 102(2) states that:

> "[I]n any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party".

Once again, the award of attorney fees in a suit brought under the Open Meetings Law is discretionary on the part of a court. Moreover, §102(2) permits a court to award attorney fees to "the successful party". As such, either party in such a suit could be awarded attorney 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
Attachment
cc: Mr. Schwarz

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2588

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

August 23, 1982

Maybelle Kutka
Councilwoman
City of Elmira
411 Robinson Street
Elmira, NY 14904

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 Councilwoman Kutka:

As you are aware, I have received your letter of August 16, as well as the materials attached to it.

According to your letter, as a councilwoman, you requested from the City Manager a copy of an engineering report which had been authorized by the City Council. You indicated that your request for the report was specific, in that you asked for a copy in order to have an opportunity to study its contents, "and also to have it studied by several engineer friends...for their advice". In the initial response from the City Manager, it was indicated that you could see the report. The inference, according to your letter, was that you could not have a copy of the report. Since the date of your letter, you have apparently received a copy of the report in question. However, for future reference, you have raised questions regarding the capacity to inspect and copy records under the Freedom of Information Law.

It is noted initially that long before the enactment of the Freedom of Information Law, it was found judicially that the right to copy is concomitant with the right to inspect [see In Re Becker, 200 AD 178 (1922)]. As such, the right to copy available records has apparently existed for some sixty years.

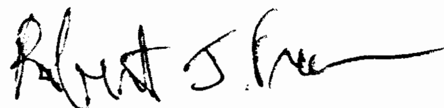
Second, with respect to the specific language of the Freedom of Information Law, §87(2) provides that "[E]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records...", except to the extent that records or portions thereof fall within one or more among eight grounds for denial. Further, §89(3) of the Law states that, in the case of a request for an accessible record:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record..."

In view of the foregoing, I believe that the Freedom of Information Law clearly requires that an agency produce copies of accessible records upon payment of or offer to pay the appropriate fees for copying.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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STEPHEN PAWLINGA
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 23, 1982

Maybelle Kutka
Councilwoman
City of Elmira
411 Robinson Street
Elmira, NY 14904

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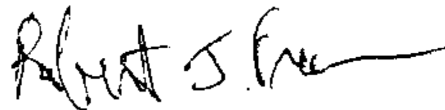
I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-805 FOIL-AO-2589

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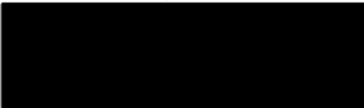
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 24, 1982

Bernard Feldman



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. Feldman:

I have received your letter of August 14 in which you asked for advice regarding minutes of meetings of the board of directors of a cooperative.

In all honesty, although you wrote that you are "certain" that I am "knowledgeable about cooperatives and their inner workings", I must admit that I do not have any expertise regarding cooperatives.

Further, it is emphasized that the Freedom of Information Law is applicable only to records in possession of government in New York. In this regard, §86(3) of the Freedom of Information 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".

Since a cooperative is not a governmental entity, the minutes of its board of directors would not fall within the purview of the Freedom of Information Law.

Similarly, although the Open Meetings Law requires that a public body must prepare minutes, I do not believe that the board of directors of a cooperative would constitute a public body subject to the Open Meetings Law. Section 97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to 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 similar body of such public body".

Once again, since a board of directors of a cooperative does not conduct public business for any unit of government, it would not in my view be required to prepare minutes under the Open Meetings Law, nor would it be subject to the Open Meetings Law in any way.

Nevertheless, I have engaged in legal research and have contacted the Attorney General's office on your behalf. In this regard, although the records in question would not fall within the scope of either the Freedom of Information Law or the Open Meetings Law, it appears that minutes are generally available to shareholders. A cooperative would generally be governed by the provisions of the Cooperative Corporations Law and the Business Corporation Law (see Cooperative Corporations Law, §5). With respect to minutes, §624(a) of the Business Corporation Law states that:

> "[E]ach corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its shareholders, board and executive committee, if any, and shall keep at the office of the corporation in this state or at the office of its transfer agent or registrar in this state, a record containing the names and addresses of all shareholders, the number and class of shares held by each and the dates

> when they respectively became the owners of record thereof. Any of the foregoing books, minutes or records may be in written form or in any other form capable of being converted into written form within a reasonable time".

In addition, §624(b) states in part that:

> "[A]ny person who shall have been a shareholder of record of a corporation for at least six months immediately preceding his demand, or any person holding, or thereunto authorized in writing by the holders of, at least five percent of any class, of the outstanding shares, upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom".

Based upon the provisions quoted above, it would appear that minutes must be kept by a cooperative's board of directors and that they must be made available to shareholders in conjunction with §624.

With regard to your question, it does not appear that any newsletter or similar document must be distributed. However, it is suggested that you request the minutes in accordance with §624 of the Business Corporation 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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 24, 1982

Mrs. Pearl Michaels

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 Mrs. Michaels:

I have received your letter of August 21 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 concerning "break ins" occurring at P.S. 202 in Brooklyn. In response to your request, a representative of the New York City Police Department wrote that:

> "[I]n order for us to locate your break-in report in 1976, we need the complaint number or the exact date of your report.
>
> Your request for all break-in's at P.S. 202 from September 1981 to June 1982 are not available. These records are not public and can only be obtained by due process of law (Subpoena)".

I would like to offer the following comments regarding the situation.

First, as you are aware, §89(3) of the Freedom of Information Law states that an applicant for records must submit a request for records "reasonably described". From

my perspective, what is "reasonably described" is in part dependent upon the manner in which an agency maintains its records. For instance, with respect to your request for records regarding all break ins at P.S. 202 from September, 1981 to June, 1982, it is in my view unlikely that such records would be filed in a manner in which they could be readily retrieved by the Police Department. Similarly, since the Police Department likely receives thousands of reports within a particular month, it might be difficult, if not impossible, to locate a particular report that occurred in a particular month for a particular year, unless more specificity is provided.

If possible, you should provide as much information as you can to enable an agency to locate the records sought. For instance, with regard to the break in occurring in September of 1976, perhaps the record could be located if a specific date is given.

Second, with respect to rights of access to records generally, I would disagree with the broad statement offered by Mr. Statelback of the Police Department. To reiterate, Mr. Statelback indicated that records of break ins can be obtained only by means of a subpoena.

Although some records might be available only by means of a subpoena, others might nonetheless in my opinion be subject to rights of access granted by the Freedom of Information Law.

For instance, it has been held judicially that a police blotter is a log or diary in which any event reported by or to a police department is recorded. Further, since such a record contains no investigative information, but rather is merely a summary of events or occurrences, it has been found to be available under the Freedom of Information Law [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. If, for example, the police department maintains a record analagous to a police blotter, I believe that it would be available.

In addition, 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.

Perhaps the most relevant ground for denial concerning police department records 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 quoted above is based upon potentially harmful effects of disclosure. If, for example, an investigation is ongoing and disclosure would interfere with the investigation, records may be withheld under §87(2)(e)(i). On the other hand, if an investigation has ended, it is possible that the grounds for denial described in §87(2)(e) might no longer constitute valid bases for withholding. In short, due to the flexibility of the Freedom of Information Law, rights of access to records, particularly those concerning an investigation, may vary, depending upon the status of an investigation.

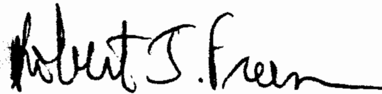
Third, it is possible that the School District might maintain records of break ins independent of those maintained by the Police Department. If that is so, it is suggested that a request for such records be forwarded to the appropriate school district official.

Lastly, the Freedom of Information Law grants rights of access to existing records. Further, as a general rule, an agency is not required to create a record in response to a request [see Freedom of Information Law, §89(3)]. In

this regard, it is possible that records once created regarding break ins or other events might have been destroyed. In such cases, if records no longer exist, an agency would be under no obligation to create records in response to a request made 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

cc: Angelo J. Aponte
William Statelback

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2591

COMMITTEE MEMBERS

THOMAS H. COLLINS
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MARCELLA MAXWELL
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

August 25, 1982

James M. Williams
82 D 0106
Clinton Correctional Facility
Post Office Box B
Dannemora, New York 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. Williams:

I have received your letter of August 9, which reached this office on August 25.

You have requested a copy of commitment papers pertaining to you concerning an escape charge initiated in Schenectady County. Although you wrote to the office of the District Attorney several times, you have apparently gotten no response from that office. Consequently, you have requested the records in question and assistance from this office regarding the use of the Freedom of Information Law.

I would like to offer the following comments regarding your letter.

First, the Committee on Public Access to Records has the authority to advise 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 grant or deny access to records.

Second, if the facts as you described them are accurate, the District Attorney should in my view have responded to your request. In this regard, various

judicial determinations indicate that the records of the office of a district attorney are subject to rights of access granted by the Freedom of Information Law (see e.g., New York Public Interest Research Group v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979; Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., New York Law Journal, June 24, 1982).

Third, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, prescribe time limits for responding 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Therefore, if, for example, you have received no response to your request sent to the District Attorney, you may consider the request to have been denied. As such, an appeal may be taken.

Lastly, it is possible that the records in which you are interested may be obtained from other government offices. For example, if the records are in possession of a

court, a request might be directed to the clerk of the court pursuant to §255 of the Judiciary Law. It is also possible that the records might be in possession of the Department of Correctional Services. Therefore, it is suggested that you submit a request to the facility superintendent pursuant to regulations promulgated under the Freedom of Information Law by the Department of Correctional Services (see attached).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2592

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

COMMITTEE MEMBERS

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JOHN C. EGAN
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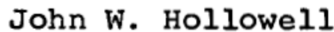
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 26, 1982

John W. Hollowell



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. Hollowell:

I have received your letter of August 22 addressed to Gilbert P. Smith, Chairman of the Committee. As indicated above, the staff of the Committee generally provides advice.

Your letter includes a substantial amount of information designed to "reinforce" your request for "dollar data" in relation to annual financial reports of the New York State Common Retirement System. You indicated that the information has been sent to this office "for review, determinations and advice".

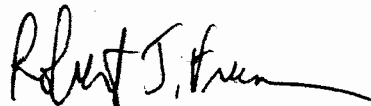
Two points should be emphasized at the outset. First, although you have obviously engaged in a substantial amount of research regarding the Retirement System, I do not believe that the staff of the Committee has sufficient expertise regarding the subject to offer reasonable commentary. Second, the Committee has only authority to advise with respect to the Freedom of Information and Open Meetings Laws. As such, the Committee has no authority to render what might be considered a "determination". Stated differently, this office does not have the capacity to compel an agency to grant or deny access to records under the Freedom of Information Law.

Further, as indicated to you in an earlier letter, your request to the Department of Audit and Control in which you asked that Department officials complete a series of blanks contained within forms that you prepared would not in my view constitute a request falling within the purview of the Freedom of Information Law. To reiterate, the Freedom of Information Law provides broad rights of access to existing records. Moreover, §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 for information on behalf of an applicant.

Lastly, it would appear that you have begun to engage in what may be the most appropriate course of action. Specifically, if you feel that the Retirement System does not operate as efficiently as it could, your proposals should in my view be forwarded to members of the State Legislature. Perhaps those who have the requisite expertise regarding the subject would be willing to review your materials and introduce remedial legislation.

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 - 808
FOIL- AO-2593

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 30, 1982

Mr. J. Roy Dodge
Town Clerk
Box 57
LaFayette, NY 13084

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. Dodge:

I have received your letter of August 25 concerning a request for records directed to the Republican Committee of the Town of LaFayette.

Specifically, according to your letter and the correspondence attached to it, on July 15, you submitted a request under the Freedom of Information Law to the LaFayette Republican Committee in which you asked for copies of minutes of all regular and special meetings of that Committee regarding meetings held from May 12 to July 12. In response to your request, the Chairman stated that he was in the process of determining whether the Committee is obliged to respond to the request.

You have sought an opinion regarding whether the committee in question is required to comply with your request.

In my view, it is unlikely that a political party committee is subject to the provisions of the Freedom of Information Law. If that is so, the records of a political committee, such as its minutes, would not be subject to rights of access granted by the Freedom of Information Law, nor would they be required to be made available to the public.

In this regard, the Freedom of Information Law states generally that all records of an agency are available, except to the extent records fall within one or more grounds for denial listed in §87(2) of the Law. The term "agency" is defined in §86(3) of the Freedom of Information 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."

Although a political committee may be related to government, it could not in my opinion be considered a governmental entity performing a governmental function. As such, I do not believe that a political committee would fall within the definition of "agency" or, therefore, the scope of the Freedom of Information Law.

Viewing your request from a different perspective, I do not believe that the meetings or minutes of a political committee would fall within the requirements of the Open Meetings Law. The coverage of the Open Meetings Law is determined in part by the definition of "public body". Section 97(2) of the Open Meetings Law defines "public body" to mean:

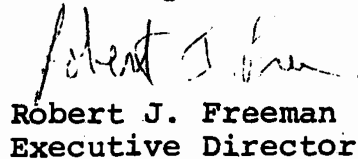
> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, of for a public corporation as defined in section sixty-six of the general construction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

Once again, while the deliberations of a political committee may relate to public business, I do not believe that a political committee performs what might be characterized as a "governmental function".

Moreover, §103(2) of the Open Meetings Law states that the provisions of that law do not apply to "deliberations of political committees, conferences and caucuses." As a consequence, the Open Meetings Law would not in my view be applicable to meetings of a town political party committee. Further, although a public body is required to prepare minutes and make them available pursuant to §101 of the Law, those provisions would not in my opinion be applicable to a political committee due to its exemption 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2594

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

COMMITTEE MEMBERS

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 31, 1982

Isidore Garcia
82 A 1695
Pouch 1
Woodbourne, NY 12788

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. Garcia:

Your letter of August 18 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 Law.

In your letter to the Attorney General, you requested "any and all information" that you might need to "get [your] records under the 'Freedom of Information Act'".

Enclosed for your consideration are copies of the New York Freedom of Information Law, the regulations promulgated by the Committee which govern the procedural aspects of the Law, and an explanatory pamphlet on the subject that may be useful to you.

In addition, I would like to offer the following comments on the subject.

First, the "Freedom of Information Act" is a federal law that applies to records in possession of federal agencies. The "Freedom of Information Law" is a New York State law that applies to records of agencies of government in New York.

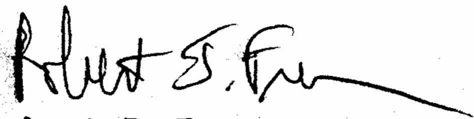
Second, it is emphasized that the Freedom of Information Law requires that an applicant submit a request for records "reasonably described" [see §89(3)]. As such, a request for records sent to an agency in which an applicant merely seeks records pertaining to himself, without greater detail, would not in my view likely "reasonably describe" the records sought. It is suggested that when making a request, as much identifying information as possible should be provided, including names, dates, file designations, index and docket numbers and similar information that will enable an agency to locate the records sought.

Third, as a general rule, 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.

Lastly, §89(1)(b) of the Freedom of Information Law requires the Committee to promulgate regulations dealing with the procedural implementation of the Freedom of Information Law. In turn, §87(1) requires that each agency must adopt it own regulations relative to its records. In this regard, also enclosed is a copy of the regulations promulgated by the Department of Correctional Services regarding access to records of the Department.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-809
FOIL-AO-2595

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

COMMITTEE MEMBERS

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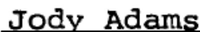
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 31, 1982

Jody Adams



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. Adams:

I have received your letters of August 23 and 24. Enclosed as requested is a list of the names and addresses of the members of the Committee on Public Access to Records.

Your letter of August 24 concerns the status of a Special Court Facilities Committee designated by the Suffolk County Legislature. The Committee in question is apparently advisory in nature, and your question is whether the "public access rules" regarding voting are applicable to the Special Court Facilities Committee.

In my view, based upon a review of the resolution that you enclosed, which established the Committee in question, it would be subject to the provisions of both the Freedom of Information Law and the Open Meetings Laws. Consequently, I believe that the "public access rules" to which you made reference concerning voting would be applicable.

Your letter to Joyce Long of the Suffolk County Attorney's office indicates that there may be some confusion on the part of members of the Special Court Facilities Committee regarding the status of the Committee under the Open Meetings Law. Notwithstanding the apparent confusion, the Committee in question is in my view clearly a "public body" subject to the Open Meetings Law in all respects.

In terms of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in §97(2) of the Open Meetings Law. Perhaps the leading case on the subject involved a situation in which a school board designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that the advisory committees in question which had no capacity to take final action fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups". In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body".

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §97(2) 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".

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies".

In view of the amendments to the definition of "public body", I believe that virtually any entity designated or created to serve as a body by a county legislature, for example, or any other public body would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Moreover, a review of the definition of "public body" in terms of its components in my opinion leads to the conclusion that it is subject to the Open Meetings Law. Specifically, the Committee in question is an entity consisting of more than two members. It must in my opinion conduct its business by means of a quorum pursuant to §41 of the General Construction Law. Further, in view of its duties, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, a county.

For the reasons expressed above, the Special Court Facilities Committee is in my view a "public body" subject to the Open Meetings Law.

In your letter to Ms. Long, you also wrote that "[T]he essential thing under the law the committee has not been doing is giving public notice". In this regard, if my contention that the Committee in question is a public body subject to the Open Meetings Law is accurate, it is required to comply with the provisions concerning notice appearing in §99 of the Open Meetings Law.

In brief, §99(1) concerning meetings scheduled at least a week in advance 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. Section 99(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by means of posting in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Consequently, I believe that a public body is required to give notice before all meetings, whether regularly scheduled or otherwise. It is noted, however, that the Open Meetings Law does not specify which entities of the news media must be contacted for the purpose of providing notice. Further, §99(3) makes clear that a public body need not pay to place a legal notice in a newspaper, for example, to comply with the Open Meetings Law.

Lastly, you raised a question regarding "public access rules" regarding voting. Here I direct your attention to §101 of the Open Meetings Law pertaining to minutes. Subdivions (1) and (2) of §101 deal respectively with minutes of open meetings and executive sessions. In both instances, minutes are required to make reference to a vote regarding action taken. Further, subdivision (3) of §101 states that minutes shall be available in accordance with the provisions of the Freedom of Information Law.

Although the Freedom of Information Law generally does not require that an agency create a record in response to a request, an exception to that rule arises with respect to voting records. 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..."

Since the Committee in question would in my view fall within the definition of "agency" appearing in §86(3) of the Freedom of Information Law, it would be required to prepare a record of votes identifiable to each member who voted in every proceeding in which a vote is taken.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Joyce Long

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL- AO-2596

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

COMMITTEE MEMBERS

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WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 31, 1982

Mr. John Stone
82-A-1575, 3-B-1520
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. Stone:

I have received your letter of August 26 in which you requested assistance from this office.

Apparently you have tried to obtain information regarding a "discharge review" which you mentioned in conjunction with the Naval Review Board. It is your belief that those records are contained in your probation folder. Therefore, you have written to this office for additional information regarding access to such records.

I would like to offer the following comments in response to your inquiry.

First, with respect to the availability of the records you are seeking, it is suggested that you contact the appropriate office of the Department of the Navy. As you may be aware, the Committee on Public Access to Records is responsible for providing advice under the New York Freedom of Information Law, which applies to records of state and local government. It is likely the information you are seeking, if it continues to exist, would be in possession of a federal agency, such as the Navy, and consequently would be subject to the federal Freedom of Information Act.

In order to assist you in making a request under the Freedom of Information Act, I have enclosed an explanatory pamphlet entitled "Your Right to Federal Records". In making a request for the records you are seeking, it is suggested that you initiate your search by directing your inquiry to the following addresses:

Office of the General Counsel
Department of the Navy
Crystal Plaza, Bldg. 5, Rm. 480
Arlington, VA 20360

or

Office of the Chief Naval Records
Management Division
OP-09B1
Rm. 5E613, Pentagon
Washington, DC 20350

Second, with respect to your requests to the Division of Probation, as previously noted in the advisory opinion of August 18, 1982 that you requested, §390.50(2) of the Criminal Procedure Law might prohibit release of the "discharge review" records you are seeking. To reiterate, that section restricts availability of presentence reports as well as other material regarding sentencing presented to a court by a probation department. Therefore, if records fall within the scope of §390.50 of the Criminal Procedure Law, it would appear that judicial authorization for their release would be required.

Lastly, you made reference to a decision regarding access to records that is not familiar to me. However, enclosed is a copy of a summary of decisions rendered under the Freedom of Information Law. It is possible that the case you are seeking may be cited in the summary.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-2597

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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COMMITTEE MEMBERS

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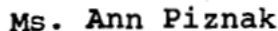
MARCELLA MAXWELL
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 31, 1982

Ms. Ann Piznak



Dear Ms. Piznak:

I have received your letter of August 25 as well as the news article attached to it.

According to your letter, the Town Board has on several occasions granted access to records pursuant to appeals made under the Freedom of Information Law. You referred specifically to determinations made by the Board on September 23, 1981 and July 7, 1982. You have asked whether the Committee on Public Access to Records has received copies of those determinations.

Having reviewed copies of appeals and determinations forwarded to this office for September and October of 1981 and July of 1982, there are no copies of appeals or determinations that were sent to this office by the Town of Deerpark.

In an effort to apprise you and Town officials of the provisions of the Freedom of Information Law relative to your inquiry, a copy of this communication will be sent to the Town Board. With respect to the appeal procedure, §89(4)(a) of the Freedom of Information Law states in relevant part that:

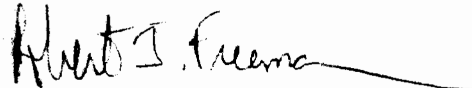
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head,

> 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. 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 language quoted above, I believe that the Town Board as the governing body of a municipality and, in this instance, as the appeals body for purposes of the Freedom of Information Law, is required to transmit to the Committee copies of appeals and the determinations that follow.

I hope that I 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-2598

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 1, 1982

Manager
Office of Business Permits
Executive Department
Alfred E. Smith Office Building
Albany, New York 12225

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 solely in your correspondence.

Dear :

I have received your letter of August 31 in which you requested assistance in obtaining records from the Office of Business Permits.

According to the correspondence attached to your letter, you appealed a determination rendered in conjunction with a performance evaluation on July 23. You requested from the Office of Business Permits records regarding the progress of your appeal. However, it appears that you have not received records or a response regarding your inquiry.

I would like to offer the following comments regarding the situation.

First, I have contacted Steven Teitelbaum, Counsel to the Office of Business Permits, on your behalf to determine the status of your inquiry. Mr. Teitelbaum informed me that, most recently, you were informed that the entire contents of your personnel file would be made available to you. In addition, he indicated that no records exist regarding the progress of your appeal. If no such records exist, the Freedom of Information Law would not in my view be applicable.

Second, in a related vein, it is noted that the Freedom of Information Law states that, as a general rule, an agency need not prepare or create a record in response to a request [see attached, Freedom of Information Law, §89(3)].

Lastly, as you may be aware, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations of a procedural nature. In turn, §87(1) requires each agency to adopt its own regulations consistent with those promulgated by the Committee. In this regard, one aspect of the regulations promulgated by the Committee involves the designation of one or more "records access officers" responsible for answering requests made under the Freedom of Information Law. The correspondence attached to your letter indicates that your initial request made under the Freedom of Information Law was directed to the Director of the Office of Business Permits, Walter G. Iles. While I have not reviewed the regulations promulgated under the Freedom of Information Law by the Office of Business Permits, as Director of the agency, I would conjecture that Mr. Iles is not the designated records access officer. It is suggested that you seek to obtain a copy of the procedures adopted by the Office of Business Permits in order that requests made in the future may be directed to the appropriate person or persons.

I hope that 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: Steven Teitelbaum

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2599

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

September 7, 1982

Ms. Alma Giannini
82-6124
112A
247 Harris Road
Bedford Hills, NY 10507

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. Giannini:

I have received your letter of August 26 in which you raised questions regarding rights of access to a variety of records.

Specifically, you are interested in reviewing and correcting a presentence report pertaining to you. In addition, you are seeking to obtain copies of your indictment, including a breakdown of charges, your arrest warrant, search warrant, statements made by the complainant resulting in your arrest, and "plea minutes" of a co-defendant.

I would like to offer the following comments regarding your inquiry.

First, the Freedom of Information Law is based upon a presumption of access. In brief, §87(2) of the Law states that all records are available, except those records or portions thereof that fall within one or more grounds for denial appearing in paragraphs (a) through (h) of the cited provision. Further, many of the exceptions to rights of access are based upon potentially harmful effects of disclosure. Enclosed for your consideration are copies of the Freedom of Information Law and the Committee's regulations, which govern the procedural aspects of the Law.

Second, you indicated that you are particularly interested in obtaining a copy of your "blotter" which you believe includes a probation report containing erroneous information. In this regard, §87(2)(a) of the Freedom of Information Law states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law concerning presentence reports. Subdivision (1) and (2) of §390.50 state that:

> "1. [A]ny pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, 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.
>
> "2. [N]ot less than one court day prior to sentencing, unless such time requirement is waived by the parties, the presentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination 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 appears that a presentence report may be made available only by a court, and only under the circumstances described in §390.50. As such, it is suggested that you might want to discuss the issue further with your attorney.

Third, with respect to the other records you are seeking, there are three likely sources that could be contacted regarding those records, i.e., the precinct in which the arrest occurred, the court in which the proceeding was conducted, and at the facility where you are currently located.

In this regard, I would like to offer several additional points.

The Freedom of Information Law does not include within its scope the courts and court records. However, there are various provisions of law that pertain to access to court records (see attached, for example, Judiciary Law, §255). Further, in making a request to an agency subject to the Freedom of Information Law or to a court clerk, for instance, it is suggested that you provide as much specificity as possible. Section 89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". As such, to enable agencies or court officials to locate records sought, it is suggested that you provide names, dates, docket, index, and indictment numbers and similar information that will permit identification and location of the records sought. Further, with respect to records pertaining to you that may be in custody of officials at the facility in which you are housed, enclosed is a copy of the regulations promulgated by the Department of Correctional Services concerning access to department records. It is noted that there are specific provisions relating to inmate records and that a request for records pertaining to you should likely be directed to the facility superintendent (see §5.15).

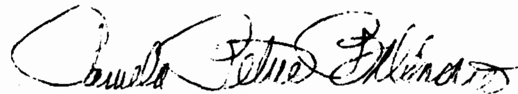
Lastly, without greater familiarity with the records sought or their contents, it is all but impossible to provide specific direction. Nevertheless, there are several grounds for denial appearing in the Freedom of Information Law that may be of possible relevance. For instance, §87 (2)(e) pertains to records compiled for law enforcement purposes and permits an agency to withhold those records under circumstances specified in the cited provision. Section 87(2)(f) permits an agency to withhold records or portions thereof when disclosure would "endanger the life or safety of any person". Section 87(2)(b) permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy".

The extent to which the cited grounds for denial or perhaps others may be applicable is unknown to me. It is recommended that you review the provisions of the Freedom of Information Law and seek the assistance of an attorney.

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

Sincerely,

ROBERT J. FREEMAN
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-810 FOIL-AO-2600

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

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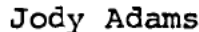
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 8, 1982

Jody Adams



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. Adams:

I have received your letter of August 31, in which you described three "problems".

First, you indicated that you contacted this office approximately two weeks ago to request copies of a pamphlet published by the Committee, as well as amendments to the Freedom of Information Law. In this regard, having reviewed our records, the materials were sent to you on August 26. If you have not received them, please contact me.

Second, you made reference to a portion of the pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door", which indicates that while courts and court records are not covered by the Freedom of Information Law, court records are generally available under §255 of the Judiciary Law. Your inquiry concerns rights of access to records in possession of two administrative judges who apparently act as judges and administrators. The question is which area of law would be applicable to the records of the administrative judges.

In all honesty, without greater specificity regarding the nature of the records sought, clear advice cannot be offered. As you may be aware, the court system is run by the Office of Court Administration (OCA). Disputes, however, have arisen regarding the application of the Freedom of Information Law to OCA. From my perspective, OCA is not a court, but rather is an "agency" subject to the provisions of the Freedom of Information Law. Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

Further, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record".

Based upon the definitions quoted above, this office has consistently advised that as the administrative arm of the court system, OCA is subject to the Freedom of Information Law. In addition, two judicial decisions tend to confirm that OCA is an agency required to comply with the Freedom of Information Law [see Babigian v. Evans, 427 NYS 2d 688 (1980); and, attached, in Re Quirk, Sup. Ct., New York County, New York Law Journal, June 4, 1982].

It is unclear whether the records in which you are interested involve the duties of administrative judges in their capacity as administrators for the unified court system. In such a situation, it is my view that the records would be subject to the Freedom of Information Law. If, on the other hand, the records sought involve the records of the judges acting as judges, the records would likely fall outside the scope of the Freedom of Information Law and within the provisions of the Judiciary Law or other applicable statutes and rules.

Your third question arises under the Open Meetings Law. You have asked whether you are "allowed to 'go to court' to ask that a decision be reversed due to open meetings law violations". You also asked whether you can seek a reversal "without court action", which court would have jurisdiction, and whether court fees might be paid if you are "indigent".

In my opinion, based upon the language of §102 of the Open Meetings Law (see attached), any "aggrieved" person may initiate a suit under the Open Meetings Law. Further, from my perspective, since §98 of the Law indicates that any member of the general public may attend a meeting of a public body, any person excluded from a meeting would likely be considered "aggrieved".

To seek a reversal of a violation of the Open Meetings Law, the vehicle would be an Article 78 proceeding commenced in Supreme Court. It is emphasized, however, that if, for example, the Open Meetings Law was indeed violated, a violation of the Law would not necessarily result in the nullification of action taken, for a court may but need not nullify action taken in violation of the Open Meetings Law.

Section 102(1) of the Open Meetings Law states that:

> "[A]ny aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action 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.
>
> An 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".

Based upon the language quoted above, to invalidate action taken in violation of the Open Meetings Law, there must be a showing of "good cause". As such, once again, any action that may be taken by a court due to a violation of the Open Meetings Law is not in any way automatic, but rather is discretionary.

With respect to "court fees", subdivision (2) of §102 states that:

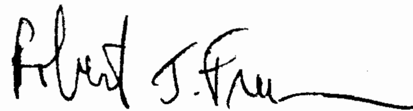
> "[I]n any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party".

The quoted language indicates that a court may award attorney fees to the successful party. Therefore, if, for example, you initiated a suit and failed to prevail, it is conceivable that attorney fees could be awarded to the public body. On the other hand, if you prevailed in such a proceeding, attorney fees could be awarded to you.

Lastly, if your questions concerning the Open Meetings Law pertain to the Special Court Facilities Committee established by the Suffolk County Legislature, it would appear that the Committee in question is performing its duties in compliance with the Open Meetings Law. I would conjecture that you have received a letter addressed to you from Joyce Long, Assistant County Attorney, a copy of which was sent to this office, indicating that the Committee in question is in compliance 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-2601

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

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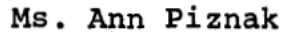
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 9, 1982

Ms. Ann Piznak


Dear Ms. Piznak:

This is to confirm our conversation of this afternoon involving appeals made under the Freedom of Information Law.

First, I must admit and apologize that my letter of August 31 addressed to you was likely not transmitted to the Town as indicated in that communication.

Second, in your letter of August 25, you made reference to an appeal of July 7 and asked whether this office had received a copy of the appeal. From my perspective, since §89(4)(a) requires that each agency "shall immediately forward to the committee on public access to records a copy of such appeal and the determination thereon", it was fair to assume that a copy of the appeal and the determination would have been forwarded to this office shortly after July 7. Nevertheless, having further reviewed our files, I have found that a copy of a transcript of a hearing before the Town's Records Appeals Board was received by this office on August 2. Consequently, while it may have been fair to assume that a copy of a determination on appeal initiated on July 7 would have reached this office at some point in July, it did not reach this office until the beginning of the following month.

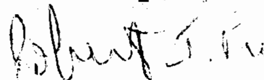
Lastly, you asked whether the Freedom of Information Law requires that a determination on appeal be forwarded to the person who initiated the appeal. Here I would like to reiterate relevant portions of §89(4)(a) of the Freedom of Information Law, which state that:

> "...any 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."

As I read the language quoted above, when a determination on appeal is made, the appeals person or body must either forward a written determination fully explaining the reasons for further denial to an appellant or provide access to the records that were initially denied.

Once again, please accept my apologies for any confusion that may have resulted. I hope that I have been of some assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2602

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 9, 1982

Mr. Isidore Garcia
82-A-1695
Pouch 1
Woodbourne, NY 12788

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. Garcia:

I have received your letter of October 7 in which you asked whether there is "any literature" that you could obtain to assist you in understanding your rights, particularly with respect to furloughs and work release.

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 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 Department of Correctional Services, to grant or deny access to records.

Nevertheless, I would like to offer the following suggestions.

First, 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 circumstances, if, for example, the Department of Correctional Services has established written policies or directives on the subjects in which you are interested, it appears that they would likely be available.

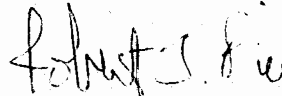
Second, in using the Freedom of Information Law, one of the requirements is that a request "reasonably describe" the records sought [see Freedom of Information Law, §89(3)]. As such, when making a request, it is suggested that you provide as much specificity as possible.

Lastly, §89(1)(b) of the Freedom of Information Law requires the Committee to promulgate general regulations governing the procedural aspects of the Freedom of Information Law. In turn, §87(1) requires each agency to adopt its own regulations under the Freedom of Information Law consistent with those of the Committee. In this regard, I have enclosed a copy of the regulations promulgated by the Department of Correctional Services regarding access to Department records. It is suggested that you closely review those regulations.

Also enclosed are copies of the Freedom of Information Law and 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2603

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 14, 1982

Isidore Garcia
82-A-1695
Pouch 1
Woodbourne, NY 12788

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. Garcia:

I have received your letter of September 7 in which you requested two reports pertaining to you.

At this juncture, it is likely that you have received my earlier letter to you of September 9 with the materials attached to it. Although the earlier letter and the materials may be helpful fo you, I would like to offer the following additional points.

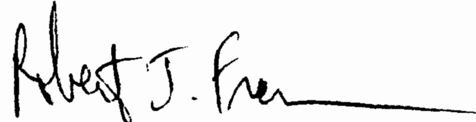
First, under the Freedom of Information Law, a request for records should be directed to the agency or agencies maintaining possession of the records sought. Consequently, in conjunction with the two reports that you are seeking, requests should likely be directed to the Suffolk County Police Department and to the Department of Correctional Services.

Second, it is possible that the records may be available from other sources. Specifically, although the Freedom of Information Law does not apply to courts and court records, perhaps the files regarding the two cases to which you made reference would be in possession of the courts in which the proceedings were held. If that is so, a request should be directed to the clerk of the appropriate court or courts.

In addition, it is possible that the case files in which you are interested may be obtainable through the facility in which you are currently located. In this regard, once again, it is suggested that you closely review the regulations promulgated by the Department of Correctional Services that were sent to you on September 7. Those regulations make specific reference to requests by inmates for 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
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2604

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

COMMITTEE MEMBERS

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 15, 1982

Alfonso Silva
#81 B 1361
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. Silva:

I have received your letter of September 10 in which you requested records from this office.

Specifically, you have requested various records from officials at the Attica Correctional Facility but you have not been given an adequate response. You also referred to access to your rap sheet and asked that such records be sent to you.

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records is authorized to advise 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 to grant or deny access to records.

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)]. In turn, §87(1) of the Freedom of Information Law requires each agency to adopt its own regulations regarding access to its records.

In this regard, I have enclosed a copy of the regulations promulgated by the Department of Correctional Services concerning access to Department records. Those regulations contain several provisions that are likely relevant to the types of records that you are seeking. For instance, requests by inmates for records pertaining to them should be directed to the facility superintendent in accordance with §5.20 of the regulations. In addition, §5.22 makes specific reference to the "DCJS report" which I believe is the equivalent of a "rap sheet". The cited provision indicates that the DCJS report shall be released to inmates when a request is directed to the facility superintendent.

I hope that 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-2605

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 15, 1982

Mr. Edward Kerr
Com. No. 82 A 0302
Green Haven Correctional Facility
Drawer "B" B-2-220
Stormville, NY 12852

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. Kerr:

I have received your letter of September 2 in which you requested that this office "seek to make New York State Department of Correctional Services and Green Haven Correctional Administration" comply with Bounds v. Smith, a decision rendered by the U.S. Supreme Court in 1977.

It is apparently your contention that the cited case requires that correctional facilities place copying machines in prison law libraries. You also asked for information from this office concerning access to records and "corruption" within various correctional facilities and "unsolved investigations".

I would like to offer the following comments regarding your letter.

First, the Committee on Public Access to Records is authorized to advise with respect to the Freedom of Information Law. As such, the Committee does not have possession of records generally, nor does it have the authority to compel an agency to grant or deny access to records.

Second, I have reviewed Bounds v. Smith [45 U.S. L.W. 4411 (1977)] on your behalf. Unless I am mistaken, the decision found that there was a fundmental constitutional right of access on the part of inmates to the courts, for the court held that:

> "...the fundmental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law" (id. at 4414).

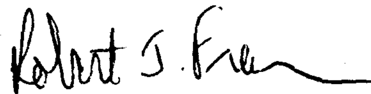
If you need assistance of a legal nature, it is suggested that you contact a legal aid group or Prisoners' Legal Services, for example.

Third, as indicated earlier, this office does not have possession of records generally. However, a request for records may be directed to the Department of Correctional Services. It is noted that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Consequently, when a request is made, as much specificity as possible should be provided, including names, dates, file designations, index and docket numbers and similar information that would enable agency officials to locate the records sought.

It is also noted that the Freedom of Information Law requires the Committee on Public Access to Records under §89(1)(b) to promulgate regulations governing the procedural implementation of the Freedom of Information Law. In turn, §87(1) requires each agency to adopt its own regulations regarding access to its records. In this regard, I have enclosed a copy of the regulations regarding records adopted by the Department of Correctional Services. It is suggested that you review those regulations closely. Also enclosed are copies 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-2606

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

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 15, 1982

Ms. Darlene Barney

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. Barney:

I have received your letter of September 10 in which you requested a copy of the Freedom of Information Law as well as information regarding the types of organizations to which the Law applies.

In conjunction with your request, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you.

With respect to the scope of the Freedom of Information Law, the Law applies to governmental entities in New York. Specifically, I direct your attention to §86(3), which 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 the language quoted above, it is in my view clear that the Law applies to agencies of state government, local government and other governmental entities in New York. It is also clear in my opinion that the Law would not apply to private organizations or institutes.

I hope that I 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-2607

MITTEE MEMBERS

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

September 15, 1982

Mr. Richard S. Christy

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. Christy:

I have received your letter of September 10 in which you requested various types of information from this office.

Specifically, you have requested information regarding federal payrolls and benefits, New York State payrolls and benefits, similar information pertaining to a county and a town, as well as information concerning "welfare payments to individuals".

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records is responsible for providing advice with respect to the New York 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 authority to require an agency to grant or deny access to records.

Second, it is noted that there may be two provisions of law relevant to the information that you are seeking. In this regard, the federal Freedom of Information Act applies to records in possession of federal agencies. The New York Freedom of Information Law applies to records in possession of units of state and local government in New

York. Consequently, in obtaining information relative to federal payrolls and benefits, a request would be made under the federal Freedom of Information Act. A request regarding state, county or town payrolls and benefits would be made under the New York Freedom of Information Law.

Third, under both the state and federal acts, an applicant is required to submit a request for records "reasonably described". As such, to enable agency officials to locate records sought, as much specificity as possible should be given when a request is made.

Fourth, the New York Freedom of Information Law specifies that each agency, including a state agency, a town or a county, must prepare a payroll record indicating the name, public office address, title and salary of every officer or employee of the agency [see Freedom of Information Law, §87 (3)(b)]. With regard to benefits of public employees, information of that nature would likely be found within collective bargaining agreements between public employers and public employees. Such records would in my view clearly be available under the Freedom of Information Law.

Fifth, with regard to welfare payments to individuals, it is noted that §136 of the Social Services Law requires that records identifiable to recipients of or applicants for public assistance must generally be kept confidential. Therefore, while records indicating the amount expended on welfare in statistical form, for example, would likely be available, records identifying particular recipients of public assistance would in my view be confidential.

Lastly, to provide you with additional information regarding rights of access to records, enclosed are copies of the New York Freedom of Information Law and an explanatory pamphlet on the subject, as well as a publication of the United States Department of Justice entitled "Your Right to Federal 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-AO-2608

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

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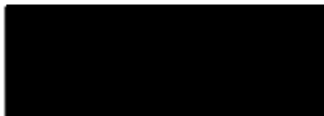
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 16, 1982



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 :

I have received your letter of August 29 in which you requested assistance from the Committee on Public Access to Records.

As you have indicated in previous correspondence to this office, you have experienced difficulties in gaining access to records concerning a workers' compensation case, some of which you believe may be in possession of a former employer. Consequently, you are concerned that the employer has not appropriately responded to your request for such records under the Freedom of Information Law. Additionally, you have requested advice regarding the ability to correct information on medical records which you believe is erroneous.

I would like to offer the following comments with respect to your inquiries.

First, the Freedom of Information Law does not appear to be applicable to the Special Funds Conservation Committee to which you directed your request for records. The definition of "agency" appearing in §86(3) of the Freedom of Information Law includes any unit of government "performing a governmental or proprietary function for the state". To the best of my knowledge, the entity to which you submitted your request for records is not an agency but rather a private enterprise. Therefore, in my view, the Special Funds Conservation Committee is not likely subject to the Freedom of Information Law.

Second, in previous correspondence from this office written at your request, you were advised that your inquiry concerning a workers' compensation case should be directed to the Workers' Compensation Board. On your behalf, I have contacted a representative of the Board who suggested that your wife direct her request for a copy of the employers' physician report to Mr. Thomas Gleason, Administrative Director, New York State Workers' Compensation Board, Two World Trade Center, New York, NY 10047.

Furthermore, since the jurisdiction of the Committee is limited to advising with respect to the Freedom of Information Law, it is suggested that any questions you have concerning the accuracy of your wife's compensation records should be directed to Mr. Gleason.

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-2609

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 17, 1982

James C. Slaughter
82-A-2479
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. Slaughter:

I have received your letter of September 5 in which you requested assistance from this office in obtaining copies of any "procedures and policies" regarding access to records under state and federal statutes.

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records is responsible for providing advice with respect to the New York Freedom of Information Law. This office does not have possession of records generally, nor does it have the authority to require an agency to grant or deny access to records.

Second, it is noted that there are likely two provisions of law relevant to the information that you are seeking. In this regard, the federal Freedom of Information Act applies to records in possession of federal agencies. The New York Freedom of Information Law applies to records in possession of units of state and local government in New York.

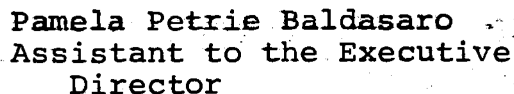
Third, under both the state and federal acts, an applicant is required to submit a request for records "reasonably described". As such, to enable agency officials to locate records sought, as much specificity as possible should be given when a request is made.

Lastly, to provide you with additional information regarding rights of access to records, enclosed are copies of the New York Freedom of Information Law and an explanatory pamphlet on the subject, as well as a publication of the United States Department of Justice entitled "Your Right to Federal 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
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2610

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

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BASIL A. PATERSON
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 17, 1982

Mid-Hudson Psychiatric Center
P.O. Box 158
New Hampton, NY 10958

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 :

I have received your letter of September 4 as well as the correspondence attached to it. According to your letter, you have not yet received a response to your request for records under the Freedom of Information Law.

I have contacted the Office of Counsel at the Office of Mental Health on your behalf. In this regard, I have been assured that the records that you requested have been sent to you. As such, I believe that the matter has been resolved.

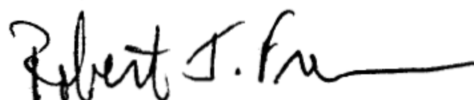
For future reference, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for response to requests. Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business 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)].

I hope that 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-2611

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

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MARCELLA MAXWELL
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 17, 1982

Victorina Nichols
80 G 262
Bayview Correctional Facility
550 West 20th Street
New York, New York 10011

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. Nichols:

I have received your letter of September 9 in which you requested assistance from this office.

In your correspondence, you indicated that you submitted an appeal under the Freedom of Information Law to the superintendent of the Bayview Correctional Facility. Your initial request for a copy of your "complete Pre-Sentence Report", as well as other records, was denied.

I would like to offer the following comments in response to your inquiry.

First, I believe that Mr. Carter's denial of your presentence report was likely appropriate. In this regard, §390.50(1) of the Criminal Procedure Law generally requires that presentence reports be kept confidential. Further, I believe that the only means by which such records may be released would involve permission from the judge of the trial court. Section 390.50(1) states in part that:

> "[I]n general. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, 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".

Subdivision (2) of §390.50 states in part that:

> "[N]ot less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination 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".

Second, in terms of the relationship between the quoted provision of the Criminal Procedure Law and the Freedom of Information Law, the Freedom of Information Law would not in my view expand your rights of access to a pre-sentence report. Although the Freedom of Information Law is based upon a presumption of access, §87(2)(a) permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute".

It appears that some confusion may have arisen regarding the types of records which comprise your presentence report. Since you indicated that you need the records in question for parole purposes, you might be interested in contacting the Division of Parole at 1450 Western Avenue, Albany, NY 12203.

Second, with respect to medical laboratory results that you are seeking, I have enclosed a copy of regulations promulgated by the Department of Correctional Services concerning rights of access to inmate records. In particular, §5.24(b) indicates that requests for medical records should be submitted to the Assistant Commissioner of Health Services. Therefore, it is suggested that you review the enclosed regulations and redirect your inquiry regarding the laboratory tests to that individual.

Third, on your behalf, I have contacted a representative of the Counsel's Office for the Department of Correctional Services. She has indicated that your appeal has not yet been received and that any future appeals should be directed to the Counsel of the Department of Correctional Services as set forth in §5.45 of the Department's regulations. The appeal that you submitted to the facility superintendent is being forwarded 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

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 2612

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 20, 1982

William Van Ness
80-B-781
Clinton Correctional
Facility Annex
Box 367
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. Van Ness:

I have received your letter of September 10 in which you requested information regarding access to particular records regarding yourself.

I would like to offer the following advice in response to your inquiry.

First, the Committee on Public Access to Records is responsible for providing advice with respect to the New York 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 authority to require an agency to grant or deny access to records.

Second, 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).

Third, the Department of Correctional Services, as required by the Freedom of Information Law, has promulgated regulations with respect to access to records. It is suggested that you review the enclosed regulations.

Additionally, §5.5 indicates that the transfer and disciplinary records you are seeking may be in possession of a facility in which you are housed. Therefore, it is suggested that you direct your request for such records to the facility superintendent or his designee as indicated in §5.20. When making such a request, it is suggested that you provide as much detail as possible, including names, dates, file designations and any other identifying information which may be relevant.

Lastly, this office has 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. Records reflective of medical and/or psychological diagnoses and advice 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)].

Also enclosed for your consideration is a copy of an explanatory pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" 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

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL - AO-2613

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

COMMITTEE MEMBERS

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WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 20, 1982

Mr. Joseph Bakerian
The Civil Service Employees
Association, Inc.
Capital Region
1215 Western Avenue
Suite 308
Albany, New York 12203

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. Bakerian:

I have received your letter of September 14 in which you described "consistent difficulty in securing public information from the N.Y.S. Division for Youth".

Specifically, you wrote that on several occasions a president of a CSEA local requested employment information from the Division for Youth "to adequately monitor the number of temporary, provisional and permanent positions located at his work location at the Tryon School, Johnstown, NY." In brief, it appears that the Division for Youth has generally withheld information indicating employees' status, i.e., temporary, provisional or permanent, on the ground that disclosure would result in an unwarranted invasion of personal privacy. You have asked this office to assist you in obtaining certain information regarding employees of the Tryon School including "employee's name, current title, appointment date, budget item number, and employment status (i.e., temporary, provisional or permanent)."

I would like to offer the following comments regarding your inquiry.

First, it is emphasized that the Freedom of Information Law is an access to records law, rather than an access to information law. Section 89(3) of the Law states that, as a general rule, an agency need not create a record in response to a request. As such, if, for example, the Division for Youth does not maintain a list containing each item of information in which you are interested, it would be under no obligation to create such a list on your behalf.

Second, one of the exceptions to the rule that an agency need not create a record involves payroll information. Specifically, §87(3)(b) of the Freedom of Information 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..."

As such, any person may inspect and/or copy payroll records indicating the name, public office address, title and salary of each officer or employee of the agency.

Third, with respect to the privacy provisions of the Freedom of Information Law and employment status, it is possible that the response given by the Division for Youth may be appropriate. In determining issues regarding the privacy of public employees, the courts have held in many instances that public employees have a lesser capacity to protect their privacy than others, for it has been found that public employees are required to be more accountable than others. With respect to access to records identifiable to public employees, it has been found in essence that records that are relevant to the performance of one's official duties are generally available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. V. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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, it has also been found that records pertaining to public employees that are irrelevant to the

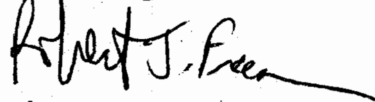
performance of their official duties may be withheld on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977].

Under the circumstances, if a court were to find that a public employee's status as temporary, provisional, or permanent is irrelevant to the manner in which the employee performs his or her official duties, it would appear that a denial of access to records indicating employees' employment status would be appropriate on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Lastly, if you are interested in statistical or numerical information regarding employees' status, such information, to the extent that it exists, would in my view be available under §87(2)(g)(i) of the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2614

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

COMMITTEE MEMBERS

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MARIO M. CUOMO
JOHN C. EGAN
WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 20, 1982

Ms. Darcy Stricker
Personnel Technician
County of Dutchess
Office of the Commissioner
of Personnel
Poughkeepsie, NY 12601

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. Stricker:

I have received your letter of September 9 and appreciate your interest in compliance with the Freedom of Information Law.

Your first area of inquiry concerns "duties statements" used by the Dutchess County Personnel Department "to obtain information on the duties and responsibilities of a position in order to appropriately classify the position". The forms that you enclosed indicating statements of duties are apparently completed by both a supervisor for the creation of a new position and by the incumbent of a position. Your question involves "what time in the classification process and to what extent these documents are public knowledge".

Having reviewed the two forms enclosed with your letter, 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 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 §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, as soon as a record exists, it would in my view be subject to rights of access. Therefore, as soon as a form is completed, I believe that it would be a "record" subject to the Freedom of Information Law.

Third, it appears that two of the grounds for denial appearing in the Freedom of Information Law might be relevant to your inquiry.

The first is §87(2)(b) and states that an agency may withhold records or portions thereof the disclosure of which would result in "an unwarranted invasion of personal privacy". In determining issues regarding the privacy of public employees, the courts have held in many instances that public employees have a lesser capacity to protect their privacy than others, for it has been found that public employees are required to be more accountable than others. With respect to access to records identifiable to public employees, it has been found in essence that records that are relevant to the performance of one's official duties are generally available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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, it has also been found 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 indeed constitute an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977].

Under the circumstances, it would appear that the majority of the information found within the two forms would be relevant to the performance of one's official duties. If that is so, disclosure would likely result in a permissible rather than an unwarranted invasion of personal privacy.

There may, however, be certain aspects of the forms that might justifiably be deleted to protect personal privacy. For instance, Item 3 of Form MS 220 appears to require an indication of the city, county, town or village of residence of an employee. From my perspective, it is questionable whether the municipality of residence would be relevant to the performance of one's official duties. Similarly, Item 8 requires an indication of the status of a position. Again, it is questionable whether that information is relevant to the performance of one's official duties. Therefore, it is possible that disclosure of those items would result in an unwarranted invasion of personal privacy and may be deleted from the form prior to public disclosure.

The remaining ground for denial of 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 policies or determinations must be made available.

Based upon a review of the forms, it would appear that much of the information would be of a factual nature and, consequently, would be available.

There may, however, be certain aspects of the forms which are reflective of advice or suggestion, for example, which might justifiably be withheld. For instance, in Items 20-22, a supervisor is required to make a judgment and provide advice. Similarly, Item 25 requires "comment" made by a department head. In short, those aspects of the forms reflective of advice or opinion, i.e., comments, for example, may in my view be deleted while those portions indicating factual information would in my view be available.

The remaining area of inquiry concerns a situation in which a municipality employs a police officer on a part-time basis. In this regard, you wrote that the individual does not meet the minimum educational requirements for the position and therefore was not certified on the payroll. Your question is whether you must release "the name of the individual and reasons for his not being certified to the press upon their request".

First, in my opinion, the name of the individual should likely be made available, for it may be obtained via other records. For instance, §87(3)(b) of the Freedom of Information Law requires that each agency, including a municipality, must maintain and make available a payroll record including:

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

Based upon the provision quoted above, the identity and salary of a part-time police officer would likely appear on a municipality's payroll record required to be compiled under §87(3)(b) of the Freedom of Information Law.

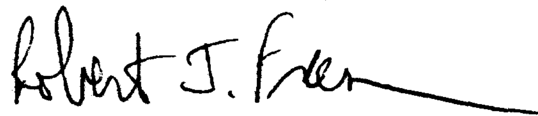
Second, with respect to records indicating the reasons for an absence of certification, it is possible that such records may be confidential. Here I direct your attention to §50-a of the New York Civil Rights Law. Subdivision (1) of the cited provision states that:

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

If the individual in question is a police officer, if the records in question could be considered personnel records, and if such records are used to evaluate performance toward continued employment or promotion, I believe that the confidentiality requirements of §50-a of the Civil Rights Law would be applicable. If that is so, the Freedom of Information Law would not increase rights of access, for §87(2)(a) permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute".

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2615

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 20, 1982

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

I have received your card in which you requested advice regarding rights of access to various types of records. Specifically, you made reference to your unsuccessful efforts to obtain court records, psychiatric and psychological reports, as well as reports of private physicians.

I would like to offer the following comments regarding your inquiry.

First, it is emphasized that the Freedom of Information Law generally applies to records in possession of governmental entities in New York. In this regard, the scope of the Law is determined in part by §86(3), which 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 the language quoted above, it is in my view clear that the Freedom of Information Law would not apply to records in possession of private physicians or the courts, for example.

Second, with regard to court records, while the Freedom of Information Law does not apply to such records, there are various other provisions of law that might be applicable. For instance, enclosed is a copy of §255 of the Judiciary Law which generally requires that clerks of courts make records available upon payment of the appropriate fees.

Third, if the psychiatric or psychological reports in which you are interested are part of a presentence report, they may in my view be made available only after having obtained permission of the judge in whose court a proceeding was held. Section 390.50(1) and (2) of the Criminal Procedure Law concerning the confidentiality of presentence reports and memoranda states that:

> "[A]ny pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, 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."
>
> "[N]ot less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination 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."

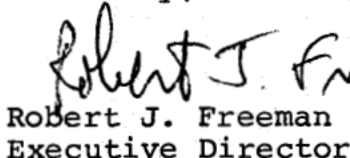
Based upon the language quoted above, if the reports you are seeking are part of presentence reports, I believe that permission from the sentencing judge would be required.

Fourth, while the Freedom of Information Law would not apply to records of private physicians, I have enclosed a copy of §17 of the Public Health Law. The cited provision does not provide direct rights of access by a patient to records pertaining to him. However, it generally requires that medical records pertaining to a patient must be forwarded by a physican to another physician of the patient's choice on request.

Lastly, to the extent that the Freedom of Information Law is applicable to records in which you are interested, I would like to point out that the Law requires that an applicant request records "reasonably described" [see attached Freedom of Information Law, §89(3)]. Consequently, when making a request, it is suggested that you provide as much specificity as possible in order to enable agency officials 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2616

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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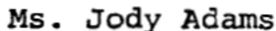
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 21, 1982

Ms. Jody Adams



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. Adams:

I have received your letter of September 11 in which you discussed various issues. It appears that you have requested comment with respect to the status of the Suffolk County Bar Association under the Freedom of Information Law.

As I interpret the situation as described in your letter, the Bar Association contracts with the County to provide private attorneys under a state program. Your inquiry apparently deals with records of the Bar Association concerning the program.

In this regard, as you are aware, the Freedom of Information Law includes within its scope entities of government. The coverage of the Law is determined in part by §86(3), which defines "agency" to mean:

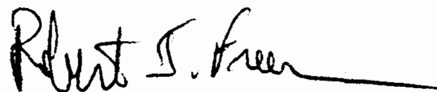
> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or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

From my perspective, although a bar association might engage in a contractual relationship with a county, it would nonetheless remain outside the scope of the definition of "agency". Consequently, it is in my view doubtful that records of the Bar Association concerning its contractual relationship with Suffolk County would be subject to rights of access granted by the Freedom of Information Law.

However, it should be noted that records concerning the program in possession of Suffolk County would in my view fall within the scope of rights of access granted by the Freedom of Information Law. The extent to which the records would be available is unknown to me, for I am unfamiliar with the program in question. If you could provide additional information, perhaps I could supply additional commentary.

I hope that 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-2617

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 21, 1982

Robert David Goodstein, Esq.
271 North Avenue
Suite 304
New Rochelle, New York 10801

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. Goodstein:

I have received your letter of August 24 which reached this office on September 13.

According to your letter and the correspondence attached to it, you submitted a request to Lawrence Kunin, Records Access Officer for the Division of Human Rights, on July 14, for "[C]opies of all complaints filed with the New York State Division of Human Rights between September 1, 1981 and July 1, 1982".

Also attached to your letter is a memorandum from Ann Thacher Anderson, General Counsel to the Division, to Simon Feduik, formerly the Division's Records Access Officer, in which it was indicated that verified complaints should be made available to the public.

You wrote that each verified complaint includes the address of the complainant and that you plan to "utilize the verified complaints to compile a mailing list to be used for commercial purposes". Your question is whether you "still have a right to access to the verified complaints".

I would like to offer the following comments 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 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, perhaps the most relevant ground for denial under the circumstances 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 addition, §89(2) of the Law lists five examples of unwarranted invasions of personal privacy. The examples in my view represent but five among conceivable dozens of potential unwarranted invasions of personal privacy.

The third example of unwarranted invasions of personal privacy involves:

> "...sale or release of lists of names and addresses if such lists would be used for commerical or fund-raising purposes..." [see §89(2)(b)(iii)].

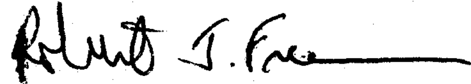
Under the circumstances, it is unclear whether the information in question exists in the form of a "list". In my opinion, if indeed the information sought does appear in the form of a list and is being requested for commercial purposes, the Division of Human Rights could, based upon §89(2)(b)(iii), justifiably withhold such a record.

If individual complaints are being requested for the purpose of creating your own list to be used for commerical purposes, it is questionable whether the stated basis for withholding would be applicable. Stated differently, if records that are individually available are requested for the purpose of preparing a list for commercial use, §89(2)(b)(iii) might not specifically be applicable, for no list of the Division would be involved. However, in view of the intent of §89(2)(b)(iii), it is possible that individual complaints requested to prepare a list for commercial use might be withheld based upon the direction provided in the cited provision.

It is noted that I am unaware of any judicial determination involving factual circumstances analogous to those presented. As such, it appears that rights of access would, under the circumstances, be conjectural.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

ERROR NO

FOIL-AO-2618

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2619

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 21, 1982

Mildred Lugo
#81G370
Bayview Correctional Facility
550 West 20th Street
New York, New York 10011

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. Lugo:

I have received your letter of September 18 in which you requested assistance in gaining a copy of a pre-sentence report.

Having submitted a request for your pre-sentence report to your counselor at the Bayview Correctional Facility, you were informed that you were "not allowed to see it because there might be things in the record that are testimony". Your question is whether you may obtain a copy of the pre-sentence report under the Freedom of Information Law.

Although the Freedom of Information Law grants broad rights of access, I do not believe that it may be cited as a basis for obtaining a copy of a pre-sentence report.

The first ground for denial in the Law pertains to records that are "specifically exempted from disclosure by state or federal statute". In this regard, §390.50 of the Criminal Procedure Law requires that pre-sentence reports be kept confidential, except under certain specified circumstances.

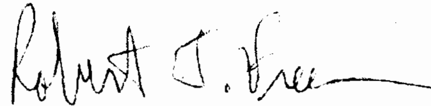
The cited provision in subdivisions (1) and (2) states that:

> "[I]n general. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, 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.
>
> "Pre-sentence report; disclosure; general principles. Not less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination 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".

Based upon the foregoing, it is suggested that you request the pre-sentence report from the judge in which the proceeding was conducted, for it appears that disclosure is conditioned upon permission by the court.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2620

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 22, 1982

Mr. John Stone
82-A-1575
Box 149
3B1520
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. Stone:

I have received your letters of September 12 and September 14, which were received by this office on September 15 and September 16, respectively.

You have requested assistance from this office with respect to medical test records and certain school and treatment records regarding yourself.

I would like to offer the following comments in response to your inquiries.

First, with regard to the school and treatment records you believe are contained within probation files, I am unable to offer information in addition to that supplied by Mr. Freeman in his letter of June 3 at your request. Nevertheless, on your behalf, I have contacted a representative of the Division of Probation, who has advised me that a consultant of that office will seek to ascertain the existence and location of the records you are seeking and advise you of the results of his search. Consequently, a copy of your September 12 letter is being forwarded to the Division of Probation.

Second, you requested help in obtaining copies of particular medical laboratory results. Although you have apparently contacted "hospital administration", as yet you have not received the records you are seeking. With respect to those records, enclosed is a copy of regulations promulgated by the Department of Correctional Services concerning rights of access to inmate records. Specifically, §5.24(b) indicates that requests for medical records should be submitted to the Assistant Commissioner for Health Services. Therefore, it is suggested that you review the enclosed regulations and redirect your inquiry regarding the laboratory tests to that individual.

Third, with regard to appeal of a denial of access under regulations of the Department of Correctional Services, future appeals should be directed to Counsel to the Department of Correctional Services as set forth in §5.45 of the Department's regulations.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY:

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2621

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 22, 1982

Mr. Victor Evaito Serrano
DIN 79 A 0179 SHU 2/16
Green Haven Correctional Facility
Stormville, New York 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. Serrano:

I have received your letter of September 21 in which you requested information regarding the functions of the Committee on Public Access to Records in conjunction with compliance with the Freedom of Information Law.

I would like to offer the following comments regarding your inquiry.

The Committee on Public Access to Records generally has the authority to advise with respect to the Freedom of Information Law. This office does not have possession of records generally, nor does it have the authority to compel an agency to grant or deny access to records.

In terms of the specific duties of the Committee, §89(1)(b) of the Freedom of Information Law states that the Committee shall:

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

> iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;
>
> iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties; and
>
> v. report on its activities and findings, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth".

In addition, §89(4)(a) of the Law requires that an agency in receipt of an appeal following a denial of access is required to transmit to the Committee copies of all appeals and the ensuing determinations.

In terms of day to day functions, the Committee provides advice to any person by phone or in writing by means of advisory opinions. To provide you with a more complete view of the Committee's work, I have enclosed a copy of its latest annual report to the Governor and the Legislature on the Freedom of Information Law. The report contains recommendations for legislation, an index to written advisory opinions and a summary of judicial determinations. Also enclosed are copies of the Law, regulations promulgated by the Committee that govern the procedural aspects of the Law and an explanatory pamphlet on the subject.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2622

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

COMMITTEE MEMBERS

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STEPHEN PAWLINGA
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 23, 1982

Mr. John C. Malowsky

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. Malowsky:

As you are aware, your letter of September 9 addressed to the Attorney General was forwarded to the Committee on Public Access to Records on September 22.

In your letter, you raised questions regarding the "State's FOIA", the nature of information that you may obtain regarding criminal records pertaining to yourself and the means by which you may seek information from the Department of Correctional Services.

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. In order to provide you with information regarding the Law, I have enclosed copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects of the Law, and an explanatory pamphlet on the subject.

Second, with respect to "criminal records" pertaining to you, the Division of Criminal Justice Services maintains criminal history information and it is suggested that a request be directed to that agency. To obtain information regarding the means by which a request should be made, it is recommended that you write to:

NYS Division of Criminal Justice Services
Identification & Data Systems
Stuyvesant Plaza
Executive Park Tower
Albany, NY 12203

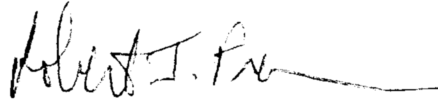
As a general rule, by submitting the appropriate information, the Division of Criminal Justice Services will provide criminal history information to the individuals to whom the information pertains.

Third, the Department of Correctional Services is subject to the Freedom of Information Law and has adopted regulations regarding Department records. I have enclosed a copy of those regulations for your consideration. The regulations indicate the title and address of the person to whom a request should be sent.

Lastly, it is emphasized that §89(3) of the Freedom of Information Law requires that an applicant for records submit a request for records "reasonably described". Consequently, it is suggested that when making a request, as much information should be provided as possible, including names, dates, file designations, identification numbers and similar information that would enable agency officials 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

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2623

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
MARIO M. CUOMO
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MARCELLA MAXWELL
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 29, 1982

Mr. Douglas Arneson

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. Arneson:

I have received your recent letter in which you requested information that this office might have regarding electronic surveillance.

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 authority to compel an agency to grant or deny access to records.

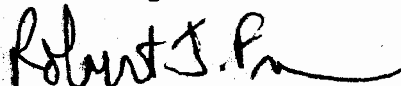
Nevertheless, having reviewed applicable provisions of law, it is suggested that you attempt to review Article 700 of the Criminal Procedure Law. Although I have not enclosed Article 700 in its entirety, copies of §§700.50, 700.55, 700.60, 700.65 and 700.70 have been enclosed for your consideration. It is recommended that you closely review those provisions. Further, it is noted that §700.55 (1) indicates that "applications made and warrants issued under this article shall be sealed by the justice", and that §700.70 states that:

> "[T]he contents of any intercepted communication, or evidence derived therefrom, may not be received in evidence or otherwise disclosed upon a trial of a defendant unless the people, within fifteen days after arraignment and before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant, and accompanying application, under which interception was authorized or approved. This fifteen day period may be extended by the trial court upon good cause shown if it finds that the defendant will not be prejudiced by the delay in receiving such papers."

It is suggested that you discuss the applicable provisions of the Criminal Procedure Law with your attorney.

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-2624

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

COMMITTEE MEMBERS

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 29, 1982

Mid-Hudson Psychiatric Center
P.O. Box 158
New Hampton, NY 10958

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 :

I have received your letter of September 22 in which you requested a copy of the Freedom of Information Law and raised questions regarding the procedure by which a denial of access to records may be appealed, particularly in the event of a denial by the Office of Mental Health.

In this regard, as requested, I have enclosed a copy of the Freedom of Information Law and an explanatory pamphlet on the subject that may be useful to you.

In addition, §89(4)(a) of the Freedom of Information Law regarding the procedure by which an appeal may be initiated states in relevant part that:

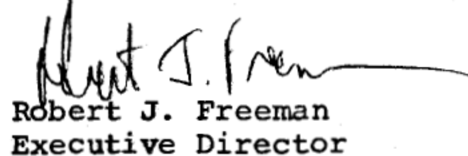
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within seven business days of the receipt of such appeal fully explain in writing to the person re-

> questing the record the reasons
> for further denial, or provide
> access to the record sought."

Lastly, I believe that the person designated by the Commissioner of the Office of Mental Health is the Counsel to the Commissioner, Paul Litwak. As such, should the need arise to appeal a denial of access to records, I believe that appeals may be directed to Mr. Litwak at the Office of Counsel, 44 Holland Avenue, Albany, New York 12229.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2625

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 29, 1982

Mr. Joseph Cooper, Jr.
No. 80-B-1239
Fishkill Correctional Facility
P.O. Box 307
Beacon, New York 12508

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. Cooper:

I have received your letter of September 24 in which you made reference to medical records and indices as well as information regarding the Freedom of Information Law and the functions of the Committee generally.

First, with regard to the materials that you apparently requested, an index is likely the "subject matter list" required to be compiled under §87(3)(c) of the Freedom of Information Law. The cited provision states that each agency shall maintain:

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

It is noted that a subject matter list need not identify each and every record of an agency; on the contrary, it is required to list the types of records in possession of an agency in reasonable detail.

Second, medical records pertaining to third parties could likely be withheld under the Freedom of Information Law. Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Further, §89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy, the first two of which include:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

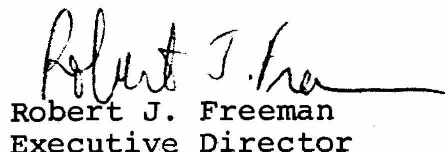
As such, if you are interested in obtaining medical records pertaining to persons other than yourself, I believe that they could likely be withheld.

On the other hand, if you are seeking medical records in possession of government pertaining to yourself, it is likely that factual information, such as laboratory test results and similar records, would be available. However, medical records reflective of opinion could likely be withheld [see Freedom of Information Law, §87(2)(g)].

Lastly, with regard to the functions of the Committee, in brief, the Committee is responsible for advising with respect to the Freedom of Information and Open Meetings Laws. To provide you with additional information regarding the functions of the Committee, I have enclosed for your consideration copies of the Freedom of Information Law, regulations that govern the procedural aspects of the Law, and an explanatory pamphlet on the subject that may be 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-2626

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

COMMITTEE MEMBERS

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 29, 1982

Mr. Michael J. Gabel, Jr.
81-D-93
Clinton Correctional Facility
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. Gabel:

I have received your letter of September 24 in which you requested from this office a copy of "a directive on limited privileges which is made out by the superintendent of Clinton Correctional Facility."

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. The Committee does not have possession of records generally, such as the record in which you are interested, nor does it have the authority to require that an agency must grant or deny access to records.

Nevertheless, I would like to offer the following comments regarding 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 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, if indeed there is such a directive reflective of the policy of the Department of Correctional Services or the Clinton Correctional Facility, I believe that such a record would likely be available. Specifically, §87(2)(g) of the Law permits 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..."

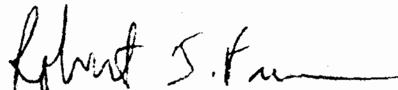
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, as stated earlier, if the directive is essentially a statement of policy regarding limited privileges, I believe that it would be available under the Freedom of Information Law.

Lastly, I have enclosed a copy of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law. Those regulations make specific reference to requests by inmates and indicate that requests should be directed to the superintendent of the facility 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
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2627

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

COMMITTEE MEMBERS

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 30, 1982

Mr. Denes Gellert

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. Gellert:

Your letter of September 28 addressed to Gilbert P. Smith, Chairman of the Committee, has been received by this office. In your letter, you requested copies of all records relating to your employment by the New York State Department of Transportation as of July 4, 1970.

I would like to offer the following comments regarding your inquiry.

First, the staff of the Committee, rather than its members, generally responds to questions raised under the Freedom of Information Law.

Second, 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 authority to require an agency to grant or deny access to records.

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

Fourth, a request for records should be directed to the agency that maintains the records. In this case, a request should be directed to the records access officer at the New York State Department of Transportation, which is located at the State Campus, Building #5, Albany, New York 12232.

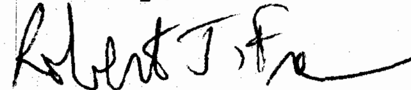
Fifth, it is emphasized that the Freedom of Information Law [§89(3)] requires that an applicant submit a request for records "reasonably described". Consequently, when making a request, it is suggested that you provide as much detail as possible, including names, dates, file designations and similar information that will assist agency officials in locating the records sought.

Lastly, since the records in which you may be interested involve a period ending some twelve years ago, it is possible that the records may no longer exist or they may no longer be maintained by the Department of Transportation. In this regard, I would like to point out that the Freedom of Information Law is applicable to existing records. Further, as a general rule, §89(3) of the Law states that an agency is not required to create or prepare a record in response to a request.

Enclosed for your consideration are copies of the New York Freedom of Information Law, regulations that govern the procedural aspects of the Law, and 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2628

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
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 30, 1982

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 :

I have received your letter of September 6 in which you requested advice regarding your capacity to gain access to certain records.

Specifically, you wrote that in 1976 two psychiatrists prepared examination reports pertaining to you pursuant to Article 730 of the Criminal Procedure Law. Both reports in your view apparently failed to mention that various drugs were being administered to you as medication. Although you wrote to the Public Information Unit at Bellevue Hospital, it appears that you have been unable to obtain the information in which you are interested.

I would like to offer the following comments with respect to your inquiry.

It is noted initially that there may be a number of statutes that might be applicable to the records in which you are interested. As such, the ensuing comments are intended to provide suggestions only, for it is unclear which statutes might be relevant to the records in question.

First, it would appear that the records in which you are interested may be part of a court record. In this regard, it is important to point out that the Freedom of Information Law does not apply to the courts or court records [see definitions of "agency", §86(3) and "judiciary",

§86(1)]. Nevertheless, many court records are available pursuant to various provisions of the Judiciary Law and other court acts. One of those provisions is §255 of the Judiciary Law, a copy of which has been enclosed. If you believe that the records might be in possession of a court clerk, it is suggested that you request those records, providing as much detail as possible, including names, dates, file designations, index and docket numbers and similar information that would enable the appropriate officials to locate the records in question.

Second, it is also possible that the records in question might constitute part of a pre-sentence report. As a general rule, pre-sentence reports are considered confidential under §390.50 of the Criminal Procedure Law. Having reviewed the cited provision, it would appear that the only means by which a pre-sentence report could be disclosed would involve a grant of permission made by the trial court. As such, if you believe that the psychiatric reports in question might be included within a pre-sentence report, it is suggested that you apply to the court in which the proceeding was held.

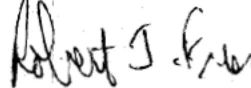
Third, it is unclear whether the reports in question may have been prepared in relation to a drug addiction or drug abuse program. It is noted in this regard that federal law provides that records identifiable to an individual maintained in conjunction with drug abuse programs are confidential. Specifically, 21 U.S.C. §1175(a) states that:

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

Lastly, since I have little knowledge regarding the criminal justice system, it is suggested that you seek the services of a legal aid group or Prisoners' Legal Services. I would conjecture that such an attorney specializing in criminal procedure would have more and better suggestions that I can offer.

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-2629

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
MARIO M. CUOMO
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 1, 1982

Mr. James Moley
79-A-3844
Box 51
Comstock, NY 12821

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. Moley:

I have received your letter of September 16 in which you requested assistance in gaining access to various records.

It is noted at the outset that the Freedom of Information Law does not include within its scope the courts or court records. In this regard, the scope of the Law is determined in part by the definition of "agency". Section 86(3) of the Freedom of Information 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."

Further, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or distict court, whether or not of record."

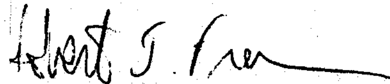
Based upon the language quoted above, it is in my view clear that any court records in which you may be interested would not be subject to rights of access granted by the Freedom of Information Law.

It is possible, however, that some of the records that you are seeking may be in possession of various law enforcement agencies that are subject to the Freedom of Information Law. Without knowledge of the contents of the records in which you are interested, I could not offer specific direction. Nevertheless, I would like to point out that if you opt to submit a request under the Freedom of Information Law to an agency, §89(3) of the Law requires that a request "reasonably describe" the records sought. As such, as much specificity as possible should be given, including names, dates, file designations, index and docket numbers and similar information that might enable agency officials to locate records.

Lastly, it is suggested that you might want to contact a legal aid group or Prisoners' Legal Services. Representatives of those organizations have much greater expertise than I regarding matters relative to criminal procedure.

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-2630

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

COMMITTEE MEMBERS

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MARCELLA MAXWELL
BASIL A. PATERSON
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 5, 1982

Mr. David A. Lewis
Staff Attorney
The Legal Aid Society
Criminal Appeals Bureau
15 Park Row - 19th Floor
New York, NY 10038

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. Lewis:

I have received your letter of September 30 as well as the correspondence attached to it.

According to your letter and the attachments, you submitted requests under the Freedom of Information Law some time ago to superintendents of several correctional facilities regarding information relative to the operation of their "media review" committees. Although satisfactory responses were received from six superintendents, you wrote that the remaining three "have yet to provide any meaningful response". Consequently, you have requested that I "look into this matter" in order to assist you in receiving a "proper response immediately".

In all honesty, without more information regarding the nature of the materials sought, I cannot provide specifice advice or direction. Nevertheless, I have contacted the Office of Counsel at the Department of Correctional Services on your behalf in order to determine the status of your requests. I was informed that you will within two or three days receive an appropriate response from the Deputy Superintendent of the Elmira Correctional Facility, R.J. Oare, Jr. In addition, the dates of your corres-

pondence with the Green Haven and Coxsackie Correctional Facilities were given to staff counsel in order to ensure that responses to the remaining two requests will be handled appropriately.

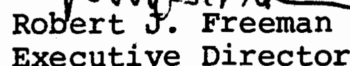
For future reference, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for response to requests. Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business 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)].

Based upon the provisions to which reference has been made in the preceding paragraphs, it is suggested that you might want to appeal constructive denials of access when situations similar to that which you described arise 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2631

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

COMMITTEE MEMBERS

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MARIO M. CUOMO
JOHN C. EGAN
WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
XXXXXXXXXXX Charles Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 7, 1982

Mr. David Kost
81-A-5122
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. Kost:

I have received your letter of September 30 in which you requested "a copy of agency standards and regulations". The records in which you are interested relate to the Clinton Correctional Facility.

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, nor does it have the authority to require an agency to grant or deny access to records. Nevertheless, I would like to offer the following comments regarding your inquiry.

First, a request for records should be directed to the agency that maintains the records. Under the circumstances, it is likely that you could obtain many of the records in which you are interested by submitting a request to the superintendent at the Clinton Correctional Facility. If the facility does not maintain all of the regulations and standards that you are seeking, such records would likely be in possession of the central administrative offices of the Department of Correctional Services. In this regard,

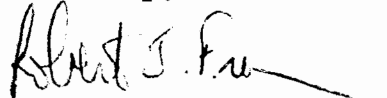
I have enclosed a copy of the regulations of the Department of Correctional Services regarding access to Department records. It is noted that requests for some records should likely be directed to the facility superintendent, while requests for others should likely be directed to the Department's Albany office. It is suggested that you review the enclosed regulations closely.

Second, it is emphasized that a request under the Freedom of Information Law is required to "reasonably describe" the records sought [see attached, Freedom of Information Law, §89(3)]. Consequently, you should provide as much detail and specificity as possible when making a request.

Enclosed for your consideration is a copy of a 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2632

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
Charles Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 7, 1982

Mr. Edward A. Korona
82-B-0565
Hudson Correctional Facility
P.O. Box 576, Worth Avenue
Hudson, New York 12534

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. Korona:

I have received your letter of October 3 in which you indicated that you were recently denied access to records by the Nassau County District Attorney under §87(2)(e) of the Freedom of Information Law. You have asked for assistance in the matter and that you be furnished with the "proper forms of appeal".

The procedures regarding appeals following a denial of access to records are found in §89(4)(a) of the Freedom of Information Law and §1401.7 of the regulations promulgated by the Committee. I have enclosed copies of both the Law and the regulations for your consideration.

It is noted that a denial should indicate the name of the person or body to whom an appeal should be directed [see regulations, §1401.7(b)] and that an appeal must be made within thirty days of a denial [see Freedom of Information Law, §89(4)(a)].

With respect to the denial itself, §87(2)(e) states that an agency may withhold records that:

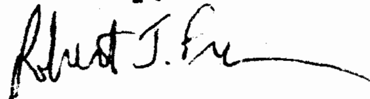
> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information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

It is emphasized that the language quoted above is based largely upon potentially harmful effects of disclosure. For instance, if a law enforcement agency has prepared records in conjunction with an investigation and disclosure would interfere with the investigation, it is likely that §87(2)(e)(i) could justifiably be cited as a basis for withholding. It is possible, however, that if an investigation has been terminated, for example, the harmful effects of disclosure envisioned by §87(2)(e) might essentially disappear in whole or in part. Without greater knowledge of the records sought or the circumstances, more specific advice cannot be offered.

Lastly, in terms of the form of an appeal, it is suggested that you closely review §1401.7 of the regulations. In addition, enclosed is an explanatory pamphlet on the Freedom of Information Law which contains a sample letter of appeal that may be useful to you.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-813
FOIL-AO-2633

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 7, 1982

Mr. Bruce H. Vail
The Brooklyn Paper
26 Court Street
Suite 1910
Brooklyn, NY 11242

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. Vail:

I have received your letter of September 17 in which you requested an advisory opinion.

Your inquiry concerns the application of the Freedom of Information and Open Meetings Laws to the Brooklyn Navy Yard Development Corporation. Attached to your correspondence is a copy of a letter dated September 13 addressed to the General Counsel of the Brooklyn Navy Yard Development Corporation. You had written that you had been advised "that the Corporation is exempt from the provisions of the Public Officers Law because the Corporation is constituted as a not-for-profit 'C' corporation." Nevertheless, it is your belief that the Brooklyn Navy Yard Development Corporation is subject to both the Freedom of Information Law and provisions of the Open Meetings Law.

I would like to offer the following comments with respect to your inquiry.

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 is possible that such corporations are subject to the provisions of the Freedom of Information Law. Further, they would in my view likely fall within the scope of the Open Meetings Law.

Section 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."

Additionally, §1411(b) of the Not-for-Profit Corporation Law states that a local development corporation is a type "C" corporation. In view of the statutory language quoted above, it is in my opinion clear that if the Brooklyn Navy Yard Development Corporation is a type "C" corporation, it performs a governmental function presumably for a public corporation, such as the City of New York.

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 might perform 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. Nevertheless, the status of a local development corporation under the Freedom of Information Law in my view remains open to question and judicial review.

With respect to the Open Meetings Law, I believe that the meetings of the board of a local development corporation would be subject to that statute, for the definition of "public body" appearing in §97(2) of the Open Meetings Law is not in my opinion as restrictive as the definition of "agency" in the Freedom of Information Law.

"Public body" is defined to include:

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

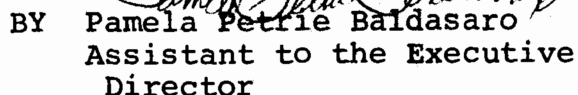
By breaking the definition into its components, I believe that each condition necessary to a finding that a local development corporation is a "public body" may be met. A local development corporation is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. Its board consists of more than two members. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, it appears that a local development board conducts public business and performs a governmental function for a public corporation, in this instance, the City of New York.

In view of the foregoing, while it is not completely clear that the records of a local development corporation are subject to the Freedom of Information Law, its meetings would in my view likely fall within the scope 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



BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm
cc: Bruce Hubbard

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2634

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 8, 1982

Mr. Donald F. Larson
Attorney at Law
823 Woodward Road
Nassau, New York 12123

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. Larson:

I have received your letter of September 24 in which you requested an advisory opinion under the Freedom of Information Law.

According to the correspondence attached to your letter, on August 26, you requested various records from the Ravena-Coeymans-Selkirk Central School District, including job applications and/or resumes filed with the school district by four named individuals who were apparently hired by the district, as well as job applications and resumes relative to unsuccessful applicants. It is also noted that, in your request, you specified a concern for privacy and indicated that various aspects of personal information could be deleted. The information that you sought to obtain from the applications and resumes was specified to include "sex, experience, certification type and number, age, educational background, and other professional qualifications."

Nevertheless, you wrote that the materials described in the preceding paragraph "were substantially denied". Moreover, the records access officer wrote that:

"[R]elease of the records requested in numbered paragraph 3 would constitute an unwarranted invasion of personal privacy under Subdivision (2)(b)i. of Section 89 of the Public Officers Law; deletion of the protected material would involve preparation of new records, which the school district is not required to do under subdivision 3 of that Section. Therefore, these records will not be made available."

I would like to offer the following comments regarding 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 are available, except to the extent that records or portions thereof fall within one or more enumerated grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, it is emphasized that the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within one or move of the ensuing grounds for denial. From my perspective, the authority to withhold "portions" of records indicates that the State Legislature envisioned situations in which a single record might be both available and deniable in part. The same language also in my opinion requires that an agency must review records sought in their entirety to determine which portions, if any, might justifiably be withheld.

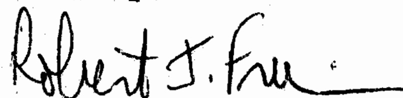
Third, based upon the requirement that an agency make available portions of records accessible under the Law, I disagree with the contention of the records access officer that deleting certain aspects of records would "involve preparation of new records". It is true that §89(3) of the Freedom of Information Law states that, as a general rule, an agency need not prepare or create a new record in response to a request. Nevertheless, once again, I do not believe that deleting portions of records could be equated with preparing new records. Several judicial determinations have involved situations in which portions of records were withheld, while remaining portions were found to have

been accessible [see e.g., American Broadcasting Companies, Inc. v. Siebert, 442 NYS 2d 885 (July 9, 1981); Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978), 46 NY 2d 906 (1979); Cirino v. Board of Education of City of New York, Sup. Ct., New York Cty., NYLJ, July 10, 1980; Fink v. Lefkowitz, 63 AD 2d 610 (1978), modified in 47 NY 2d 567 (1979); Fox v. Krill, Sup. Ct., Albany Cty., May 15, 1981; Kryston v. Board of Education, East Ramapo School District, 430 NYS 2d 688, 71 AD 2d 896; Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979); Sea Crest Construction Corp. v. Stubing, 442 NYS 2d 130, ___ AD 2d ___ (1981); Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); and Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977]. In short, it is reiterated that the deletion of certain aspects of records would not in my view constitute the creation of new records, but rather would involve compliance with the requirements of the Freedom of Information Law.

Lastly, it may be true that disclosure of the identities of individuals who submitted applications or resumes to the District or that disclosure of those records in their entirety might result in an unwarranted invasion of personal privacy. Nevertheless, if identifying and other personal details which if disclosed would result in an unwarranted invasion of personal privacy can be deleted, it would appear that the remaining information would be available under the Freedom of Information Law, for no other ground for denial would exist. If my contention is accurate, the District could in response to your request delete those portions of the records to the extent that disclosure would result in an unwarranted invasion of personal privacy, while granting access to the remainder.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Milton H. Chodack

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2635

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 12, 1982

Mr. Joseph W. Brooks
Accountant

Dear Mr. Brooks:

I have received your letter of October 5 in which you requested various materials from this office.

Specifically, you wrote that you would be interested in obtaining:

> "...a directory of the New York State Assembly and the Senate, with names, addresses and Phone numbers as to where we can get a copy of the New York State Law pertaining to the operation authorities. Example, ORDA - Olympic Regional Development Authority. Also, competitive bidding, public access to employee salary and wages, usage of local vendors as opposed to out of state vendors."

I would like to offer the following comments regarding you inquiry.

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. 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 grant or deny access to records.

Further, there is likely no single source for the information that you are seeking. To obtain a directory of members of the Senate and Assembly, it is suggested that you write directly to each house. For the Assembly, you might request a directory from Stanley Fink, Speaker of the Assembly, The Capitol, Albany, New York 12247. With respect to the Senate, it is suggested that you write to Stephen Sloan, Acting Secretary of the Senate, 321 State Capitol Building, Albany, New York 12247.

In terms of the state law pertaining to the operation of authorities, there is an entire volume entitled "Public Authorities Law" which is numbered up to §3500. The public Authorities Law would likely be the best source for obtaining information relative to public authorities generally.

It is noted that the provisions of the Public Authorities Law concerning the Olympic Regional Development Authority are found in §§2605 through 2629. Further, there are specific provisions regarding public bidding, for example [see Public Authorities Law, §2620].

Lastly, the public does have access to records indicating employees' salaries under the Freedom of Information Law. Specifically, §87(3)(b) states that each agency shall maintain:

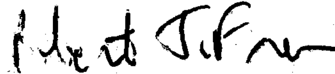
> "a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

Since the Olympic Regional Development Authority, a public benefit corporation, is an agency subject to the Freedom of Information Law, it would be required to maintain and make available payroll records as described in §87(3)(b) of the Freedom of Information Law.

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.

I hope that I 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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 12, 1982

The Honorable Michael J. Bragman
Member of the Assembly
708 South Main Street
North Syracuse, NY 13212

Dear Assemblyman Bragman:

I have received your letter of October 6 and appreciate your interest in the Freedom of Information Law.

You have asked that I review a letter addressed to you by Robert H. Newman, Chief of the North Syracuse Police Department, regarding the fees that may be assessed for photocopies under the Freedom of Information Law. Chief Newman's question apparently has arisen due to an amendment to the Freedom of Information Law that will become effective on October 15. The change in the Law concerns fees that may be assessed for photocopying and the question is whether the limitation of twenty-five cents per photocopy may be superseded by a local enactment of a county or village, for example.

From my perspective, the purpose behind the replacement of the term "law" for "statute" involved an intent to preclude the assessment of fees in excess of twenty-five cents per photocopy except in those instances in which a statute approved by the State Legislature permits a higher fee.

As stated in the Committee's most recent report to the Governor and the Legislature on the Freedom of Information Law (December 3, 1981), in which the Committee recommended the amendment:

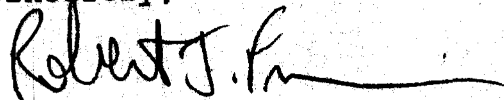
> "[T]he existing provision states that an agency may assess a fee of no more than twenty-five cents per photocopy, unless a different fee is required by some other provision of law. The problem

> is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-fice cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

I believe that the language quoted above indicates the rationale for the amendment in a reasonably clear fashion.

I hope that I 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

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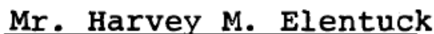
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 12, 1982

Mr. Harvey M. Elentuck


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. Elentuck:

I have received your letter of September 7 and apologize for the delay in response.

You have requested advice regarding various issues concerning the implementation of the Freedom of Information Law by the New York City Board of Education.

Your first area of inquiry concerns a request directed to the Board of Education on February 27 in which you asked to inspect "all material" in your "probationary discontinuance file and U-rating files at the Office of Appeals and Reviews". Ms. Ruth Bernstein, the Records Access Officer, indicated that you should contact a representative of the Division of Personnel. Although Ms. Bernstein appeared to have approved your request for all material in the file, a document characterized as the "Chancellor's Committee Report" was withheld. You have expressed the view that since Ms. Bernstein approved your request for all material in the file, the denial of the report in question was inappropriate. Additional inquiries that you made seemed to indicate that you were granted the right to inspect the entire file.

In my view, two points should be offered. First, as you are likely aware, the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, state in §1401.2 that the designated records access officer is responsible for

coordinating an agency's response to requests. If the records access officer did not "coordinate" the responses of other officials of the Board, the access officer should likely have done so. Second, assuming that you were denied access to certain portions of the file, perhaps the most appropriate step would have involved the submission of an appeal as a result of the denial of access. It is noted, however, that §89(4)(a) of the Freedom of Information Law states that an appeal following a denial of access to records must be made within thirty days of the denial. Consequently, the most appropriate course of action at this juncture might involve the submission of a new request.

The second area of inquiry concerns a request for "an exhaustive statement indicative of final policy" concerning the conditions for receipt of a U-rating, as well as a similar "exhaustive statement" regarding the meaning of a "satisfactory" rating. Ms. Bernstein indicated that no such records exist. In conjunction with her response, you requested to inspect the subject matter list of the Board of Education. Since you were "handed a multitude of individual lists", you asked whether "there are any definite criteria which specifies the format of the list". Other than the specific language of the Freedom of Information Law regarding the subject matter list [see §87(3)(a)], the remaining area of guidance would in my view again be found in the regulations promulgated by the Committee. Specifically, §1401.6(b) and (c) state respectively that:

> "(b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.
>
> (c) The subject matter list shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list."

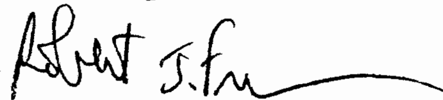
From my perspective, the key provision is §1401.6(b), indicating that the list should "permit identification of the category of the records sought."

The third area of inquiry involves any suggestions that I might have with respect to the "correct legal interpretation of a phrase" within a by-law adopted by the Board of Education. In this regard, the only source that I could suggest would be the Office of Counsel to the Board of Education.

Your final question concerns a statement made by Dr. Franse of the Board of Education in which he stated that "Items contained in any employee's personnel file are not open to the public under the Freedom of Information Act". I respectfully disagree with Dr. Franse's contention, for rights of access to the contents of personnel files are not in my view determined by their physical placement in such files, but rather by the specific contents of the records. There are numerous judicial decisions concerning the contents of personnel files and, in several instances, it has been held that certain aspects of personnel files must be made available. The central issue in such cases concerns the extent to which disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy under §87(2)(b) of the Freedom of Information Law [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. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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]. However, without knowledge of the specific contents of particular records, it would be inappropriate to conjecture as to rights of access.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-814
FOIL-AO-2638

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

October 13, 1982

Mr. Robert Krolikowski

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. Krolikowski:

I have received your letter of September 28 in which you asked generally whether the public may "appeal the actions of public officials".

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information and Open Meetings Laws. As such, if your question involves actions taken by public officials unrelated to those laws, specific advice cannot be provided.

Second, if under the Freedom of Information Law you requested and were denied access to records, the Law provides a procedure under which a denial may be appealed. Specifically, §89(4)(a) of the Freedom of Information Law states in 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 a determination on appeal is upheld, the person denied may seek judicial review by initiating an "Article 78" proceeding. Although an Article 78 proceeding generally requires that a member of the public prove that government acted unreasonably or failed to perform a duty required to be performed, §89(4)(b) of the Freedom of Information Law specifies that the burden of proof is on the agency that denied access to records.

If your inquiry concerns the Open Meetings Law, §102 of that Law provides that any "aggrieved person" may initiate an Article 78 proceeding challenging a possible violation of the Law.

I have enclosed an explanatory pamphlet dealing with both the Freedom of Information Law and the Open Meetings Law.

In the event that the actions that are the subject of your complaint do not relate to the Freedom of Information or the Open Meetings Laws, it is suggested that you contact the attorney of your choice.

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-2639

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

October 13, 1982

Mr. Joseph J. Carrus
Research Director
Citizens Action Board
775 Main Street
Dunkirk, NY 14048

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. Carrus:

I have received your letter of September 28, in which you raised questions under the Freedom of Information Law regarding the status of records of the Core Preservation Company (the Company) of Dunkirk.

According to your letter, the Company in question rehabilitates homes with government funds. In this regard, in response to your request to the Company for its "survey of low income people", you were informed that the documents of the Company are not accessible, for the Company is not an agency subject to the Freedom of Information Law. You have asked whether the Company and its records fall within the requirements of the Freedom of Information Law.

In my view, it is unlikely that the Company is subject to the Freedom of Information Law.

The scope of the Law is determined in part by §86 (3), which defines "agency" to mean:

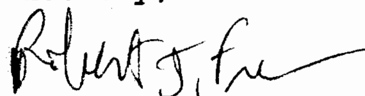
> "...any state or municipal department, board, bureau, commission, committee, public authority, public corporation, council, office or other governmental entity performing a government or proprietary function for the state or any one or more municipalities thereof, except the judicial or the state legislature."

From my perspective, if the Company is private and not a "governmental entity", it is not likely subject to the Freedom of Information Law, even though it receives government money. In all honesty, however, the status of such a company may somewhat unclear due to the decision rendered in Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)], which held that volunteer fire companies are subject to the Freedom of Information Law, notwithstanding their status as not-for-profit corporations.

Lastly, even if the Company in question is not an "agency" as defined by the Freedom of Information Law, some of its records may be available. For instance, if the Company submits records to governmental entities that fall within the definition of "agency", those records would in my view be subject to rights of access granted by the Freedom of Information Law. As such, rather than submitting requests directly to the Company, you might want to submit requests for records pertaining to the Company to those agencies that have a relationship with the 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-815
FOIL-AO-2640

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 13, 1982

Mr. George D. Haas

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. Haas:

I have received your letter of September 24 in which you raised questions regarding the implementation of the Open Meetings and Freedom of Information Laws by the Board of Fire Commissioners of the Stone Ridge Fire District.

Specifically, you wrote that the Chairman of the Board, Mr. Edward J. Poenicke, has on two occasions asked you and others to leave meetings in order that the Board could discuss "issues that were not specified". Further, the minutes of one of the meetings "failed to make any mention that the Board did, in fact, meet in Executive Session nor specify the purpose of such meeting."

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 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 upon 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 ares 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.

Fifth, it is unclear from your letter whether action was taken by the Board during an executive session. If action was taken, §101(2) of the Open Meetings Law would require that minutes reflective of the action taken, the date and vote be prepared and made available.

Sixth, I believe that the provisions of the Freedom of Information Law are likely also relevant to your inquiry. Specifically, while the Freedom of Information Law states generally that an agency is not required to create records, one of the exceptions to that rule pertains to the requirement that a record of votes be prepared any time a vote is taken. Section 87(3)(a) states that each agency, such as a board of fire commissioners, shall maintain:

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

From my perspective, any vote taken by the Board, including a vote to enter into an executive session should be contained within minutes or a voting record.

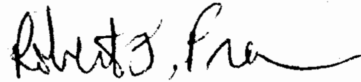
It is also noted that the provisions of the Open Meetings Law regarding minutes of open meetings would require that a motion to enter into an executive session be included in minutes of the open meetings and/or the record of votes required by the Freedom of Information Law.

Lastly, §102 of the Open Meetings Law states that any "aggrieved person" may initiate a proceeding under Article 78 of the Civil Practice Law and Rules to seek compliance with the Open Meetings Law. In addition, the cited provision also states that if, for example, a public body takes action during an improper executive session, a court in its discretion may nullify the action taken in violation of the Law.

As requested, a copy of this opinion will be sent to the Chairman of the Board of Fire Commissioners. In addition, enclosed are copies of the Freedom of Information Law, the Open Meetings Law, and an explanatory pamphlet on both subjects.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Mr. Edward J. Poenicke

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2641

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

October 13, 1982

Mr. Barry W. Kibbe
71-C-0195
C & D Building
Drawer B
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. Kibbe:

I have received your letter of September 27, in which you requested that this office seek to determine the status of a request initially sent to Monroe County in June.

According to your letter, there has been correspondence between you and Mr. Lapple, the Monroe County Records Access Officer, regarding the scope of the request and the fees that may be assessed for photocopying. Although your request has been acknowledged, you have not yet received any of the records sought.

In conjunction with your letter, I have contacted Mr. Lapple's office on your behalf. I was informed that a letter dated September 28 was sent to you by Melvin Bressler, Assistant District Attorney, who explained that the search and review of the records in question involve complex tasks, but that a response as well as certain records would be forwarded to you shortly. I regret that there is little that I can do to enhance the process of obtaining a response or the records in question.

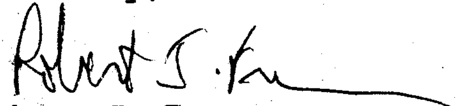
For future reference, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for responses to requests. Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five busi-

ness 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)].

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Frederick Lapple, Records Access Officer,
Monroe County

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2642

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 13, 1982

Mr. Bienvenido Molina
81-A-3386
Clinton Correctional Facility
Box 367
Dannemora, NY 12929

Dear Mr. Molina:

I have received your letter of October 7 in which you requested from this office information reflective of your criminal history record, including convictions.

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 that in which you are interested, nor does it have the authority to compel an agency to grant or deny access to records. As such, the requested record cannot be made available by this office.

Nevertheless, I believe that your criminal history record can be made available to you by requesting it 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

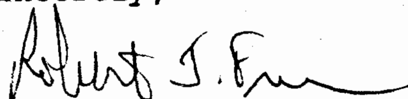
It is also noted that the regulations of the Department of Correctional Services contain provisions regarding the inspection of records by inmates (§5.20). Further, §5.22 concerning the "DCJS Report", which is the criminal history record, states that:

> "The DCJS report shall be released pursuant to section 5.20 of this Part to the inmate himself or his attorney. The DCJS report shall also be released to other parties for a proper purpose, but only if (1) it contains no nonconviction data as defined in 28 C.F.R. 20.3(k), or (2) the Division of Criminal Justice Services has verified that the disposition data, or the report, is the latest available. If the DCJS report does contain nonconviction data, then the only proper purpose for its release shall be those described in 28 C.F.R. 20.21(b)."

In view of the foregoing, it is suggested that you submit a request for your criminal history records to either the Division of Criminal Justice Services or to your facility superintendent in conjunction with the regulations of the Department of Correctional Services regarding access to Department records. I have enclosed a copy of those regulations for your consideration.

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.

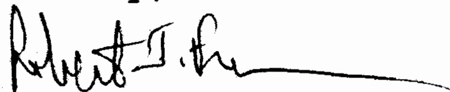
In all honesty, if you believe that a public body has violated the Open Meetings Law, a lawsuit may be the only way to ensure compliance. Further, the Committee does not have the authority or the resources to conduct what may be characterized as an "investigation". Nevertheless, the Open Meetings Law does state that the Committee may issue advisory opinions under the Law. If you could describe problems or situations that have arisen with respect to a particular board, I would be more than willing to prepare an advisory opinion on your behalf.

In terms of the Open Meetings Law generally, it is noted that all meetings of a public body must be convened open to the public. In brief, the Law applies to any convening of a quorum of a public body, 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)]. Further, the Open Meetings Law specifies and limits the areas of discussion that may properly be considered during closed or "executive" sessions [see Open Meetings Law, §100(1)]. Consequently, a public body may not convene an executive session to discuss the subject of its choice, but rather only those topics listed in the Law as appropriate for consideration in executive session.

Enclosed for your review are copies of the Freedom of Information Law, the Open Meetings Law and an explanatory pamphlet on 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:jm

Encs.

cc: Board of Education, Hamburg Central School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-816

FOIL-AO-2643

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

October 13, 1982

Mr. Neil P. Nelsen

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. Nelsen:

I have received your letter of September 28, in which you raised questions regarding rights of access to records of the Hamburg Central School District, as well as meetings held by its Board of Education.

Your first question is whether, as a taxpayer, you may "examine the detailed budget of the district". In my view, the record required to be prepared by the District that is reflective of its "detailed budget" is accessible. Specifically, §1716 of the Education Law, entitled "Estimated expenses for ensuing year", 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 of each. The amount of 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."

Based upon the language quoted above, the proposed budget of a school district must be made available prior to its approval. After its approval, I believe that it would also clearly remain available, for no ground for denial in the Freedom of Information Law [see §87(2)] could in my view be cited.

The second question is whether you are entitled "to see the budget figures for each building in the system". In this regard, it is emphasized that the Freedom of Information Law is a statute that pertains to existing records. Section 89(3) of the Law states that, as a general rule, an agency, such as a school district, is not required to prepare or create records in response to a request. If, for example, budget figures relative to each building have not been prepared, the district would not in my opinion be required to prepare such records on your behalf in response to a request made under the Freedom of Information Law.

To the extent that such figures do exist, I believe that they would be available. Relevant to such a request 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, existing budget figures could likely be characterized as "intra-agency materials". However, it appears that they would consist of "statistical or factual tabulations or data" that are available under §87(2)(g)(i).

The third question raised in your letter is whether you are "entitled to know the salaries of school administrators". As noted earlier, the Freedom of Information Law generally does not require an agency to create records. An exception to that rule, however, is found in §87(3)(b) pertaining to payroll information. The cited provision 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..."

As such, the District is required to maintain and make available a list which identifies every employee of the District, including administrators, by name, title, public office address and salary.

The fourth question is whether you may obtain "a list of the number of students in each classroom by grade and building and a breakdown of how the district employees are deployed". Once again, if no such records exist, the District would not be obliged to create them on your behalf. Nevertheless, to the extent that such records do exist, I believe that they would be available on the ground that they are reflective of factual information available under §87(2)(g)(i).

Lastly, you asked whether there is any "avenue" open to you, other than initiating a lawsuit, to force a local board to comply with the Open Meetings Law. You also asked whether this office could investigate whether a board is acting in violation of the Open Meetings Law.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2644

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

October 14, 1982

Mr. Larry M. Himelein
District Attorney
Office of the District Attorney
Cattaraugus County Center
Little Valley, NY 14755

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. Himelein:

I have received your letter of October 4 and appreciate your kind words as well as your interest in complying with the Freedom of Information Law.

Your inquiry concerns records regarding a "high-speed chase" occurring in December of 1979. Although the chase arose "solely out of a traffic infraction", the defendant apparently pleaded guilty to misdemeanors involving stolen property found in his car, even though the officers in pursuit were not aware of the stolen property at the time of the chase. The defendant subsequently filed a lawsuit against the County which has been settled. You added that "There are allegations that the Sheriff's Department tried to cover up this incident as the deputy involved is the now-retiring sheriff's son. The investigator for the Sheriff's Department, now a candidate for sheriff, is alleged to have been a participant in that cover up". You wrote further that your predecessor requested an investigation by the District Attorney's Office and the State Police. In the course of that investigation, statements were taken from a variety of individuals, "including members of the Salamanca Police Department, the principals involved, neutral persons and hospital personnel who were allegedly instructed not to reveal anything to the press". While you expressed the feeling that release of the statements might "prove embarassing" to some individuals, you also wrote that there are no pending criminal investigations regarding the incident, nor

are there confidential sources involved. Your question concerns the extent to which the Freedom of Information Law might require disclosure of the statements.

I would like to offer the following comments regarding your inquiry.

First, although many records in possession of the office of a district attorney might justifiably be withheld under the Freedom of Information Law or other provisions of law, I believe that such an office nonetheless is an "agency" subject to the Freedom of Information Law in all respects. Section 86(3) of the Freedom of Information 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."

Since the office of a district attorney is a "governmental entity" performing a "governmental" function, I believe that it clearly falls within the scope of the Law. Moreover, various judicial determinations have found that the records of a district attorney are subject to the Freedom of Information Law [see e.g., Dillon v. Cahn, 79 Misc. 2d 300, 359 NYS 2d 981 (1974); New York Public Interest Research Group v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979; Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., NYLJ, June 24, 1982].

Second, 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.

Third, under the circumstances, it appears that there may be three relevant grounds for denial. It is emphasized that the extent to which those bases for withholding may be applicable is in my view dependent upon the nature and content of the records.

The first ground for denial of possible relevance is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In the context of your letter, it would appear that §87(2)(b) might be applicable with respect to statements made by "neutral persons and hospital personnel". If, for example, you believe that disclosure of the identities of such persons would result in an unwarranted invasion of personal privacy, it may be possible to delete identifying details from the statements, while granting access to the remaining portions.

I would like to point out at this juncture that the introductory language of §87(2) refers to the capacity to withhold records "or portions thereof" that fall within one or more of the ensuing grounds for denial. As such, it is in my opinion clear that the Legislature envisioned situations in which a single record might be both available and deniable in part. Further, I believe that the language in question requires an agency to review requested records in their entirety to determine which portions, if any, could justifiably be withheld.

With respect to the identities of others, such as police officers and the principals, I generally concur with your intimation that no ground for denial based upon privacy would likely exist with respect to those individuals. The principals have been identified by any number of means already, i.e., judicial proceedings and records, and police officers who may have provided statements likely did so in the performance of their official duties. Consequently, it is in my view doubtful that disclosure of the identities of those people would result in an unwarranted invasion of personal privacy.

A second ground for denial of possible relevance is §87(2)(e). The cited provision states that an agency may withhold 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 disclosure confidential information relating to a criminal investigation; or

> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

While the records in question may have been compiled for law enforcement purposes, based upon the facts as you presented them, it would appear that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) have essentially disappeared, for the investigation has been terminated. If my understanding of the facts is accurate, I do not believe that §87(2)(e) could justifiably be cited to withhold the records.

The final ground for denial of possible 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..."

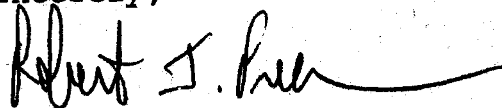
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, statements by police officers, although compiled for law enforcement purposes, might also be considered "intra-agency materials". From my perspective, to the extent that they contain statistical or factual information, for example, they would likely be available. Nevertheless, to the extent that such materials are reflective of advice, opinion, suggestion, impression and the like, I believe that they could likely be withheld under §87(2)(g).

In sum, to the extent that the grounds for denial discussed in the preceding paragraphs are applicable, I believe that the records may be withheld. Conversely, to the extent that none of the grounds could be cited, the records would in my view be available.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2645

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 14, 1982

Mr. Michael Hajovsky

Dear Mr. Hajovsky:

Your letter addressed to Gilbert P. Smith, Chairman of the Committee, has been received by this office. As a matter of practice, the staff of the Committee handles correspondence regarding the Freedom of Information Law.

Your correspondence includes a copy of an appeal concerning a denial of a request for certain records of the New York City Department of Consumer Affairs. In this regard, I received a letter today from Hope Roshetar, Freedom of Information Officer for the Department of Consumer Affairs, in which it was indicated that your request was granted and that it would be honored upon payment of the appropriate fees for photocopying. As such, I feel that the matter is moot.

It is noted that I agree with your contention that you need not indicate reasons for requesting records. As a general rule, it is my view that records accessible under the Freedom of Information Law 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].

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2646

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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C. MARK LAWTON
MARCELLA MAXWELL
~~BASIL A. PATERSON~~ Charles Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 14, 1982

Mr. Joseph Cooper, Jr.
80-B-1239
Fishkill Correctional Facility
P.O. Box 307
Beacon, NY 12508

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. Cooper:

I have received your letter of October 2 in which you requested advice regarding access to medical records pertaining to you which are apparently in possession of the facility where you are now located.

I would like to offer the following observations regarding your inquiry.

First, I have enclosed for your consideration a copy of the regulations promulgated by the Department of Correctional Services containing the procedure by which records may be requested. It is noted that §5.20 of the regulations pertains to the examination of inmate records by an inmate or his attorney and that §5.24 involves medical records. In this regard, I direct your attention to §5.24(a)(9) which states that an inmate medical record may be made available to:

> "...attorneys representing inmates in proceedings in which the inmate's commitment pursuant to section 402 of the Correction Law is in issue, and attorneys representing inmates in other matters, only upon written request, when accompanied by an authorization signed by the person whose record is desired, or by someone authorized to act on his behalf..."

Based upon the provision quoted above, it is suggested that you might want to request that an attorney representing you submit a written request for your medical records based upon a signed authorization.

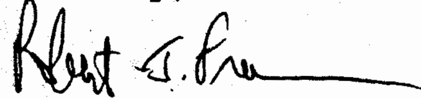
Second, I have engaged in several discussions regarding access to medical records by inmates with officials of the Department of Correctional Services. As a general rule, I believe that the Department provides access to medical information of a factual nature, such as laboratory tests, X-rays, and similar 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, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed 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 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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2647

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ROBERT J. FREEMAN

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

October 15, 1982

Mr. John Stone
82-A-1575
Box 149 BW-15
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. Stone:

I have received your letter of September 31.

Our records indicate that the General Counsel to the Division of Probation has responded to your inquiry of September 5 regarding copies of records pertaining to educational placement and treatment. If for some reasons you have not received the response, please contact this office.

Additionally, you have requested from this office subject matter lists concerning records of the Department of Correctional Services as well as various correctional facilities within the State. In this regard, please note that the Committee on Public Access to Records is authorized to advise 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 grant or deny access to records.

I would like to point out, however, that the rules and regulations promulgated by the Department of Correctional Services (see attached) indicate in §5.13 that each facility records custodian must maintain an up-to-date subject matter list. Therefore, it is suggested that you contact the Department of Correctional Services as indicated in the regulations and the custodian of each facility in which you are interested in order to request the various subject matter lists.

Mr. John Stone
October 15, 1982
Page -2-

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2648

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 18, 1982

Mr. Edward Sieber, Jr.
Administrator
Lewis County General Hospital
7785 North State Street
Lowville, NY 13367

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. Sieber:

I have received your letter of October 14 in which you raised questions regarding the Freedom of Information Law as it relates to medical records in possession of a county hospital, as well as its relationship to various other provisions of law.

Specifically, you indicated that the problem in your view deals not with the Freedom of Information Law but with other laws that "make it imperative that [you] do not release a patient's medical record without his authorization". You have requested guidance regarding "the medical histories and other chart information specific to a patient's record in regard to the Freedom of Information Act and also the provisions of Public Health Law No. 17; Civil Practice Law and Rules, Paragraph 4504." You also wrote that you would like "to know the impact of the Commissioner of Health Rules and Regulations Paragraph 405.25".

I would like to offer the following comments regarding your inquiry.

First, I believe that a county hospital and its records are subject to the provisions of the Freedom of Information Law. 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."

Since a county hospital is run by a municipality, I believe that its records would fall within the scope of the Freedom of Information Law.

Second, it is emphasized that the term "record" is broadly defined. Section 86(4) 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, virtually all records in possession of a county hospital, including medical records, would in my view be subject to the Freedom of Information Law.

Third, while records of a county hospital would fall within the purview of the Freedom of Information Law, that would not necessarily mean that they must be available to any person. Stated differently, the materials in possession of a county hospital might be considered those of an "agency" and would constitute "records"; nevertheless, those factors alone are not determinative of rights of access, for the Law provides eight grounds for withholding records.

Perhaps the most relevant ground for denial 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, as indicated in the language quoted above, §89 (2) of the Freedom of Information Law provides several examples of unwarranted invasions of personal privacy. The first two examples state that an unwarranted invasion of personal privacy includes, but shall not be limited to:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

Consequently, if a third party requests medical records pertaining to a particular patient, I believe that the records could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

It is noted that other provisions within §89(2) might operate to grant access to certain records. Section 89(2)(c) states that, unless a different ground for denial is applicable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy:

> "i. when identifying details are deleted;
>
> ii. when the person to whom a record pertains consents in writing to disclosure;
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Therefore, if, for example, a patient has a right of access to a particular medical record pertaining to himself, and that person consents in writing to disclosure to a third party, I believe that the records would be available to the third party.

I do not believe that the three provisions of law to which you made reference are inconsistent with the direction provided in the Freedom of Information Law. Section 17 of the Public Health Law appears to deal with medical records in possession of hospitals and physicians generally, and not only public hospitals. Further, disclosure of medical records under §17 is conditioned upon the "written request of any competent patient, parent or guardian of an infant, committee for an imcompetent, or conservator of a conservatee..." As such, I do not believe that §17 requires that medical records be made freely available, but rather that they be made available upon the condition that written consent is given.

Section 4504 of the Civil Practice Law and Rules (CPLR) deals with the privileged relationship between a physician, dentist or nurse and a patient. Section 4504(a) states in its introductory language that:

> "[U]nless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

From my perspective, if no waiver is given and medical records remain within the scope of the privilege envisioned by §4504 of the CPLR, such records could be withheld under the Freedom of Information Law. Section 87(2)(a) of the Freedom of Information Law states that rights of access to records do not apply to records that are "specifically exempted from disclosure by state or federal statute". In my opinion, if records are considered confidential under §4504, they fall within the exception found in §87(2)(a) of the Freedom of Information Law. As such, I believe that they would remain confidential, notwithstanding the provisions of the Freedom of Information Law.

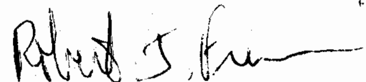
The third provision to which you referred is §405.25 of the regulations promulgated by the Commissioner of Health entitled "Patients' rights". The most relevant provisions of those regulations would appear to be §405.25 (7) and (8) which state that the policies and procedures of a hospital:

> "shall afford patients the right to...
>
> (7) privacy to the extent consistent with providing adequate medical care to the patient. This shall not preclude discreet discussion of a patient's case or examination of a patient by appropriate health care personnel;
>
> (8) privacy and confidentiality of all records pertaining to the patient's treatment, except as otherwise provided by law or third-party payment contract..."

In my view, discussion of a patient's case among appropriate health care personnel would not likely constitute a disclosure under the Freedom of Information Law. Presumably in such situations information is disclosed among health care personnel in the performance of their official duties. Subdivision (8) involves the privacy and confidentiality of records "except as otherwise provided by law or third-party payment contract". In my view, the quoted provisions of the regulations are consistent with the Freedom of Information Law, for the Freedom of Information Law and §4504 of the CPLR either permit or require, as the case may be, that medical records be withheld if requested by third parties, unless the patient has consented to disclosure.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2649

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[illegible] Charles Williams III
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 19, 1982

Mr. Jack Murray
Public Information Officer
County of Onondaga
Office of the County Executive
Onondaga County Civic Center
421 Montgomery St. - 14th Floor
Syracuse, NY 13202

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. Murray:

I have received your letter of October 8 addressed to Pamela Petrie Baldasaro of this office in which you requested a clarification of the Freedom of Information Law regarding various issues relative to personnel records. Since Ms. Baldasaro is ill, I am taking the liberty of responding to your inquiry.

The personnel records to which you made reference include a payroll roster report, a personnel change form, an employee roster card, an "Alpha" report of employees, a "P-11" concerning a request from departments to create or abolish positions, classification surveys that describe employees duties, salary surveys, materials regarding examinations, and general correspondence among or between county departments and municipalities.

Although specific reference will not be made in the ensuing paragraphs to each of the records that you described, for I am not familiar with their content in every instance, I would like to provide the following general advice.

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 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.

Further, I would like to point out that the introductory language of §87(2) refers to the capacity to withhold records "or portions thereof" that fall within one or more of the eight grounds for denial listed in the Law. Consequently, it is my view that the Legislature envisioned situations in which a single record might be both available and deniable in part. I believe that the quoted language also requires an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In my view, based upon the description of the records in question, there are likely three grounds for denial of possible significance.

The first ground for denial is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In addition, §89(2)(b) lists five examples of unwarranted invasions of personal privacy.

Although subjective judgments must often of necessity be made when questions concerning privacy arise, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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, Oct. 30, 1980]. Conversely, to the extent that records are irrelevant to the performance of one's 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].

In the context of the records that you described, various items would likely be available, for they are relevant to the performance of official duties. For example, a salary, a job description, and a title would be available, for such items, among others, would clearly be relevant to the performance of one's official duties. Other items, such as social security numbers, union codes, marital status, retirement numbers and similar information would likely have little relevance to the manner in which a public employee performs his or her duties. As such, it is likely that disclosure of those types of items would result in an unwarranted invasion of personal privacy, and, therefore, could be withheld or deleted from records.

A second ground for denial of potential significance 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. 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.

With respect to the records described, a request from a department to create or abolish a position, for instance, would in my view likely be deniable. Such records could be considered advisory in nature and subject to acceptance or rejection. They would not likely consist of statistical or factual information, instructions to staff that affect the public or final agency policy or determinations. If, however, a determination to create or abolish a position is made, a record reflective of such a decision would in my view constitute a final determination made by an agency and therefore would be available, perhaps under §87(2)(g)(ii) as an instruction to staff that affects the public, or under §87(2)(g)(iii) as a final determination made by an agency.

Similarly, correspondence among or between agencies may be characterized as inter-agency materials. Once again, if those materials consist of advice, recommendation, suggestion and the like, they could in my opinion be withheld. Nevertheless, those portions consisting of statistical or factual information, instructions to staff that affect the public or final agency policy or determinations would be required to be made available.

A third possible ground for denial to which reference should be made 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 the context of the records described, the language quoted above could not likely be cited as a basis for withholding, for the records described involve the examination process rather than examinations themselves.

Lastly, I would like to point out two specific records, both of which may relate to the records described, that must be made available. First, eligible lists identifying those who passed a civil service examination have long been available by means of rules adopted by the Department of Civil Service. Second, while an agency is generally not required to create or prepare a record [see Freedom of Information, §89(3)], an exception to that rule involves the creation of a payroll record. Section 87(3)(b) of the Freedom of Information Law requires that each agency shall maintain:

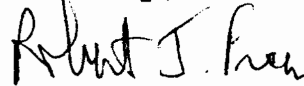
> "a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

Based upon the language quoted above, the payroll record required to be compiled must be available to any person under the Freedom of Information Law.

In sum, it would appear that the records described would be available, except to the extent that an agency could withhold them pursuant to §87(2)(b) pertaining to unwarranted invasions of personal privacy or §87(2)(g) concerning inter-agency or intra-agency materials.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2650

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 20, 1982

Mr. Harold Mondshein

<u>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.</u>

Dear Mr. Mondshein:

I have received your letter of October 5, which again deals with requests made under the Freedom of Information Law and directed to the New York City Off-Track Betting Corporation (hereafter "OTB").

Based upon your belief that your requests to OTB have been proper and your contention that OTB has not complied with the Freedom of Information Law, you have requested that:

> "...the Committee on Public Access to Records furnish directions that [your] requested marked 1 to 6 are proper and that OTB be required to furnish the records in connection with these requests."

Your contentions are apparently based in great measure upon the terms of a collective bargaining agreement between Local 2021 and OTB, in which the agency in your view "obligated itself to set up a separate employee record" regarding "the time worked at the City and OTB". Other areas of your request also concern the means by which OTB has carried out the provisions of the collective bargaining agreement.

Having reviewed your letter and the correspondence attached to it, I would like to offer the following comments.

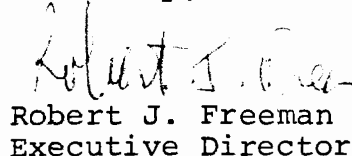
First, the Committee on Public Access to Records is authorized under §89(1)(b) of the Public Officers Law to advise with respect to the Freedom of Information Law. As such, the Committee has no authority to compel an agency, such as OTB, to grant or deny access to records. Consequently, this office simply does not have the legal capacity to direct OTB to furnish records to you.

Second, I would like to reiterate a statement of advice given to you in earlier correspondence. Specifically, §89(3) of the Freedom of Information Law states that, unless otherwise provided, an agency is not required to create a record in response to a request. In this regard, as indicated in various responses to your requests by Lois A. White, Assistant General Counsel and Acting Records Access Appeals Officer, your requests have raised questions; you have not requested records. While your requests may have been based upon specific contractual provisions, I concur with Ms. White's response that answers to questions, rather than records, were apparently requested.

Lastly, if indeed the contractual provision that you cited requires OTB to maintain a specific record, it would appear that your remedy would involve enforcement of the contract. Although the Freedom of Information Law might not require an agency to prepare a records in response to a request, if, for example, a contract does require the preparation of a record, it is suggested that you contact union officials for the purpose of seeking compliance with the contract.

I hope that I 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: Lois A. White

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-818
FOIL-AO-2651

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 20, 1982

Arthur W. Tidd, President
Tax Payers Association of the
Carthage Central School District
253 Maple Street
Black River, New York 13612

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. Tidd:

I have received your letter of October 4 in which you requested "advice and direction".

In your letter, you asked how "we teach local officials to obey the Laws". Your question apparently was precipitated by various requests made to the Carthage Central School District Board of Education under the Freedom of Information Law. Particular memoranda were requested and, although it appears that the materials have been made available, you were forced to expend a great deal of effort in gaining access to the records. Further, you expressed uncertainty with respect to whether the document sent to you was indeed the document to which reference was made at a meeting. You also questioned changes in financial records which were not in your view authorized by resolution by the School Board.

I would like to offer the following comments regarding your inquiry.

First, perhaps the best method of teaching officials to "obey" the law would involve an effort to educate those officials with respect to specific provisions of law in question. In this regard, I have enclosed copies of both

the Freedom of Information Law and the Open Meetings Law for your consideration, as well as eight copies of a pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door", in order that you may have one for yourself and distribute the remainder to members of the Board.

Second, both the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, contain procedural guidance regarding the responsibilities of an agency, such as a school district, when it receives a request for records.

It is noted that the Freedom of Information Law and the regulations contain prescribed 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 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)].

You intimated that you are unsure of whether a document sent to you was indeed the document to which reference was made by the Board at its meeting. Here I would like to point out that §89(3) of the Freedom of Information Law requires that an agency on request:

> "...certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possesion of such record or that such record cannot be found after diligent search."

As such, if, for example, you question the authenticity of a record, you may request a certification indicating that the copy received is a true copy.

Third, in terms of substance, the Freedom of Information Law provides broad rights of access and 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 circumstances, since your requests involve statistical or factual information regarding the financial condition of the School District, §87(2)(g), one of the grounds for denial, may be particularly relevant to the situation. 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 the context of the fiscal information in which you are interested, although such information might be contained within "inter-agency or intra-agency materials", those materials would likely consist of "statistical or factual tabulations or data" that must be made available under §87(2)(g)(i).

To provide you with additional information regarding financial accounting requirements of school districts, I have enclosed Parts 170 to 172 of the regulations promulgated by the Commissioner of Education.

At this juncture, I would like to direct your attention to the provisions of the Open Meetings Law.

In brief, the Open Meetings Law states that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" subject to the Law [see definition of "meeting", §97(1)]. Further, the Law permits the holding of executive sessions only for the purpose of discussing those topics deemed appropriate for closed door sessions that are enumerated in §100(1)(a) through (h) of the Law.

If indeed resolutions were required to be passed by the Board regarding changes in fund balances and similar records, I believe that reference to those resolutions should be included within minutes of the Board.

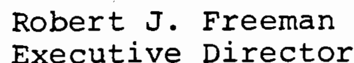
Section 101 of the Open Meetings Law provides guidance regarding the contents of minutes. Subdivision (1) of §101 concerning minutes of open meetings states that:

> "[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, if a resolution was adopted by the Board of Education, I believe that reference to the resolution, the date and the vote would be required to be included in minutes.

I hope that I 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-2652

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

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Charles Williams III
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 25, 1982

Mr. George D. Patte, Jr.
Greenburg and Patte
Attorneys at Law
121 East Buffalo Street
P.O. Box 174
Ithaca, NY 14850

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. Patte:

I have received your letter of October 5, which reached this office on October 14. Your interest in complying with the Freedom of Information Law is much appreciated.

You have requested an advisory opinion precipitated by a demand that the name of a complainant be made available. The complaint apparently resulted in an investigation that did not lead to any action. As such, you have raised questions regarding "the requirements under the Freedom of Information Act of New York State as it pertains to disclosure of complainants' identity that the Tompkins County SPCA receives in the course of business." You also noted in your letter that the SPCA has a contract with the City Attorney has contended that the SPCA is not subject to the Freedom of Information Law.

I would like to offer the following comments regarding your inquiry.

It is noted at the outset that, in my view, you are not required to disclose the identities of complainants for one or perhaps two reasons.

First, as you are aware, the scope of the Freedom of Information Law is determined in part by the definition of "agency". 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."

Based upon the language quoted above, it would appear that the SPCA, a not-for-profit corporation, would fall outside the definition, for it is not a "governmental entity".

Nevertheless, I would like to point out that the Court of Appeals in Westchester-Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)], found that volunteer fire companies, not-for-profit corporations that perform contractual services for one or more municipalities, are considered "agencies" subject to the Freedom of Information Law in all respects.

In all honesty, in view of the decision cited above, it is unclear at this juncture in my opinion whether an organization such as the SPCA falls within the scope of the Freedom of Information Law. In short, if it is considered an agency, its records would be subject to whatever rights of access might exist under the Freedom of Information Law. If it is not an agency, the Freedom of Information Law would not apply.

Notwithstanding the uncertainty regarding the status of the SPCA, and even if it is an agency, I believe that those portions of complaints that identify complainants could be withheld.

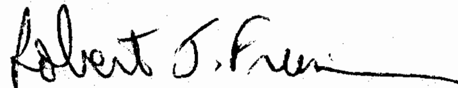
In this regard, it has consistently been advised that the substance of a complaint submitted to an agency is available, but that the identifying details regarding a complainant might be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" under §87(2)(b) 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.

In sum, I concur with the policy that you described under which names of complainants are generally withheld, whether or not the SPCA and its records are subject to the provisions of the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: City Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-821
FOIL-AO-2653

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

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Charles Williams III
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 25, 1982

Susan P. Brooks, President
Citizens for a Decent Community
810 N. Rogers Avenue
Endicott, New York 13760

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. Brooks:

As you are aware, I have received your letter of October 1 in which you requested assistance from this office concerning requests made under the Freedom of Information Law.

In your letter, you wrote that:

> "[I]n particular, to what extent is a Village Clerk bound by the provisions of the Act when a person submits a request for copies of Village Board Minutes of Regular Board Meetings, and copy of a proposed ordinance amendment?
>
> "It is our understanding that these records are not in any way confidential, and should be produced by the Clerk upon request, for inspection by any citizen."

I would like to offer the following comments in response to your inquiry.

First, §4-402 of the Village Law sets forth the duties of a village clerk to include the following:

> "(a) have custody of the corporate seal, books, record, and papers of the village and all of the official reports and communications of the board of trustees;
>
> (b) act as clerk of the board of trustees and of each board of village officers and shall keep a record of their proceedings;
>
> (c) keep a record of all village resolutions and local laws..."

Further, the Committee on Public Access to Records, in accordance with the Freedom of Information Law, has adopted procedural regulations which have the force and effect of law (see attached). Specifically, §1401.2(a) states in part that a governing body, such as a village board, must 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 the Village Board has designated a records access officer, which in many instances is the village clerk due to the duties imposed by §4-402 of the Village Law, requests for records in possession of any unit within village government would fall within the scope of that person's responsibility.

Section 1401.2(b) of the regulations sets forth the responsibilities of a records access officer. You are correct in your contention that a records access officer must make records available for inspection, although there is no requirement that a requester be allowed to search for or "browse" through records in a government office. In my view, access to records as envisioned by the Law involves the right to physically inspect requested records made available by a records access officer.

Second, you have indicated that confusion has arisen with respect to the manner in which a form prescribed by the Village for the purpose of requesting records must be completed. With regard to the use of a form, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot validly be cited as a basis for withholding or delaying access to records. Section 89(3) of the Freedom of Information Law merely requires that a request be made in writing that "reasonably describes" the records sought. Therefore, in my view, any request made in writing that reasonably describes records should suffice. I believe, too, that the purpose of the Freedom of Information Law is to facilitate the process by which records are made available by government. Similarly, whether multiple requests for records are submitted separately or on one request form is in my opinion irrelevant.

Third, you expressed concern regarding what you believe may be a lack of cooperation in your efforts to obtain minutes of meetings of the Village Board and local laws. Here I direct your attention to §101(3) of the Open Meetings Law (see attached). In brief, the cited provision states that minutes of open meetings must be compiled and made available within two weeks of such meetings. In my opinion, the minutes are available as soon as they are created, whether or not they have been approved.

In terms of background, prior to the effective date of §101(3), October 1, 1979, the Committee transmitted a memorandum to all public bodies in anticipation of problems regarding unapproved minutes. For example, in many instances, a public body might not meet within two weeks and, therefore, might not be able to approve or make minutes official. Consequently, it has been suggested that in such cases, the clerk or whoever is responsible for preparing minutes should do so within the appropriate time limits and mark the minutes as "unapproved", "non-final", "draft", for example. By so doing, a member of the public can learn generally what transpired at a meeting, and concurrently, notice is given to the effect that minutes are subject to change.

Fourth, it is unclear whether the Clerk has responded to your requests verbally or in writing. In this regard, the Freedom of Information Law and the regulations provide direction regarding the manner and time within which responses to requests should be given. Specifically, §89(3) of the

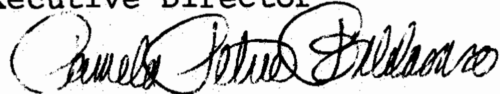
Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating 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. 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



BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Encs.

cc: Village Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2654

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

COMMITTEE MEMBERS

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MARIO M. CUOMO
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~~BASIL A. PATERSON~~ Charles Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 25, 1982

Mr. J. Woods
81-A-2413
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. Woods:

I have received your letter dated September 28, which was notarized on October 5 and received by this office on October 13.

You wrote that you are attempting to learn the means by which you can obtain certain records "through the Freedom of Information or public information Acts". You indicated that the records sought involve arrest warrants and reports and transcripts for particular cases heard in the First District Court in Hauppauge. Although you wrote to the Legal Aid Society, which represented you, and the clerk of the court, you have to date received no response from either.

I would like to offer the following comments regarding your inquiry.

First, it appears that the records in which you are interested would likely be in possession of the court in which the proceeding or proceedings were held. In this regard, it is emphasized that the scope of the Freedom of Information Law is determined in part by the definition of "agency". Specifically, §86(3) 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 govern-

> mental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

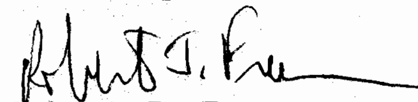
Based upon the definitions quoted above, it is likely that the records in which you are interested fall outside the scope of the Freedom of Information Law.

Second, there are, however, various provisions of the Judiciary Law and other court acts that might grant access to the records sought. For instance, I have enclosed a copy of §255 of the Judiciary Law, which grants broad rights of access to many records in possession of a court clerk.

Lastly, it is suggested that you once again contact the attorney who represented you or perhaps a representative of Prisoners' Legal Services, either of whom could likely provide substantial assistance in seeking to obtain the 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:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2655

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

COMMITTEE MEMBERS

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Charles Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 26, 1982

Mr. Samuel L. Sommer
71-A-141
Clinton Correctional Facility
Box B
Dannemora, NY 12929

Dear Mr. Sommer:

I have received your letter of October 11, as well as the materials attached to it.

You have requested that I review the materials for the purpose of advising with respect to the merit of your application and asked whether the Freedom of Information Law permits reimbursement of attorney's fees to a pro se litigant.

Having reviewed the materials, I made inquiries on your behalf and learned that you are currently involved in several lawsuits, including a suit against Suffolk County concerning access to records. In this regard, it is the policy of the Committee not to prepare advisory opinions when it is known that litigation has been commenced. Due to the pendency of litigation, I do not believe that it would be ethical or appropriate to prepare an advisory opinion at this time.

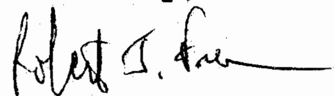
Since your question regarding attorney's fees does not involve the substance of the litigation, it is noted that an amendment to the Freedom of Information Law [see attached Freedom of Information Law, §89(4)(c)] that became effective on October 15, 1982, permits a court to award attorney's fees to a person who has substantially prevailed in a challenge to a denial of access to records under certain circumstances. It is emphasized, however,

that the legislation (Chapter 73, Laws of 1980) containing the amendment specifies that the provisions concerning attorney's fees "shall apply only to actions commenced on or after" October 15, 1982. Further, due to the brief period in which the amendment has been in effect, it is unknown whether it would apply to pro se litigants.

As requested, I am returning the materials that you enclosed.

I hope that I have been of some assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2656

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

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JOHN C. EGAN
WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
~~BASIL A. PATERSON~~ Charles Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 26, 1982

Mr. Thomas Friel

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. Friel:

I have received your recent communication regarding the implementation of the Freedom of Information Law by the Suffolk County Water Authority.

In all honesty, I am not sure of the nature of information that you are seeking from this office. It is unclear whether you are requesting materials that I have prepared or those that may have been prepared and sent to this office by the Authority.

In any case, I have enclosed a copy of an opinion addressed to you dated March 29. You may remember that the opinion was precipitated by a copy of a letter sent to this office by Ronald Glickman, Assistant Attorney General. Attached to that letter are various items of correspondence including an application for records that you submitted on March 10, a letter sent to you by Walter C. Hazlitt, Executive Director of the Authority on September 4, 1981, a letter that you sent to the Authority on October 20, 1981, a letter that you sent to the Authority dated September 3, 1981, a response to you by Mr. Hanrahan of the Authority dated September 15, 1981, a letter sent to Mr. Bond of the Authority on January 26, 1982, a letter addressed to "Whom it may concern" on February 1, 1982, a letter that you sent to the Authority dated February 9, 1982, a letter addressed to Mr. Flynn on February 23, 1982, an application for records that you submitted on January

28, 1982 and a letter addressed to Mr. Flynn dated January 5, 1982. If you are interested in obtaining copies of any of those materials, please contact me and I will send them to you free of charge. None, however, appears to be a determination rendered following an appeal.

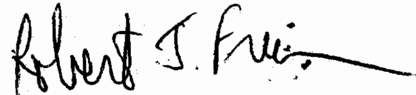
Further, as you are aware, when an appeal is made, an agency in receipt of the appeal must send copies of the appeal and the determination to the Committee [see Freedom of Information Law, §89(4)(a)]. Nevertheless, since hundreds of appeals are sent to this office, if you believe that particular appeals may have been sent to the Committee, they could be located if you could specify the month, for example, in which an appeal may have been made.

With respect to procedures, I would like to point out that §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate general regulations concerning the procedural aspects of the Law. In turn, §87(1) requires that each agency, including the Suffolk County Water Authority, must promulgate its own regulations consistent with those of the Committee. I have enclosed a copy of the Committee's regulations for your review and, in addition, a copy will be sent to the Authority. To assist the Authority in complying with the Freedom of Information Law, I have also transmitted a copy of model regulations that permit an agency to comply with the procedural aspects of the Law by adopting the model and, in essence, filling in the appropriate blanks.

It is suggested that you request and obtain a copy of the regulations adopted under the Freedom of Information Law by the Water Authority, if such regulations exist, for the purpose of becoming familiar with the appropriate procedures. Perhaps a greater knowledge of the procedures will help to avoid some of the problems that you have encountered.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Walter C. Hazlitt

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2657

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

COMMITTEE MEMBERS

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MARIO M. CUOMO
JOHN C. EGAN
WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
~~BASIL A. PATERSON~~ Charles Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 26, 1982

Mr. Paul Winters
66-B-11
P.O. Box 618
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. Winters:

I have received your letter of October 12 in which you requested guidance regarding the use of access laws in conjunction with an event that occurred more than seventeen years ago.

Specifically, you apparently learned recently that the attorney who represented you some seventeen years ago may have received a series of threatening phone calls. You are seeking to obtain information regarding those calls from the Utica Police Department, the court in which your proceeding was conducted, or perhaps the telephone company. It is your view that one or more of those offices might have received complaints concerning the calls.

I would like to offer the following comments regarding your inquiry.

First, it is possible that the records that may have been created in response to complaints were destroyed long ago. If such records no longer exist, there would be no records to be made available.

Second, to the extent that the Freedom of Information Law might apply, it is noted that the Law states that, as a general rule, an agency is not required to create a record in response to a request [see Freedom of Information Law, §89(3)]. Therefore, if records no longer exist, an agency would not be required to prepare a new record on your behalf.

Third, the application of the Freedom of Information Law is limited to records of agencies. In this regard, §86(3) of the Freedom of Information 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, while a municipal police department, for example, would be subject to the Freedom of Information Law, neither the courts nor a telephone company would fall within the provisions of the Freedom of Information Law.

It is noted that, although the Freedom of Information Law does not include the courts and court records within its scope, various provisions of the Judiciary Law and court acts grant access to certain court records. As such, it might be worthwhile to direct an inquiry, fully describing the situation, to the clerk of the court in which the proceeding was conducted.

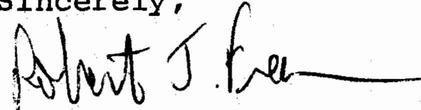
Fourth, assuming that records exist and that the Freedom of Information Law is applicable, I would like to point out that an applicant must "reasonably describe" the records sought. Therefore, if, for example, a request is sent to a police department, it should contain names, dates, file numbers and similar details that might enable the appropriate officials to locate the records in question.

Lastly, although the Freedom of Information Law is based upon a presumption of access, the Law lists eight grounds for denial [see §87(2)(a) through (h)]. Without knowlege of the contents of the records, I could not conjecture as to the extent, if any, to which one or more of the grounds for denial might be applicable.

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 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2658

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

COMMITTEE MEMBERS

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MARIO M. CUOMO
JOHN C. EGAN
WALTER W. GRUNFELD
C. MARK LAWTON
MARCELLA MAXWELL
~~BASIL A. PATERSON~~ Charles Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 27, 1982

Mr. Charles Wayne Van Etten
82-C-0142 - J-270
Camp Mt. McGregor
P.O. Box 2071
Wilton, NY 12866-0996

Dear Mr. Van Etten:

I have received your recent letter, which, although dated October 29, reached this office on October 27.

You have requested arrest records pertaining to you from this office. Based upon the request in the context of your letter, I assume that you are interested in obtaining your criminal history record, which is a record of arrests and convictions.

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 that in which you are interested, nor does it have the authority to compel an agency to grant or deny access to records. As such, the requested record cannot be made available by this office.

Nevertheless, I believe that your criminal history record can be made available to you be requesting it through either the Department of Correctional Services of 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

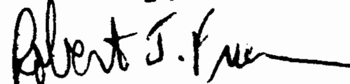
It is also noted that the regulations of the Department of Correctional Services contain provisions regarding the inspection of records by inmates (§5.20). Further, §5.22 concerning the "DCJS Report", which is the criminal history record, states that:

> "The DCJS report shall be released pursuant to section 5.20 of this Part to the inmate himself or his attorney. The DCJS report shall also be released to other parties for a proper purpose, but only if (1) it contains no nonconviction data as defined in 28 C.F.R. 20.3(k), or (2) the Division of Criminal Justice Services has verified that the disposition data, or the report, is the latest available. If the DCJS report does contain nonconviction data, then the only proper purpose for its release shall be those described in 28 C.F.R. 20.21(b)."

In view of the foregoing, it is suggested that you submit a request for your criminal history records to either the Division of Criminal Justice Services or to your facility superintendent in conjunction with the regulations of the Department of Correctional Services regarding access to Department records. I have enclosed a copy of those regulations for your consideration.

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.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2659

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
~~[illegible]~~ Charles Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 27, 1982

Mr. Daniel J. Garcia
82-A-3292 - F-95
Mt. McGregor Correctional Facility
Wilton, NY 12866

Dear Mr. Garcia:

I have received your letter of October 25 in which you requested copies of several judicial decisions, as well as the federal Freedom of Information Act and the New York Freedom of Information Law. You indicated that you want to obtain the decisions and statutes in question to learn of rights of access to records pertaining to you relative to the penal system, including parole.

In this regard, 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. This office does not have possession of the judicial decisions that you are seeking. As such, it is suggested that you contact an attorney or request that a friend or relative copy the judicial decisions at a local law library or courthouse, for example.

I have, however, enclosed a copy of a publication of the United States Justice Department entitled "Your Right to Federal Records". That publication includes the text of the federal Freedom of Information Act. Also enclosed are copies of the New York Freedom of Information Law and an explanatory pamphlet on the subject that may be useful to you.

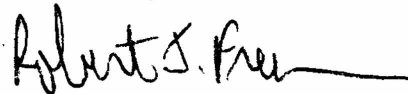
I would like to point out that the New York Freedom of Information Law requires the Committee to promulgate regulations that govern the procedural aspects of the Law [see §89(1)(b)]. In turn, each agency, including the Department of Correctional Services and the Division of Parole is required to adopt its own regulations consistent with those of the Committee [see §87(1)].

In the event that the penal records in which you are interested involve one or more New York State correctional facilities, I have enclosed a copy of the regulations of the Department of Correctional Services regarding Department records. Please note that the regulations contain provisions that deal specifically with inmate records.

Lastly, both the federal Freedom of Information Act and the New York Freedom of Information Law require that requests "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you provide names, dates, index, docket and identification numbers and other details that would enable agency officials 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2660

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 28, 1982

Mr. Joseph Cooper, Jr.
Fishkill Correctional Facility
80-B-1239
P.O. Box 307
Beacon, NY 12508

Dear Mr. Cooper:

I have received your letter of October 19 concerning records of the Department of Correctional Services.

It appears that there may be confusion regarding the nature and scope of the "master index" prepared by the Department. I would like to point out, too, that since the receipt of your letter, Counsel to the Department has forwarded a copy of a determination on appeal regarding your request for a "master index" to records pertaining to you.

In this regard, Mr. Rodriguez in my view appropriately indicated that the master index deals generally with records kept by the Department of Correctional Services; it does not and is not required to make reference to individual inmates.

The basis for the creation of the master index is §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."

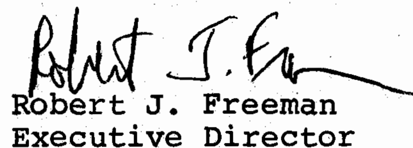
In view of the language quoted above, it is in my opinion clear that a subject matter list need not make reference to every record of an agency; on the contrary, a subject matter list should make reference in reasonable detail to categories of records maintained by an agency.

Further, §5.13(a) of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law is in my opinion consistent with §87(3)(a) of the Freedom of Information Law. The cited provision of the regulations states that:

> "[E]very custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in his possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office."

Perhaps the interpretation given in the preceding paragraphs will serve to enhance your understanding of the "master index" and clarify the problem that you have encountered.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Ramon Rodriguez

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2661

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

October 28, 1982

Mr. John Hopkins
80-D-226
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. Hopkins:

I have received your letter of October 15 in which you requested advice under the Freedom of Information Law.

According to your letter, you are interested in obtaining information dealing with the number of passenger vehicles entering and leaving particular exits of the New York State Thruway between certain hours on a particular day, the method of payment of tolls, and the name of the agency that might maintain the information. Your question is whether the information is available under the Freedom of Information Law.

I would like to offer the following comments regarding your inquiry.

First, it is emphasized that the Freedom of Information Law is not an access to information law, but rather an access to records law. Stated differently, the Freedom of Information Law grants rights of access to existing records, and §89(3) of the Law states in part that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, statistics or totals have not been prepared reflective of the information sought, an agency would have no obligation to create such records on your behalf.

Second, assuming that the information sought does exist in the form of a record or records, it would in my view likely be available under the Freedom of Information Law.

In brief, the Freedom of Information Law states that all records of an agency are accessible, except records or portions of records that fall within one or more among eight grounds for denial [see Freedom of Information Law, §87(2) (a) through (h)].

Under the circumstances, if records exist relative to the subject of your inquiry, there is likely one ground for denial of possible relevance. However, due to the structure of that provision, I believe that existing records would be available. Specifically, §87(2)(g) 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. Although inter-agency or intra-agency materials must be made available, statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Although the information sought might be found within "intra-agency" materials, they would likely consist of "statistical or factual tabulations or data" available under §87(2)(g)(i), if such records exist.

Lastly, since the NYS Thruway Authority administers thruway operations, it is suggested that a request be directed to the Authority's records access officer as follows:

Records Access Officer
NYS Thruway Authority
200 Southern Boulevard
Albany, New York 12209

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2662

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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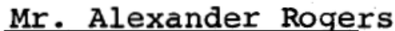
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 28, 1982

Mr. Alexander Rogers



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. Rogers:

I have received your letter of October 15 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you submitted a request to the Fiscal Officer of the Town of Deerfield, who is also the Town Supervisor, on September 27, in which you asked for various fiscal records of the Town. You indicated that no response was forthcoming and that you expected "a formal reply, be it in person, or by mail, or a phone call". Based upon previous correspondence with you and the Town, it had been my understanding that an agreement was reached whereby your requests for the same types of fiscal information would be provided to you at Town Board meetings in view of the absence of regular Town business hours. Since you did not attend the latest Town Board meeting, which was held on October 11, you indicated that you do not know if there was indeed any reply to your request. You also asked whether this office received a copy of a reply to your request.

I would like to offer the following comments regarding your inquiry.

First, in order to learn more in relation to your request, I contacted Ms. Gail Stappenbeck, Town Clerk, who informed me that the records requested on September 27 were brought to the meeting of October 11 for your review. As such, in view of what may have been a prior agreement to review records at meetings of the Town Board, it appears that your request was honored, for the records would have been available for your review at the meeting of October 11. If you remain interested in reviewing the records sought in your request of September 27, it is suggested that you submit a new request for those records.

Second, having discussed the matter with Ms. Stappenbeck, it was agreed that in the future, an acknowledgment of receipt of your request will be made either in writing or by phone.

Third, as indicated in previous correspondence, from my perspective, it appears that the Town has engaged in serious efforts to respond appropriately to your requests. It is noted that the Town Clerk does not maintain regular business hours and performs many of her duties out of her home. Although in some instances, records might be made available from a public official's home, that should not in my view be construed to mean that requests may be made at that person's home at any time. Section 1401.4 of the regulations promulgated by the Committee states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

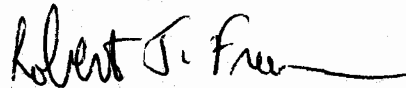
Based upon the language quoted in §1401.4(b), I believe that a procedure may be developed whereby records may be inspected at a time mutually convenient to the applicant for records and the custodians of records. Further, once again, even if records are in some cases kept at the home of the town clerk, for example, I do not believe that members of the public could request records from

the clerk at his or her home at any time, but rather only in conjunction with the appointment procedure envisioned in the regulations.

Lastly, I would like to point out that under §29 of the Town Law, a town supervisor is the fiscal officer, and that copies of requests for records need not be sent to this office. While §89(4)(a) of the Freedom of Information Law requires that copies of appeals and the determinations following appeals be sent to the Committee, there is no similar requirement regarding copies of or responses to requests.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Gail Stappenbeck

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2663

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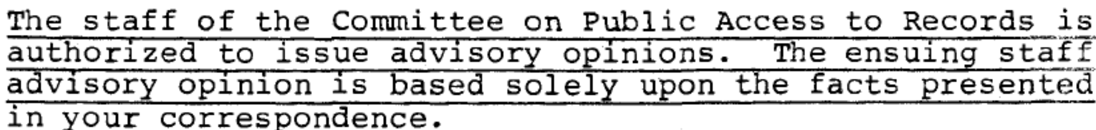
~~[illegible]~~ Charles E. Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 29, 1982

Ms. Rose Dominquez



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. Dominguez:

I have received your letter of October 18 in which you indicated a need to obtain certain criminal court records "in order to prove to Social Security" that your husband has used "two different (2) names and social security numbers".

I would like to offer the following suggestions in response to your inquiry.

First, the Freedom of Information Law does not include within its coverage the courts and court records. The scope of the Law is determined in part by the definition of "agency", for the Law applies to records of agencies. 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."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based upon the definitions quoted above, it is reiterated that court records would not be subject to the Freedom of Information Law.

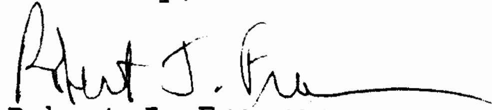
Second, although the Freedom of Information Law does not include court records within its scope, there are various provisions of the Judiciary Law and other court acts that provide access to court records. For instance, I have enclosed a copy of §255 of the Judiciary Law, which appears to grant broad rights of access to records in possession of a court clerk. In directing a request to a court clerk under §255 of the Judiciary Law, it is suggested that as much specificity as possible be provided, including names, dates, docket and index numbers and similar information that would enable the appropriate officials to locate the records sought.

Third, if the arresting agency reported a name and social security number to the Division of Criminal Justice Services, which maintains criminal history information, it is possible that such information could be made available for your inspection by the Division of Criminal Justice Services.

It is suggested that you contact the Division of Criminal Justice Services, which is located at 80 Centre Street in Manhattan and may be contacted at 587-4416. Perhaps a review of records in possession of the Division could be of value to you and your husband.

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-2664

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 29, 1982

Mr. Gerard D. Snover
Snover & Co., Inc.
193 East Main Street
Babylon, NY 11702

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. Snover:

I have received your letter of October 25 in which you requested assistance regarding rights of access to a "Real Property Transfer Report (EA-5217)".

According to your letter, there appear to be varying policies among local governments regarding access to forms prepared pursuant to §574 of the Real Property Tax Law. Your specific question is whether there are "occasions when an appraiser properly engaged in a real property valuation matter which will be the subject of a judicial review by virtue of a pending trial..." may obtain the reports in question. You also asked whether rights of access would differ "if such an appraiser was appraising the property on behalf of the assessment unit, which presumably has direct access to those forms for the property owner."

I would like to offer the following comments regarding your inquiry.

From my perspective, your question focuses upon the forms required by and their treatment under §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."

Although this office is not authorized to interpret the Real Property Tax Law, as a service to members of the public, comments on the subject have been given in the past after having discussed the issues with representatives of the Division of Equalization and Assessment. That agency would in my view be the best and most appropriate source of specific information on the subject.

Having discussed the matter with a representative of the Division of Equalization and Assessment, it was agreed that a request for the form in question made in conjunction with the judicial review of an assessment should result in access to the form. Further, if an appraiser is acting on behalf of an assessing unit, presumably a request for such forms would be made in the performance of one's official duties acting on behalf of a municipality and, therefore, would be honored.

It is noted that §574(5) of the Real Property Tax Law cites the "rules promulgated by the state board", referring to the Board of Equalization and Assessment. In this regard, I have enclosed a copy of 9 NYCRR §191.5, which requires that certain information be given by an applicant to the appropriate agency before a real property transfer form is made available. I was informed that the reason for the restriction imposed in §574(5) and by the enclosed regulations was likely to protect privacy by precluding what may be characterized as fishing expeditions for numerous real property transfer records. As indicated, however, in the statutory provisions as well as the regulations, disclosures may be made under specified circumstances.

To obtain additional and perhaps more specific guidance on the subject, it is suggested that you might want to contact Stanley J. Jones of the Office of Counsel at the NYS Division of Equalization and Assessment. The

address for that office is Agency Building 4, Empire State Plaza, Albany, New York 12233; Mr. Jones may be reached by phone at (518) 474-8821.

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-2665

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 1, 1982

Russell K. Trank, Information
Security Manager
Fisher-Price Toys
636 Girard Avenue
East Aurora, New York 14052

Dear Mr. Trank:

A copy of your letter of October 11 addressed to Senator Dale Volker has been forwarded to the Committee on Public Access to Records. This office, which received your letter of October 29, is responsible for advising with respect to the New York Freedom of Information Law.

According to your letter, you are interested in obtaining information regarding privacy and data security vis-a-vis your function as Information System Security Manager for the Fisher-Price Toys Company.

I would like to offer the following comments regarding your inquiry.

First, although the Committee has no authority with respect to the federal Freedom of Information and Privacy Acts, I am generally familiar with those statutes. In brief, the federal Freedom of Information and Privacy Acts are applicable to records in possession of federal agencies. The New York Freedom of Information Law is applicable to records in possession of units of state and local government in New York. As such, none of those laws would directly apply to records in possession of a private corporation. Stated differently, no member of the public would have the right to request and obtain records directly from Fisher-Price.

Second, however, if, for example, Fisher-Price has a relationship with a state, local or federal agency, records submitted to an agency would likely become subject to whatever rights of access might exist. For instance, the New York Freedom of Information Law contains a broad definition of "record". Section 86(4) of the New York Freedom of Information Law defines the term "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."

Therefore, if a contract is entered into by a unit of government and a private corporation, the contract and other records pertaining to it in possession of the agency would become subject to rights of access granted by the Freedom of Information Law.

Third, although the Freedom of Information Law is based upon a presumption of access, the Law lists eight grounds for denial of access to records. Of particular interest to you might be §87(2)(d), which states that an agency may withhold records or portions thereof that:

> "are trade secrets or are maintained for the regulations of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

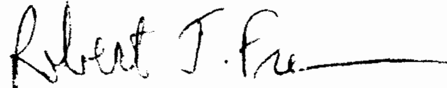
It is also noted that the Freedom of Information Law contains new provisions concerning the treatment and security of trade secrets that may come into the possession of state agencies. In this regard, enclosed is a copy of the Freedom of Information Law, which in §89(5) (see pages eight and nine) details a procedure that state agencies must follow with respect to the treatment of records submitted by corporations that are characterized as trade secrets.

Also enclosed for your consideration are copies of a booklet entited "Your Right to Federal Records" published by the Office of Information Law and Policy of the United States Department of Justice, and an explanatory pamphlet regarding the New York Freedom of Information Law that may be useful to you.

If you have questions regarding the federal legislation, it is suggested that you might want to contact the Office of Information Law and Policy in Washington. If questions arise regarding rights of access to records in New York, please do not hesitate to contact this office.

I hope that I have been of some assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Senator Dale M. Volker

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2666

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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~~BASIL A. PATERSON~~ Charles E. Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 1, 1982

Mr. Frederick J. Kirch

Dear Mr. Kirch:

Bennett Liebman, Counsel to the Lieutenant Governor, has forwarded to this office your letter of October 20 and the materials attached to it. The Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law.

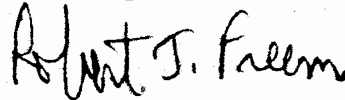
Since the correspondence involves a series of requests sent to the Department of Civil Service, I have contacted the appropriate officials of that agency on your behalf in order to obtain additional information regarding the controversy.

It is noted at the outset that there may be a misconception on your part concerning the nature of the Freedom of Information Law and the obligations that it imposes upon a government agency, such as the Department of Civil Service. In this regard, I would like to emphasize that the Freedom of Information Law is not necessarily a law that grants access to information, but rather is a law that grants access to records. Further, the Freedom of Information Law provides that, as a general rule, an agency is not require to create or prepare a record in response to a request for information. Therefore, if, for example, reasons for an agency's action have not been placed in records, the agency would have no obligation under the Freedom of Information Law to create a record indicating written reasons for its action in response to a request for records. In short, if information requested does not exist in the form of a record, an agency need not create a new record on behalf of an applicant who requests "information".

Based upon discussions with representatives of the Department of Civil Service, it appears that virtually all records pertaining to you or your son that are in possession of the Department have been made available to you. I was also informed that your most recent request concerning general information on the appeals procedure before the Commission has been granted and that those materials will be sent to you 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:jm

cc: Bennett Liebman
Ralph J. Vecchio

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2667

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Charles E. Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 3, 1982

Mr. Leroy James
82-A-1969
354 Hunter Street
Ossining, NY 10562

Dear Mr. James:

I have received your letter of October 27 in which you requested from this office all of your "city and state medical records" in possession of county and/or state correctional facilities in which you have housed during the past six years.

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 authority to compel an agency to grant or deny access to records. Consequently, since the Committee does not have the records that you are seeking, the records in question cannot be made available by this office.

Nevertheless, I would like to offer the following suggestions regarding your inquiry.

First, as a general matter, requests for records should be directed to the agency that maintains the records.

Second, as required by §87(1) of the Freedom of Information Law, the Department of Correctional Services has adopted regulations regarding access to Department records. In this regard, the regulations adopted by the Department of Correctional Services make specific reference to examination of records by inmates in §5.20 and medical records of inmates

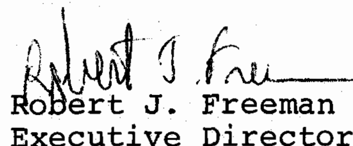
(see §5.24). In addition, depending upon the nature of records, some may be kept by the facility in which you are now located. With respect to those records, a request should be directed to the facility superintendent. If records are kept by other facilities or by the Department of Correctional Services at its offices in Albany, requests should be directed to the facility superintendents or the Department's records access officer in Albany, as the case may be. With respect to records kept by the New York City facilities, it is suggested that a request be sent to the New York City Department of Corrections which is located at 100 Centre Street, New York, New York 10013.

Third, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". If, for example, you have a lengthy medical history, a request for medical records without greater detail might not "reasonably describe" the records sought. As such, it is suggested that you provide as much specificity as possible, including dates, file designations, types of treatment and similar information that will enable the appropriate officials to locate the records sought.

Enclosed for your consideration are copies of the Freedom of Information Law, an explanatory pamphlet on the subject and regulations adopted by the Department of Correctional Services regarding access to Department records. It is recommended that you carefully review those regulations.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2668

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 4, 1982

George Korutz, Chief of Police
Village of Johnson City
42 Willow Street
Johnson City, NY 13790

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 Chief Korutz:

I have received your letter of October 18 and appreciate your interest in complying with the Freedom of Information Law.

Your inquiry concerns a recent amendment to the Freedom of Information Law pertaining to fees for copies. Specifically, it is apparently your contention that a fee of greater than twenty-five cents per photocopy may be assessed if a local law permits a higher fee to be charged. You also wrote that the Police Department charges two dollars for police accident reports, a fee which in your view is not excessive if consideration is given to the volume of reports sought by insurance companies and the time it takes to service their requests.

In my opinion, due to the change in the Freedom of Information Law, the enactment of a local law establishing a fee in excess of two dollars per photocopy could not legally permit the Village to charge more than twenty-five cents per photocopy. As you may be aware, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15 that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". The word "law" has been replaced by the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is not law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, a local law establishing a fee in excess of twenty-five cents per photocopy was valid. However, with the amendment, only an act of the State Legislature would permit the assessment of a fee higher than twenty-five cents per photocopy.

It is noted, too, that the amendment was not directed at fees charged for accident reports, but rather fees charged for records in general. From my perspective, although the twenty-five cent limitation may pertain to accident reports, once again, the intent behind the amendment was to establish a ceiling with respect to fees generally and not with respect to accident reports specifically.

I hope that I 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-2669

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 4, 1982

Ms. Alma Giannini
82-G-124 112 A
247 Harris Road
Bedford Hills, NY 10507

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. Giannini:

I have received your letter of October 28 in which you asked whether it is possible to obtain a list of records available to a person relative to a case in which he or she has been involved.

I would like to offer the following comments regarding your inquiry.

First, 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 grant or deny access to records.

Second, it is in my view doubtful that there is any "list" that would indicate exactly which types of records exist with respect to cases, for the nature of records involved in cases varies. Further, it is impossible to determine exactly which records might be available or the extent to which they may be withheld, for the grounds for denial in the Freedom of Information Law are based largely upon the effects of disclosure. Stated differently, in some cases, certain records might be available, for no ground for denial could be cited; in others, however, similar records might justifiably be withheld because one or more grounds for denial might remain applicable.

Third, with respect to records kept by a correctional facility, it is suggested that you attempt to obtain and review a copy of a so-called "master index" prepared by the Department of Correctional Services. The master index is based upon requirements in the Freedom of Information Law concerning the creation of a "subject matter list". Under the Freedom of Information Law, §87(3)(c) requires that each agency must maintain:

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

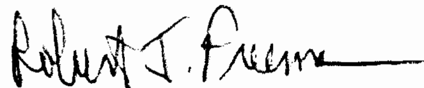
The master index prepared by the Department of Correctional Services pursuant to §5.13 of its regulations is in essence the subject matter list for records of the Department. I have enclosed a copy of the Department's regulations concerning access to Department records for your consideration.

It is emphasized that a master index would not make reference to records pertaining specifically to individual inmates, but rather to categories of records in possession of the Department. As such, by reviewing the Department's master index, you could learn generally of the types of records maintained by the Department.

Lastly, it is suggested that you raise the issue with the attorney of your choice, or perhaps the attorney who handled your case. In the alternative you might want to contact an attorney with a legal aid group or Prisoners' Legal Services, for example. Those individuals could likely provide you with more specific direction than I.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2670

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 4, 1982

Mr. James C. Slaughter
82-A-2479
354 Hunter Street
Ossining, NY 10562

Dear Mr. Slaughter:

I have received your letter of October 18 which reached this office on October 20.

You have requested assistance from this office concerning difficulties you have encountered in requesting various records from the Department of Correctional Services. In particular, you have indicated that you have appealed an original denial to the Counsel of the Department of Correctional Services but as yet have not received a response.

I would like to offer the following comments in response to your inquiry.

As you may be aware, a determination on appeal has been rendered under the Freedom of Information Law by the Counsel to the Department of Correctional Services. Therefore, it would be inappropriate to render an advisory opinion at this time. In a recent decision of the Court of Appeals, it appears that the Court may have limited the Committee's authority to render opinions in those instances in which a final determination has been made following an appeal [see John P. v. Whalen, 75 AD 2d 1021 (1980); aff'd 54 NY 2d 89 (1981)].

With respect to your question concerning a waiver of fees, it is suggested that you review §5.36 of the regulations promulgated by the Department of Correctional Services regarding access to records. That provision indicates that the

waiver of fees is a matter of discretion of the custodian of records. As such, although Department officials may waive fees for copying, there is no requirement that a waiver be given.

I regret that I cannot be of greater assistance. As you requested I am enclosing the original materials that you attached to your letter. 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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2671

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 5, 1982

Mr. Louis J. Mustico
County Attorney
Chemung County
Department of Law
203 Lake Street
Elmira, NY 14901

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. Mustico:

I have received your letter of October 21 concerning a request made under the Freedom of Information Law by Donald C. Mattison. You have asked that I review and advise with respect to Mr. Mattison's request and his ensuing correspondence.

It is noted at the outset that Mr. Mattison has requested a voluminous amount of information which apparently focuses upon events and individuals related to his work as a police informant and in conjunction with his arrest. In this regard, without knowledge of the contents of the records sought, I regret that I can offer only the following general comments.

First, much of the information sought was likely created several years ago. It is possible that some of the records may have been destroyed or discarded. As you are aware, the Freedom of Information Law pertains to existing records and §89(3) states that, as a general rule, an agency need not create a record in response to a request. Therefore, to the extent that information sought does not exist in the form of a record or records, the Freedom of Information Law would not in my view apply.

Second, §89(3) also requires that an applicant submit a request for records "reasonably described". Although Mr. Mattison has provided a significant amount of detail, it is possible that the detail alone might not be sufficient to locate records sought. For instance, Mr. Mattison has requested records pertaining to himself, "regardless of the location or origin", including computer retrievable information, teletype messages, telephone recorded messages and similar information, as well as records pertaining to other named individuals that may have been created over a period of several years. Depending upon the means by which records are filed and stored, despite the degree of detail, it might nonetheless be virtually impossible to locate records sought without a greater degree of detail (i.e., approximate dates when phone calls or other messages may have been recorded). If, under the circumstances, records sought have not been reasonably described, it would appear that the applicant would be required to provide a greater detail in order to enable an agency to locate records sought.

Third, the records sought involve a number of agencies, including Chemung County agencies, the State Police, the FBI, the Secret Service, and the Elmira Police Department. From my perspective, if records prepared by those agencies are in possession of Chemung County, the records would likely be subject to whatever rights of access might exist. Nevertheless, if Chemung County does not have possession of records produced by other state and federal agencies, requests for those records should in my view be directed to the agencies that have custody of the records.

Fourth, Mr. Mattison has contended that the Office of the District Attorney in Chemung County is subject to the federal Freedom of Information and Privacy Acts on the basis that it has accepted funds through federal programs. I disagree with that contention. It is my view that the federal Freedom of Information and Privacy Acts apply only to records of federal agencies. Similarly, the New York State Freedom of Information Law applies to records of units of government in New York, such as Chemung County and its District Attorney's Office.

Fifth, Mr. Mattison requested a "Vaughan Index" itemizing each document or portion thereof that may be denied. Although the Freedom of Information Law and the regulations promulgated by the Committee require that reasons for a denial be stated in writing, I am unaware of any judicial interpretation of the New York Freedom of Information Law that would required the creation of a "Vaughan Index". Moreover, I do not believe that the requirement that a Vaughan Index be prepared has been found to be applicable to all federal agencies.

Sixth, is is possible that existing records sought by Mr. Mattison might fall in whole or in part within one or more grounds for denial found within §87(2)(a) through (h) of the Freedom of Information Law. It is possible in my view that there may be five grounds for denial, depending upon the nature and content of the records. I would like to briefly review the five grounds for denial that might in part be applicable.

The first ground for denial of possible relevance is §87(2)(a), which concerns records that are "specifically exempted from disclosure by state or federal statute". The extent to which records sought might fall within a statutory exemption is unknown to me. However, since the request involves various individuals and records pertaining to them, there might be situations in which records have been sealed (i.e., records of grand jury proceedings).

A second possible ground for denial is §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Once again, since various individuals are the subjects of the request, there may be privacy considerations.

A third ground for denial of possible significance 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."

Without greater knowledge of the circumstances or the individuals who are the subject of the request, I could not conjecture as to the applicability of §87(2)(e).

A fourth ground for denial of possible relevance is §87(2)(f), which permits an agency to withhold records or portions thereof which:

> "if disclosed would endanger the life or safety of any person..."

The extent to which the language quoted above would be applicable would in my view depend upon the specific circumstances and the nature of the records sought.

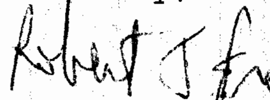
The final ground for denial of possible importance is §87(2)(g), which permits an agency to withhold records that:

> "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..."

Many of the communications made within an agency or between agencies might be withheld depending upon their content. For instance, inter-agency or intra-agency materials consisting of advice, suggestion, impression, opinion, recommendation and the like could perhaps be withheld on the basis of §87(2)(g).

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Donald C. Mattison

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2672

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 8, 1982

Mr. Harold Mondshein

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. Mondshein:

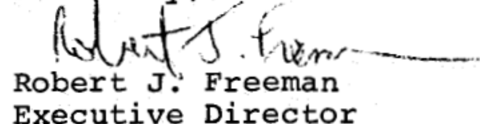
I have received your letter of October 25 in which you again referred to your unsuccessful attempts to obtain records from the New York City Off-Track Betting Corporation (OTB).

Having discussed the matter with a representative of OTB, it appears that OTB does not maintain the records sought. As indicated in earlier opinions, the Freedom of Information Law generally does not require an agency to prepare or create a record in response to a request [see §89 (3)]. Moreover, the requirements of the Freedom of Information Law could not in my view serve to compel an agency to prepare records in conjunction with the terms of a collective bargaining agreement, for example.

Under the circumstances, it would appear that whatever remedy that might exist would be based upon the collective bargaining agreement, rather than the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Lois White

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-824
FOIL-AO-2673

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

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 8, 1982

Dr. Leighton B. Wilklow
Superintendent
Barker Central School
1628 Quaker Road
Barker, NY 14012

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. Wilklow:

I have received your letter of October 28 and appreciate your continued interest in compliance with the Freedom of Information Law.

According to your letter, the Barker Central School District Board of Education has tape recorded its meetings for several years. Recently a citizen "asked to tape the previous night's meeting from the official tape." As records access officer, you granted the request and a duplicate tape was made. You wrote further, however, that you were advised that you "should not have permitted the official tape to be heard or duplicated until the unapproved minutes were made available to the public".

You have requested an opinion regarding the propriety of your action.

In my opinion, your decision to permit duplication of the tape recording of the previous night's meeting was made in compliance with the Freedom of Information Law for the following reasons.

First, as you are aware, the Freedom of Information Law defines "record" in §86(4) expansively to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical from 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."

From my perspective, based upon the language quoted above, a tape recording is clearly a "record" that is subject to rights of access as soon as it exists.

Second, 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 circumstances, since the tape recording involves a meeting open to the general public [see Open Meetings Law, §98(a)], any person could have been present to hear the deliberations recorded on tape. Moreover, it has been found judicially that a tape recording of an open meeting is available under the Freedom of Information Law [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty, NYLJ, Dec. 27, 1978]

Third, it is possible that the advice given to you regarding a delay in disclosing the tape recording might be based upon a failure to distinguish between the requirements of the Freedom of Information Law and the Open Meetings Law. The latter prescribes what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §101 (1) of the Open Meetings Law concerning minutes of open meetings 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."

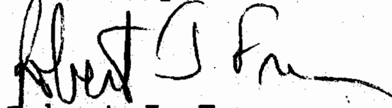
Clearly the language of §101(1) does not require that a public body maintain a verbatim account of every comment made during a meeting. Nevertheless, the Open Meetings Law does not in my opinion preclude a public body from creating a verbatim account by means of a tape recorder, for example, of what may have transpired at a meeting. Since you intimated that minutes are prepared, there is obviously a distinction in terms of content between minutes of meetings and tape recordings of meetings.

Lastly, §101(3) requires that minutes of open meetings be prepared and made available within two weeks of the meetings. Once again, I believe that the requirements of the Open Meetings Law regarding minutes may differ from the requirements of the Freedom of Information Law regarding access to records generally.

In sum, I believe that your decision to duplicate a tape recording of a meeting in response to a request made under the Freedom of Information Law one day after the meeting was entirely legal and 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2674

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 8, 1982

Mr. P.V. McPartland

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. McPartland:

I have received your letter of October 27 in which you asked how you may obtain "test key answers" regarding examinations held for the positions of court officer and senior court officer. You wrote that those examinations were held on May 22.

I would like to offer the following comments regarding 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 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, under the circumstances, there would appear to be one ground for denial of potential significance. Specifically, §87(2)(h) states that an agency may withhold records that:

> "are examination questions or answers which are requested prior to the final administration of such questions."

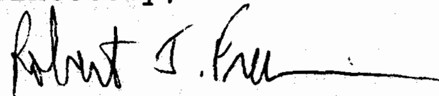
From my perspective, the language quoted above permits an agency to withhold examination questions or answers if the questions will be given in the future. Further, I believe that the reason for the exception is that examination questions are often given several times. In those cases when questions will be given in the future, disclosure of the questions or the answers might subvert the examination process.

As such, to the extent that the questions appearing on the examinations that you cited will be given in the future, it would appear that those question and the answers could justifiably be withheld.

Third, it is suggested that you nonetheless initiate a request in writing under the Freedom of Information Law to the records access officer of the Office of Court Administration. To assist you in your efforts, I have enclosed a copy of an explanatory pamphlet on the Freedom of Information Law that contains sample letters of request and appeal. In addition, as requested, enclosed is a copy of the Freedom of Information Law as recently amended.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2625

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 8, 1982

Chief Robert H. Newman
Department of Police
Village of North Syracuse
608 South Bay Road
North Syracuse, NY 13212

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 Chief Newman:

I have received your letter of October 27 in which you raised questions regarding the "cost that may be charged in addition to the twenty-five cent charge per photo copy of any public record".

More specifically, you indicated that you are "particularly interested as to whether or not a municipality can charge for postage, stationary, or the cost of clerical time in preparing the report."

I would like to offer the following comments regarding your inquiry.

First, in terms of the amendment to the Freedom of Information Law that became effective on October 15, the rationale for the change was based upon various provisions of law that required fees for copying well in excess of twenty-five cents per photocopy. As indicated in the Committee's latest annual report to the Governor and the Legislature on the Freedom of Information Law, which was published on December 3, 1981, and upon which the amendment was based:

> "The existing provision states that an agency may assess a fee of no more than twenty-five cents per photocopy, unless a different fee is required by some other provision of law. The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulations or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Since the Legislature approved the proposal made by the Committee by means of legislation, it is in my view clear that the replacement of the word "law" by "statute" indicates that the only instance in which more than twenty-five cents per photocopy may be charged would involve those cases in which a statute, an act of the State Legislature, so permits or requires.

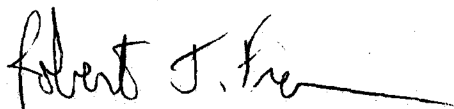
Second, you referred to the preparation of reports. In this regard, the Freedom of Information Law applies to existing records. Section 89(3) of the Law states that, as a general rule, an agency is not required to create or prepare a record in response to a request. However, under the circumstances, it would appear that your inquiry focuses upon existing records, which would be subject to the Freedom of Information Law.

Third, with respect to additional costs that may be imposed, I do not believe that a municipality could charge for stationery, search or clerical time, for example. I believe, however, that it would not be unreasonable to assess a fee for postage based upon the actual cost of whatever postage might be.

In all honesty, since the amendment went into effect, numerous inquiries have been made by insurance companies as well as police departments. It has been suggested that applicants for records furnish stamped self-addressed envelopes.

I hope that I 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-2676

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

November 8, 1982

Mr. Roy A. Krall
71-C-194
135 State Street
Auburn, NY 13021

Dear Mr. Krall:

I have received your letter of November 3 in which you requested information regarding the means by which you might obtain records from the United States District Court, Northern District.

In all honesty, I do not believe that I can provide you with specific direction for the following reasons.

First, the New York Freedom of Information Law applies to records of agencies. In this regard, §86(3) 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."

In turn, §86(1) defines "judiciary" to include:

> "...the courts of the state, including any municipal or district court, whether or not of record."

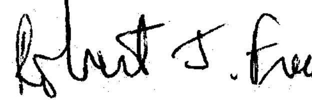
Based upon the definitions quoted above, the Freedom of Information Law would not apply to New York State courts.

And second, since the records in question are apparently in possession of a federal court, access to the records of that court would likely be governed by provisions of federal laws with which I am unfamiliar.

It is suggested that you confer with a representative of a legal aid group or Prisoners' Legal Services, for example. I would conjecture that attorneys from those organizations could provide you with much better direction 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

FOIL-AO-2677

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 9, 1982

Mr. Stan Hersh
Director of Pupil Personnel Services
Monticello Central School District
Monticello, New York 12701

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. Hersh:

I have received your letter of November 1 in which you requested an advisory opinion regarding rights of access to student records requested by a non-custodial parent.

It is noted at the outset that, under the circumstances, rights of access would likely be determined under the provisions of the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g). Although the Committee on Public Access to Records does not have specific authority to advise under that Act, as a service and in conjunction with advice given to this office by the United States Department of Education, I would like to offer the following comments.

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 is based largely upon the provisions of the federal Family Educational Rights and Privacy Act 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:

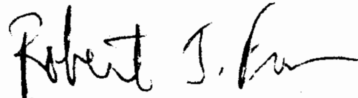
> "...a parent, a guardian, or an individuals acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence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

Lastly, I would like to point out that in a similar situation, it was found by Supreme Court, Albany County, that a non-custodial parent enjoys rights conferred by the Family Educational Rights and Privacy Act, even when the custodial parent signed a statement indicating that she did not authorize a school district to transmit records to the natural father [Page v. Rotterdam-Mohonasen Central School District, 441 NYS 2d 323 (1981)]. Further, the Court specified that the natural parent has rights granted under the Act, "unless such access is barred by state law, court order or legally binding instrument", none of which were present (id. at 325).

I hope that I 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-2678

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

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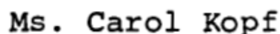
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 9, 1982

Ms. Carol Kopf



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. Kopf:

I have received your letter of October 23 in which you requested an advisory opinion under the Freedom of Information Law.

Attached to your letter are copies of correspondence between yourself and the State University of New York (SUNY) at Stony Brook concerning records of the Dental School that you requested under the Freedom of Information Law. Although you have received various documents in response to your request, you apparently have been denied access to "Any letters or data from anyone informing the Dental School of adverse reactions someone received from using flouride in any form". You have noted in your request that "The names, addresses and any identifying information can be deleted."

I would like to offer the following comments in response 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 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, a review of the correspondence that you received from the Administration Office of SUNY at Stony Brook appears to offer conflicting responses to your request. In a letter dated July 19, 1982 from Mr. John Gibbs, Assistant to the Vice President for Administration, he indicated that the records you requested would be made available after personally identifying information was deleted. Nevertheless, Mr. Gibbs' successor notified you on October 22 that:

> "...we are unable to comply with your request for letters from participants in the programs in that release of such information would be an invasion of privacy, a breach of confidentiality, as well as the fact that they are considered non-final intraagency documents and are part of an ongoing research study."

With respect to written complaints submitted to an agency, it has been consistently advised that the substance of the complaint is available, but that identifying details regarding a complainant may 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. Additionally, §89(2)(c)(i) permits disclosure of records containing personal information when "identifying details are deleted". Therefore, in my view, the substance of complaints regarding the flouride program should be made available after deletion of personally identifying information as originally indicated in Mr. Gibbs' letter.

Third, you have also inquired as to the relevance of §87(2)(g) of the Freedom of Information Law as a basis for withholding letters of complaint. 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. 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.

Nevertheless, in my opinion, §87(2)(g) would not apply in this instance, for letters of complaint submitted by or on behalf of dental school patients would not constitute records created by an "agency" as defined in §86(3) of the Law. As such, it does not appear that §87(2)(g) could be cited as a basis for withholding.

Lastly, you requested information concerning the time periods within which an appeal may be made. In her letter of October 12, Ms. Rosemarie Williams Nolan in my view correctly advised you that you may appeal a denial of access to the Office of University Counsel, Sanford Levine, Esq. An appeal following a denial of access to records may be made within thirty days after receipt of a denial by the agency's designee. The appeals 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

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

Enc.

cc: Rosemarie Williams Nolan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2679

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 12, 1982

Mr. Donavan Blissett
80-B-1405
P.O. Box 618
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. Blissett:

I have received your letter of November 5, which reached this office on November 12.

Your letter concerns requests for copies of medical records pertaining to you directed to various officials at the Auburn Correctional Facility. It appears that your letter to this office might be in the nature of an appeal following a denial of access.

I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records is authorized to advise with respect to the Freedom of Information Law. As such, the Committee does not have the capacity to require an agency, such as the Department of Correctional Services, to grant or deny access to records. Further, this office does not render determinations on appeal.

Second, §89(1) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate general regulations regarding the procedural implementation of the Law. In turn, §87(1) requires that each agency develop its own regulations consistent with those

promulgated by the Committee. The Department of Correctional Services has done so by means of the enclosed regulations, which in §§5.1 through 5.54 provide a procedural framework regarding access to Department records.

It is noted that if there is a denial, an appeal may be directed to Counsel to the Department (see §5.45). I would also like to point out that there are specific provisions regarding medical records found within §5.24.

Lastly, it is possible that medical records pertaining to a particular individual might not in their entirety be available to that individual under the Freedom of Information Law. In this regard, one of the grounds for denial in the Freedom of Information Law 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..."

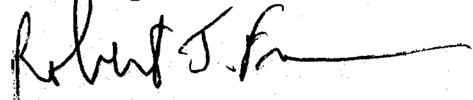
It is noted that the language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, to the extent that medical records contain factual information, I believe that they would be available. However, those records reflective of advice, diagnostic opinion and similar information could likely be withheld.

It is suggested that you carefully review the enclosed regulations, for I believe that they will serve to answer many of your questions and will help you to request records from the appropriate officials.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2680

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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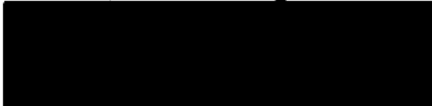
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 12, 1982

Mr. Frank Kiley



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. Kiley:

I have received your letter of November 3 in which you requested a copy of the amended Freedom of Information Law and regulations regarding access to medical records.

First, enclosed as requested are copies of the Freedom of Information Law as amended on October 15 and an explanatory pamphlet on the subject that may be useful to you.

Second, with respect to medical records, there are no general laws or regulations that could likely answer all of your questions regarding medical records. However, I would like to offer the following comments on the subject.

It is noted that the Freedom of Information Law applies only to records of units of government in New York. The Freedom of Information Law applies to records of agencies and defines "agency" in §86(3) to mean:

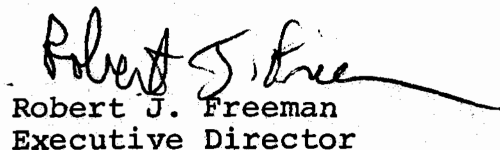
> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or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

Since the Law includes within its scope governmental entities performing a governmental function, it would not apply to records in possession of private sector employers, doctors and many hospitals. Therefore, if, for example, medical records are found within the personnel file of an employee who has worked for a private sector company, those records would in my view fall outside the scope of rights of access granted by the New York Freedom of Information Law.

Perhaps the most generally applicable provision of law regarding medical records is §17 of the Public Health Law, a copy of which has been enclosed. In brief, §17 of the Public Health Law states that, upon the request of a patient, a physician designated by the patient may request and obtain medical records pertaining to that patient from another physician or hospital. As such, as a rule, a patient does not enjoy direct rights of access to medical records pertaining to him or her. However, as indicated in §17, there may be an indirect method of obtaining medical records regarding a patient by the patient's designated physician.

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-2681

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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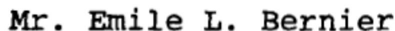
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 16, 1982

Mr. Emile L. Bernier


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. Bernier:

I have received your letter of November 8 in which you requested a copy of the Freedom of Information Law and raised questions regarding the capacity to copy criminal records.

First, as requested enclosed are copies of the Freedom of Information Law as recently amended and an explanatory pamphlet on the subject that may be useful to you.

Second, rights of access to criminal records are in my view dependent upon the specific nature of the records sought. Although the Freedom of Information Law is based upon a presumption of access, there are several grounds for denial that might apply to criminal records. For instance, §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

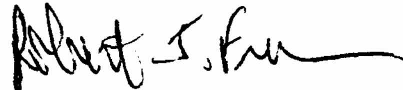
iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

From my perspective, the language quoted above is based upon potentially harmful effects of disclosure. Therefore, if, for example, records relate to an ongoing investigation and disclosure would interfere with the investigation, they could likely be withheld.

Third, assuming that records are available and that no ground for denial would apply, I believe that you could inspect the records, take notes from them or, depending upon the circumstances, copy them. Whether you could photocopy or microfilm records with your own equipment would in my view depend in part upon available space, other resources that might be present, the use of light and electricity and similar considerations. It is noted, too, that an agency subject to the Freedom of Information Law is required to make photocopies of accessible records upon payment of the appropriate fees for photocopying [see §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

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2682

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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 16, 1982

Ms. Jessica Currie

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. Currie:

I have received your recent letter in which you requested information concerning the means by which you can obtain records pertaining to and on behalf of a person who is currently incarcerated.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you, for it contains sample letters of request and appeal. In addition, I would like to offer the following comments regarding your inquiry.

First, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. As such, this office does not have possession of records generally, such as those in which you are interested, nor does it have the authority to require that records be disclosed or withheld.

Second, the Freedom of Information Law applies to governmental entities in New York [see Freedom of Information Law, definition of "agency", §86(3)]. Therefore, the Freedom of Information Law would not apply to records in possession of private employers, for example.

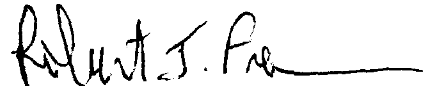
Third, requests should be directed to the agencies that you believe might have records pertaining to the individual in question, such as the New York City Police Department, the office of the district attorney, etc.

Fourth, the Freedom of Information Law requires in §89(3) that a request "reasonably describe" the records sought. Therefore, when making a request, as much specificity as possible should be given, including names, dates, nature of the information sought, file designations, index numbers and similar information.

Lastly, although the Freedom of Information Law does not include the courts and court records within its coverage, much of the information that you are seeking might be in possession of the court in which a proceeding was conducted. Consequently, it is suggested that you might want to contact 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2683

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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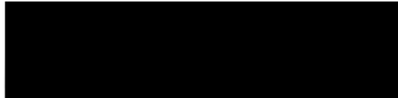
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 16, 1982

Mr. William Everett Sternberg



Dear Mr. Sternberg:

I have received your letter of November 12 in which you appealed a denial of access to records on the ground that no response to your request was given.

I would like to offer the following comments regarding your inquiry.

First, under §89(4)(a) of the Freedom of Information Law (see attached) an appeal should be directed to the head or governing body of the agency in possession of the records. Although the cited provision requires an agency to transmit to the Committee on Public Access to Records copies of appeals and the determinations that follow, the Committee has no authority to render a determination.

Second, the Freedom of Information Law includes within its scope agency records. In this regard, §86(3) defines "agency" to include:

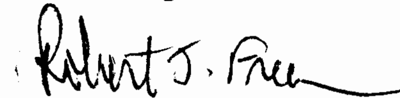
> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or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

Based upon the language quoted above, the Freedom of Information Law in my view includes governmental entities. Therefore, if the hospital to which your request was made is not a state or municipal hospital, for example, the Freedom of Information Law would not apply. Conversely, if the hospital in question is owned and operated by the state or a unit of local government, its records would in my view be subject to whatever rights of access might exist under the Freedom of Information Law.

Lastly, if the hospital in question is an "agency" required to comply with the Freedom of Information Law, as indicated earlier, an appeal should be directed to the person or body designated to render determinations on 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-2684

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 16, 1982

Mr. Paul Glenn
79-A-1059
Pouch One
Woodburne, NY 12788

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. Glenn:

I have received your letter of October 28 in which you described your transfers among state correctional facilities, some of your medical problems, and in which you requested assistance regarding the means by which you may obtain medical records pertaining to you.

I would like to offer the following comments regarding 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 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.

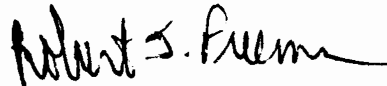
Second, §89(1) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations that govern the procedural aspects of the Law. In turn, §87(1) requires each agency to adopt regulations consistent with those of the Committee. In this regard, the Department of Correctional Services has promulgated the enclosed regulations regarding Department records.

Third, it is emphasized that the regulations of the Department of Correctional Services make specific reference to requests by inmates (see §5.20) and inmate medical records (see §5.24). It is suggested that you carefully review the regulations to determine the procedures and persons to whom your requests should be directed.

Lastly, §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. In view of your lengthy medical problems, it is likely that a request for "medical records" without greater specificity would not reasonably describe the records. As such, when making a request, it is recommended that you include as much detail as possible, i.e., dates, the nature of an illness, where you may have been located at the time of an illness, and similar information.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2685

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 17, 1982

Mr. Frankie Sands
81-A-1445 - B-20/14
Box 149
Attica, New York 14011-0149

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. Sands:

I have received your recent letter in which you indicated that you have unsuccessfully attempted to gain access to medical records pertaining to you. As such, you have requested information, including forms, that you might need in your efforts to obtain medical records.

I would like to offer the following comments regarding your inquiry.

First, there is no specific form that is necessary with respect to the submission of a request made under the Freedom of Information Law. Section 89(3) of the Law, however, requires that an applicant for records submit a request for records "reasonably described". As such, any request made in writing that reasonably describes the records sought should be sufficient. It is suggested that in making a request you provide as much specificity as possible, including dates, the nature of an illness, where treatment may have been given and similar details that might enable officials to locate the records.

Second, §89(1) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate general regulations regarding the procedural implementation of the Law. In turn, §87(1) requires that each agency develop its own regulations consistent with those promulgated by the Committee. The Department of Correctional Services has done so by means of the enclosed regulations, which in §§5.1 and 5.54 provide a procedural framework regarding access to Department records.

It is noted that if there is a denial, an appeal may be directed to Counsel to the Department (see §5.45). I would also like to point out that there are specific provisions regarding medical records found within §5.24.

Third, it is possible that medical records pertaining to a particular individual might not in their entirety be available to that individual under the Freedom of Information Law. In this regard, one of the grounds for denial in the Freedom of Information Law 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. 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.

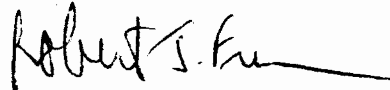
Under the circumstances, to the extent that medical records contain factual information, I believe that they would be available. However, those records reflective of advice, diagnostic opinion and similar information could likely be withheld.

It is suggested that you carefully review the enclosed regulations, for I believe that they will serve to answer many of your questions and will help you to request records from the appropriate officials.

Lastly, if the medical records in question involve those of private hospitals or physicians, the Freedom of Information Law would not apply. Nevertheless, I have enclosed a copy of §17 of the Public Health Law which applies generally to medical records in possession of physicians and hospitals in New York. The cited provision does not grant direct rights of access to medical records to the subject of the records. However, it does indicate that a patient may designate the physician of his or her choice to request and obtain medical records pertaining to the patient from other physicians or hospitals.

I hope that I 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-2686

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

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 17, 1982

Mr. Kenneth R. Dash

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. Dash:

I have received your letter of November 12 in which you requested an advisory opinion regarding your rights of access as a non-custodial parent to student records pertaining to your children.

It is noted at the outset that, under the circumstances, rights of access would likely be determined under the provisions of the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g). Although the Committee on Public Access to Records does not have specific authority to advise under that Act, as a service and in conjunction with advice given to this office by the United States Department of Education, I would like to offer the following comments.

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 is based largely upon the provisions of the federal Family Educational Rights and Privacy Act 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:

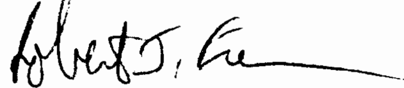
> "...a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence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

Lastly, I would like to point out that in a similar situation, it was found by Supreme Court, Albany County, that a non-custodial parent enjoys rights conferred by the Family Educational Rights and Privacy Act, even when the custodial parent signed a statement indicating that she did not authorize a school district to transmit records to the natural father [Page v. Rotterdam-Mohonasen Central School District, 441 NYS 2d 323 (1981)]. Further, the Court specified that the natural parent has rights granted under the Act, "unless such access is barred by state law, court order, or legally binding instrument", none of which were present (id. at 325).

I hope that I 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: Roper Larsen, Superintendent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2687

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 17, 1982

Mr. John R. Fridell
82-A-2797
(B) Building X520
354 Hunter Street
Ossining, NY 10562

<u>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.</u>

Dear Mr. Fridell:

I have received your letter of November 8 in which you requested assistance from this office concerning access to personal information.

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. Nevertheless, I would like to offer the following comments regarding your inquiry.

First, §89(1) of the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural implementation of the Freedom of Information Law. In turn, §87(1) of the Law requires that agencies adopt regulations in conformity with those promulgated by the Committee.

Second, the Department of Correctional Services, which likely maintains possession of the records in which you are interested, has promulgated regulations under the Freedom of Information Law. Several aspects of those regulations involve various types of inmate records and rights of access on the part of inmates to records pertaining to them. I have enclosed a copy of those regulations for your consideration.

Third, the person designated to deal with requests for inmate records is the facility superintendent. As such, it is suggested that you submit your requests to the superintendent of the facility in which you are housed. I have enclosed an explanatory pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" which contains sample letters of request and appeal that may be useful to you.

Fourth, with respect to parole records, it is suggested that you direct your request to the Division's records access officer at the following address:

NYS Division of Parole
1450 Western Avenue
Albany, New York 12203

Lastly, you indicated that you are interested in reviewing your records to determine if there are any misstatements. Although there is no statutory right to correct records in possession of state agencies of which I am aware, §5.50 of the Correction regulations sets forth a procedure by which you may seek to amend or correct information contained in records of the Department of Correctional Services that pertain 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-2688

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 18, 1982

Mr. Dennis F. Hummel
Metropolitan Reporting Bureau
Box 926
William Penn Annex
Philadelphia, PA 19105

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. Hummel:

As you are aware, I have received your letter of October 22 in which you requested a clarification from this office concerning Chapter 73 of the Laws of 1982, an amendment to the Freedom of Information Law.

Specifically, you wrote that you have experienced difficulty in obtaining copies of accident reports from various police departments since Chapter 73 of the Laws of 1982 became effective on October 15, 1982. Attached to your correspondence are copies of letters you have received from several police departments regarding the fees assessed for accident reports.

I would like to offer the following comments in response to your inquiry.

First, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15 of this year that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, a local law establishing a fee in excess of twenty-five cents per photocopy was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy.

It is noted, too, that the amendment was not directed at fees charged for accident reports, but rather fees charged for copies of records in general. From my perspective, although the twenty-five cent limitation may pertain to accident reports, once again, the intent behind the amendment was to establish a uniform maximum charge with respect to fees generally and not with respect to accident reports specifically.

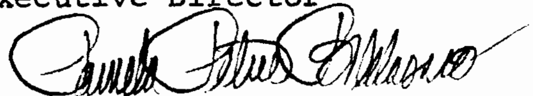
Second, you indicated that some of the police departments with which you have been in contact believe that they may "exempt" themselves from the maximum charge of twenty-five cents per photocopy by adopting the fees set forth in §202 of the Vehicle and Traffic Law. Section 202(3) authorizes a copying fee of $3.50 for accident reports obtained from the Department of Motor Vehicles. However, since that provision of the Vehicle and Traffic Law pertains to particular records in possession of the Department of Motor Vehicles only, in my opinion, other agencies, such as municipal police departments, cannot unilaterally adopt policy or regulations authorizing higher fees without specific statutory authority.

Lastly, you wrote that the City of New York has not advised you of any change in its fee for accident reports which has been $10.00 per copy. In some instances, provisions of the New York City Charter have the effect of a statute enacted by the New York State Legislature depending upon the means by which charter provisions may have been legislated. Therefore, if the fee in question was authorized by legislation comparable to a statute, such a fee would in my opinion be valid, for it would be "prescribed by statute".

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

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

cc: Village of Tarrytown Police Department
Town of Mt. Pleasant Police Department
Town of Riverhead Police Department
Town of Cornwall Police Department
Village of Depew Police Department

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2689

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 23, 1982

Mrs. Meryl Fiedelman

Dear Mrs. Fiedelman:

As you are aware, your letter of November 5 addressed to the Department of Law has been forwarded to the Committee on Public Access to Records. The Committee is authorized to advise with respect to the Freedom of Information and Open Meetings Laws.

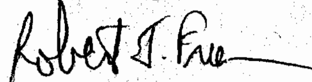
In conjunction with your request, I have enclosed copies of the New York Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects of the Law, and an explanatory pamphlet on the subject that may be particularly useful to you.

Your letter also made reference to materials that would be helpful with regard to New York's "Privacy Act". Please be advised that there is no general privacy act or other provision of law that applies specifically to the protection or privacy of records held by agencies of government in New York.

I would like to point out, however, that the Freedom of Information Law in §87(2)(b) permits an agency to withhold records or portions of records the disclosure of which would result in "an unwarranted invasion of personal privacy. In addition, §89(2) of the Law provides further guidance regarding unwarranted invasionsof personal privacy. Moreover, there are numerous other provisions of law that require that records identifiable to individuals must be kept confidential.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-828
FOIL-AO-2690

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 23, 1982

Ms. Irene Kim Seerup
Town Clerk
Box 178B
Putnam Station, NY 12861

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. Seerup:

I have received your letter of November 8 addressed to Ms. Baldasaro of this office in which you raised several questions regarding minutes of meetings and executive sessions.

Your first area of inquiry concerns a situation in which the Town Clerk is not permitted to attend an executive session. Under those circumstances, you have asked who might take minutes and whether such minutes would be forwarded to the Town Clerk.

It is noted in this regard that the Town Board may but need not admit you to its executive session. Section 100(2) of the Open Meetings Law provides that:

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

Consequently, if the Board wishes that you or any other person be present at an executive session, you may attend. However, there is nothing in the Law that requires the presence of a clerk at an executive session.

From my perspective, one of the problems lies in the potential conflict between the Open Meetings Law and §30 of the Town Law, entitled "[P]owers and duties of town clerks". Subdivision (1) of §30 states in relevant part that the clerk "shall attend all meetings of the town board, act as clerk thereof and keep a complete and accurate record of the proceedings of each meeting and of all propositions adopted pursuant to this chapter". In my view, the direction provided by §30 of the Town Law, which was enacted decades ago, could not have envisioned the Open Meetings Law that was enacted in 1976. However, since a public body may generally take action during an appropriate executive session [see Open Meetings Law, §§100(1) and 101(2)], I doubt that it is necessary for the clerk to be present during the entire time in which a board is conducting an executive session. So long as a person present at the executive session provides the clerk with a record of the action taken at an executive session, as well as the date and vote thereon, I cannot envision any reason for requiring the clerk to be present at a meeting while the Board is conducting an executive session.

I would also like to point out that minutes need not necessarily be taken with respect to all executive sessions. With regard to minutes of executive sessions, §101(2) of the Open Meetings Law states that:

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include an 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, if, for example, a public body deliberates in an executive session but takes no action, minutes of the executive session need not be prepared. Stated differently, minutes of executive sessions must be created only when action is taken during an executive session.

Your second area of inquiry concerns the propriety of discussing two particular topics in executive session. Specifically, you asked whether a town board may enter into an executive session "to discuss Bids for a Highway Truck to be purchased" or to consider "transfer of Town funds".

Without an additional description of the topics, it would appear that no ground for executive session would exist regarding a discussion of a transfer of town funds. With regard to the bid situation, among the eight limited grounds for executive session listed in the Open Meetings Law [see §100(1)], there is only one that might be cited. Section 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..."

It is possible that a discussion of bids might involve the "financial or credit history of a particular...corporation". To that extent, an executive session could likely be held.

The third question involves special meetings, work sessions or committee meetings held by the Town Board and whether the Town Clerk must attend or the public may attend.

I would like to stress in this regard that the courts have expansively interpreted the scope of what constitutes a meeting. In a landmark decision, the state's highest court found that the definition of "meeting" [see Open Meetings Law, §97(1)] includes any gathering of a quorum of a public body held to conduct 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)]. As such, I believe that special meetings, work sessions and committee meetings [see definition of "public body", §97(2)] must be convened open to the public and preceded by notice given in accordance with §99 of the Open Meetings Law.

With respect to the presence of the Town Clerk, I believe that §30 of the Town Law generally requires the presence of the Clerk at all meetings. However, in view of the expansive scope of the Open Meetings, which, as indi-

cated earlier, could not likely have been foreseen when §30 of the Town Law was enacted, if it is established in advance that no action will be taken, it is questionable in my view whether the Clerk must be present. For example, if the Town will be involved in discussions of a budget each night of the week, and if it is clear that no action will be taken during those meetings, the presence of the Clerk might not be necessary. However, it is suggested that you discuss the matter with the Town Board.

The next question concerns the length of time that notes of a public hearing must be kept prior to their destruction. I believe that the statute that determines this question is §65-b of the Public Officers Law, which states in brief that a municipality cannot dispose of records without the consent of the Commissioner of Education. In turn, the Commissioner has developed detailed schedules for the retention and disposal of particular records. As such, to obtain an answer to your question, it is suggested that you call or write to the State Archives at the Education Department.

Your last question is whether a Town Clerk can make a copy of a Town audit for a person's own file, or whether copies should not be made on request for members of the public.

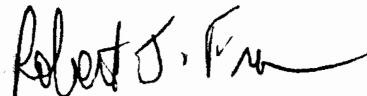
Here I direct your attention to the Freedom of Information Law. In this regard, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2) (a) through (h) of the Law.

From my perspective, audits of municipalities have long been available from either a municipality or the State Department of Audit and Control. Further, the Freedom of Information Law in §89(3) requires that an agency make copies of accessible records upon payment of the appropriate fees. As such, I believe that any person may request and obtain a copy of a Town audit.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, and an explanatory pamphlet that deals with both subjects.

I hope that I 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-2691

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 23, 1982

Mr. Timothy D. Paul
Police Administrator
Baldwinsville Police Department
Office of the Police Administrator
16 West Genesee Street
Baldwinsville, New York 13027

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. Paul:

I have received your letter of November 3 and appreciate your interest in complying with the Freedom of Information Law. Your questions generally pertain to motor vehicle accident reports.

First, you requested assistance in the development of "guidelines and regulations" concerning the release of police and traffic accident reports. You also asked if this office has a "model" set of rules and regulations for local government in the area of police and traffic accident reports.

In this regard, to the extent that guidance exists concerning the release of the records in question, it is found in statutory provisions of law. For example, with respect to accident reports, direction has long been provided by means of §66-a of the Public Officers Law. Additional direction is given in Article 6 of the Public Officers Law, which is also known as the Freedom of Information Law. One provision of particular relevance relative to police reports and records is §87(2)(e) pertaining to records compiled for law enforcement purposes.

The other areas of guidance might be found in the regulations promulgated by the Committee under the Freedom of Information Law. Those regulations deal with the procedural aspects of the Law. In addition, to assist agencies in developing procedures, "model regulations" have been prepared.

Enclosed for your consideration are copies of §66-a of the Public Officers Law, the Freedom of Information Law, the regulations and model regulations prepared by the Committee, and an explanatory pamphlet on the subject.

Your second area of inquiry concerns the propriety of a policy of the Baldwinsville Police Department. It is apparently your understanding that accident reports need not be released by the Department, and that requests for those reports may be forwarded to the Department of Motor Vehicles.

In my view, the Police Department is required to respond to requests for accident reports, and it would be inappropriate to routinely refer requests to the Department of Motor Vehicles.

Once again, I direct your attention to §66-a of the Public Officers Law. In my opinion, the cited provision requires a police department in possession of accident reports to respond to requests for the reports and make them available, except as otherwise indicated. Further, I believe that §66-a is consistent with the Freedom of Information Law. Specifically, §86(4) of the Freedom of Information Law defines "record" to mean:

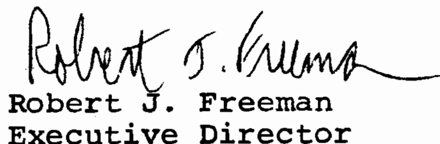
> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical for whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs,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

Since an accident report would be an agency record, once again, I believe that a police department would be required to respond to a request for an accident report in its possession, even if a copy of the same report is maintained by the Department of Motor Vehicles.

Lastly, you requested that you be given a "'model' request form for release of information under the Freedom of Information Act". In this regard, the Committee has not prescribed or devised any particular form. Section 89(3) of the Law states that an applicant should submit a written request for a record "reasonably described". As such, it has been advised that any request for records reasonably described should suffice. It is also noted that a sample letter of request appears in 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

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2692

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 29, 1982

Mr. Larry D. Wilson
The Leader
P.O. Box 1017
Corning, NY 14830

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. Wilson:

I have received your letter of November 24 in which you requested "information on what records kept by a municipal police department are open to the public and the press".

In this regard, due to the structure of the Freedom of Information Law, it is impossible to state with certainty which records of a municipal police department are available or deniable. Rights of access are dependent upon the specific contents of the records and the time in which records are requested.

In terms of background, the Freedom of Information Law as originally enacted in 1974 listed certain categories of accessible records, including police blotters and booking records. The deficiency of the original Law was that unless records requested fell within one or more of the categories of available records, an applicant had no rights. The current Freedom of Information Law, which became effective on January 1, 1978, reversed the structure of the original Law and 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.

To provide you with an example, a ground for denial often cited by police departments is §87(2)(e). The cited provision states that an agency may withhold records or portions thereof that:

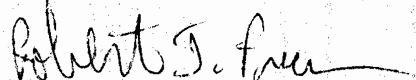
> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information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

From my perspective, the language quoted above is based upon potentially harmful effects of disclosure. If an investigation is ongoing and disclosure of records compiled for law enforcement purposes would interfere with an investigation, the records could likely be withheld under §87(2)(e)(i). Conversely, if, for example, an investigation has been terminated, the harmful effects of disclosure described in §87(2)(e) might essentially disappear. Under those circumstances, it is possible that records that may have justifiably been withheld in the past could become accessible in the future.

To provide you with additional information on the subject, I have enclosed a copy of the Freedom of Information Law and an explanatory pamphlet on the subject.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2693

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 29, 1982

Mr. Tyrone Knowles
81-B-1995
Fishkill Correctional Facility
Box 307
Beacon, New York 12508

Dear Mr. Knowles:

I have received your letter of November 25 in which you requested that this office send you copies of your "personal records", "personal history" and your "Correctional Supervision history records".

I would like to offer the following comments regarding your request.

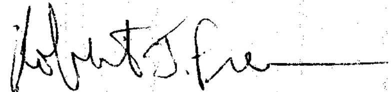
First, the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. As such, the Committee does not have possession of records generally, such as those in which you are interested.

Second, §89(1) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural aspects of the Law. In turn, §87(1) requires each agency to develop its own regulations consistent with those of the Committee. In this regard, since your request deals with records of the Department of Correctional Services, I would like to point out that the Department has adopted procedural rules and regulations concerning access to Department records. Enclosed is a copy of those regulations.

Lastly, it is emphasized that the regulations contain specific provisions regarding the examination of inmate records by inmates and their attorneys (see §5.20). Further, the cited provision indicates that a request should be directed to the facility superintendent. It is suggested that you review the enclosed regulations carefully, for they may be of substantial value to you.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2694

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 6, 1982

Mr. Lee Clarke
Department of Sociology
SUNY at Stony Brook
Stony Brook, NY 11794

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. Clarke:

As you are aware, I have received your letter of November 10 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a denial of access relative to six areas of records requested from the Office of General Services (OGS). Many of the records involve materials submitted to OGS by VERSAR, Inc., a consulting firm. The records sought involve the accident and resultant contamination of the Binghamton State Office Building, and those denied were withheld on the basis of §87(2)(g) of the Freedom of Information Law.

In response to the denial, you have contended that VERSAR is not an agency and that, therefore, §87(2)(g) concerning inter-agency and intra-agency materials cannot be cited as a basis for withholding. It is also your view that much of the material consists of "statistical or factual tabulations or data" that must be made available and that, according to the Legislative Declaration in the Freedom of Information Law (§84), you should have "the right to know and to review the documents and statistics leading to determinations..."

I would like to offer the following comments regarding your inquiry.

It is noted at the outset that I have discussed the matter of records pertaining to the accident in question with officials of OGS on several occasions. In this regard, it is clear that the event to which the records relate is unique and that, as a consequence, the materials being developed are equally unique. It is also emphasized that the records sought represent but a small portion of the documentation likely to be produced and analyzed concerning the accident. As such, at this juncture, rights of access to the records sought are in my view unclear. Further, I would like to point out that neither myself nor the Committee has the authority to review or evaluate records that are the subject of a request.

With regard to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

However, from my perspective, it is possible that several of the grounds for denial might relate to the records sought.

First, with respect to the cited basis for withholding, §87(2)(g), I believe that it might be applicable even though VERSAR is not an agency. In this regard, I direct your attention to Seacrest v. Stubing [442 NYS 2d 130, 82 AD 2d 546 (1981)], which involved records submitted to a town by a consulting firm that provided records on a contractual basis with the town, and in which it was held that those records fell within the scope of §87(2)(g). Based upon that decision, even though VERSAR might fall outside the definition of "agency" appearing in §86(3) of the Freedom of Information Law, the records that it has submitted to OGS might nonetheless be considered intra-agency materials.

It is noted that the characterization of records as inter-agency or intra-agency materials would not in my view automatically permit that the records be withheld. As you are aware, §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. 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, I could not conjecture as the extent to which the materials in question are reflective of advice, recommendations or opinions as opposed to statistical or factual information. Moreover, I am unaware of the extent to which advice and statistical or factual data may be intertwined.

A second possible 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..."

Since the duties of OGS in relation to the accident are continuing, it is in my view possible that premature disclosure might impair present or imminent contract awards. To that extent, §87(2)(c) would be applicable.

A third ground for denial of potential significance is §87(2)(d). The cited provision states that an agency may withhold records or portions of records that:

> "are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Once again, I am unfamiliar with the contents of the records. As such, I am unaware of whether the records contain what might properly be characterized as trade secrets which if disclosed would cause substantial injury to the competitive position of a commercial enterprise. Due to the uniqueness of the situation, the methodology employed by VERSAR might itself be viewed as a trade secret.

A fourth ground for denial of possible relevance is §87(2)(f), which states that an agency may withhold records or portions thereof that:

> "if disclosed would endanger the life or safety of any person..."

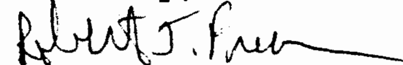
While the language quoted above is most often cited in conjunction with matters prepared relative to criminal law enforcement investigations, due to the unusual circumstances, I do not believe that it could be stated with certainty that the cited provision might not have relevance to the records sought.

Lastly, §87(2)(a) concerns records that "are specifically exempted from disclosure by state or federal statute". In this regard, there may be other applicable statutes that prohibit disclosure or permit confidentiality. For instance, §3101(d) of the Civil Practice Law and Rules states that material prepared for litigation need not be disclosed. In view of various claims that have been or may be initiated against the state with respect to the accident, it is possible that some of the records in question might be considered material prepared for litigation. Under those circumstances, the records would be exempt from disclosure by statute.

In sum, it is reiterated that the records in which you are interested pertain to a unique situation and that rights of access to those records are in my view conjectural at this juncture.

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-2695

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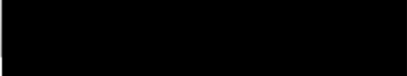
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 6, 1982

Mr. Frederick J. Kirch



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. Kirch:

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

Your letter concerns requests to the Department of Civil Service made under the Freedom of Information Law. If I understand your question accurately, you have asked whether the Department of Civil Service can or should send copies of materials to this office that it makes available to you, "as evidence of compliance".

I would like to offer the following comments regarding your inquiry.

First, the Committee has the authority only to advise with respect to the Freedom of Information Law. As such, this office has no greater rights of access to records than any member of the public.

Second, the Law contains no notification requirement, except when a request is denied and an appeal is taken. In this regard, §89(4)(a) 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. In addition, each agency shall immediately forward to the committee on public access to records a copy of such appeal and the determination thereon."

As such, the only reporting responsibility of an agency involves transmitting to the Committee copies of appeals and the determinations that follow. When that process works well, the Committee can effectively attempt to monitor compliance with the Law.

Lastly, for an agency to do as you suggested would in my view be unnecessary, for as a general rule, this office has no specific interest in records that may be requested; on the contrary, its interest is in providing appropriate advice under the Freedom of Information Law. Further, even if copies of records were sent to the Committee, there would be no way of knowing whether the records were in fact those requested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2696

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 7, 1982

Jerome J. Jacobson, Esq.
6485 East Lake Road
Mayville, NY 14757

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. Jacobson:

I have received your letter of November 6 and the materials attached to it. Please accept my apologies for the delay in response.

According to your letter, you submitted a request under the Freedom of Information Law on October 21 to the Chautauqua County Election Commissioner. In his response, which you characterized as "self-contradictory", the Commissioner indicated that the records could not be made available unless you provided the addresses of those individuals to whom the records relate.

I would like to offer the following comments regarding the situation.

First, your inquiry deals in great measure with specific provisions of the Election Law. In this regard, since the jurisdiction of the Committee involves the Freedom of Information Law, I cannot offer specific direction concerning the interpretation of the Election Law.

Second, it is noted that §89(6) 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."

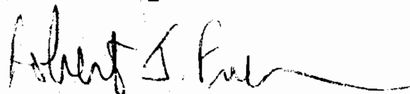
Based upon the language quoted above, I believe that rights of access granted by the Election Law remain in effect, notwithstanding the provisions of the Freedom of Information Law.

Third, it would appear that the only question that arises under the Freedom of Information Law involves the terms of your request. Specifically, §89(3) of the Freedom of Information Law states in part that an applicant must submit a request for records "reasonably described". In my view, based upon judicial interpretations of the Freedom of Information Law [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)], an applicant has met the burden of reasonably describing records when the agency in receipt of a request can determine the nature of the records sought. Due to the specificity of filing and access requirements found in the Election Law, it would appear that your request involved records "reasonably described". As such, it would further appear that the request should likely be honored.

For more specific direction regarding the interpretation of the Election Law, it is suggested that you might want to contact the Board of Elections.

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: Terry Niebel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 7, 1982

Mr. Barry M. Shulman
Scolaro, Shulman, Cohen & Lawler, P.C.
One Lincoln Center
Syracuse, New York 13202

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. Shulman:

I have received your letter of December 3 and appreciate your interest in complying with the Freedom of Information Law.

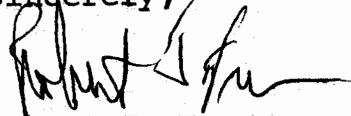
According to your letter, the agency that you represent, the Central New York Regional Transportation Authority, has reviewed the amendments to the State Administrative Procedure Act concerning adjudicatory proceedings and the Freedom of Information Law relative to the treatment of trade secrets. You have indicated that the Authority does not maintain trade secrets and that, therefore, in your view regulations on that subject need not be promulgated.

I would agree that regulations regarding the treatment of records characterized as trade secrets need not be adopted if it is certain that the Authority does not now and will never be in possession of records constituting trade secrets. In my opinion, your inquiry focuses upon a problem that has arisen often in relation to the new provisions in the Freedom of Information Law concerning the treatment of trade secrets. From my perspective, the provisions concerning the promulgation of regulations are largely anticipatory. Stated differently, if an agency maintains or can anticipate that it will maintain trade secrets, I believe that the appropriate regulations should be adopted. Therefore, if there is a reasonable certainty that trade secrets will not come into the possession of the Authority, the regulations required under Chapter 890 of the Laws of 1981 need not be promulgated.

With respect to the remaining issue, which relates to the State Administrative Procedure Act, I must admit that I have no expertise or advisory authority regarding that Act. To obtain additional information on the subject, it it suggested that you contact the Administrative Regulations Review Commission, which is located at the Twin Towers, 99 Washington Avenue, Room 1012, Albany, New York 12210. If you would like to speak to someone directly, I recommend that you call Dennis O'Leary, Director of the Commission, at (518) 455-5092.

I hope that I 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-2698

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 8, 1982

Ms. Josephine Kent
Assessor
Town of Deerpark
Drawer A
Huguenot, NY 12746

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. Kent:

I have received your letter of November 12 and appreciate your interest in complying with the Freedom of Information Law.

You have indicated the belief "that the tapes of a town clerk are not considered a public record, since they are her tools." In a similar vein, you asked whether "the tools an assessor uses in his or her computation of assessments [could] be considered their own private data". You wrote further that the term "tools" is intended to mean "appraisal manuals, etc."

I would like to offer the following comments regarding your inquiry.

First, I believe that your assumption regarding tape recordings used as a tool by a clerk is erroneous. In my view, tape recordings of a clerk used as an aid in transcribing or preparing minutes are "public records" subject to the Freedom of Information Law in all respects.

In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" to mean:

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

In view of the breadth of the language quoted above, it is in my view clear that a tape recording in possession of a clerk used to aid her in the performance of her duties is a "record" that falls within the scope of the Freedom of Information Law. Moreover, there is a judicial decision indicating that tape recordings of meetings constitute "records" that are available [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].

Second, due to the definition of "record", I believe that the "tools" used by an assessor also fall within the scope of the Freedom of Information Law.

Third, 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.

From my perspective, there is one ground for denial of possible significance. 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..."

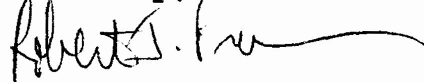
It is noted that the language quoted above contains what in effect is a double negative. Although inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, appraisal manuals and similar records would likely consist of inter-agency or intra-agency materials. Nevertheless, it appears that they would likely consist of "instructions to staff that affect the public" available under §87(2)(g)(ii) or the policy of an agency available under §87(2)(g)(iii).

It is noted, too, that the subject of assessor's manuals has been previously discussed with representatives of the Office of Counsel at the State Division of Equalization and Assessment, who concur with my opinion.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2699

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[illegible] Charles E. Williams III
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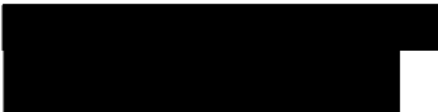
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 8, 1982



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

As you are aware, I have received your letter of November 15, as well as other materials concerning your requests directed to the New York City Board of Education under the Freedom of Information Law.

Your inquiry concerns your capacity to inspect and/or copy "Chancellor's Committee Reports" relative to your "discontinuance from probationary service" and your "U-rating". Most recently, James J. Stein of the Board's Division of Personnel wrote that the Committee recommendations in question would be withheld. You have apparently requested an opinion regarding the matter because other Board officials indicated previously that the records in question would be made available.

If I understand the situation accurately, I agree with Mr. Stein that the records may be withheld. Relevant under the circumstances is §87(2)(g) of the Freedom of Information Law, which states that an agency may withheld records that:

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

While some aspects of inter-agency and intra-agency materials must be made available, others need not, such as advice, recommendation or suggestion, for example.

Under the circumstances, it would appear that the Committee reports in question contain advice that may be accepted or rejected. If that is so, I believe that they may be withheld under §87(2)(g).

I would also like to point out that in a situation similar, if not the same as that which you described, it was held that recommendations of a panel submitted to the Chancellor of the Board of Education concerning a teacher given an unsatisfactory rating could be withheld [see attached, McAulay v. Board of Education, 61 AD 2d 1048 (1978), aff'd with no opinion, 48 NY 2d 659 (1979)]. In view of the decision rendered in McAulay, it would appear that the denial by Mr. Stein was appropriate.

Lastly, you made reference to "hearings known as 3020-a's" and noted that "the complete summaries and panel decisions are published, without any deletions, in yearly volumes". In my view, since §3020-a of the Education Law pertains to proceedings initiated against tenured teachers, it is not applicable in this situation. Moreover, I believe that the published materials to which you referred involve only situations in which charges against a tenured teacher are upheld, for §3020-a(4) states in part that "[I]f the employee is acquitted he shall be restored to his position...and the charges expunged from his record". Once again, the situation in which you are involved is in my view inapposite to records relative to a 3020-a proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2200

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

December 8, 1982

Mr. Vaughan W. Goodwin

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. Goodwin:

I have received your letter of November 6 and the materials attached to it, which reached this office on November 17.

Your inquiry pertains to a request and subsequent appeal made under the Freedom of Information Law with respect to records of the Greece School District.

The first question is whether the Committee received any correspondence regarding your request from either the School District or its attorney, William E. Easton. Having reviewed our files, I have found a copy of a letter addressed to you by Mr. Easton, the District's attorney and appeals officer. The letter is dated September 27 and was received by this office on October 4.

Your second question involves the existence of "interpretations of law and/or court orders" rendered under the Freedom of Information Law concerning the capacity to withhold photocopies of the reverse side of checks. In this regard, there is a decision dealing squarely with the issue raised. In Minerva v. Village of Valley Stream (Sup. Ct., Nassau Cty., August 20, 1981), it was held that the reverse side of checks in possession of an agency could be withheld on the ground that disclosure would result in an unwarranted

invasion of personal privacy [see attached, Freedom of Information Law, §§87(2)(b) and 89(2)(b)(iv) and (v)]. In so holding, the Court found that:

> "[W]ith regard to the 'unwarranted invasion of personal privacy' exemption as defined in Section 89(2)(b)(iv), there must be a showing that disclosure of the reverse side of Furey's checks would result in personal hardship to Furey and that such information is not relevant to the ordinary work of the party requesting it. See Matter of Gannett Co. v County of Monroe, 45 NY 2d 954, 411 NYS 2d 557 (1978).
>
> "Applying these principles to this case, it is clear that disclosure of the manner in which Village Attorney Furey spent his money would constitute an unwarranted personal hardship to him and would be irrelevant to any valid requirement of the petitioner. It is not necessary to determine whether the checks given to the Village Attorney have been co-mingled with the general assets of the Furey & Furey law firm. No valid reason for such disclosure has been advanced by petitioner. Nor is Village Attorney Furey required to disclose how he spends his 'pay checks' merely because he is a public employee. Disclosure may in some instances be required as to receipt of monies by a public employee but not how he disposes of his lawful salary or fees" (emphasis added by Court).

In view of the decision quoted above, it appears that Mr. Easton's response was appropriate, even though a reason for withholding the reverse side of the checks should in my view have been stated [see Freedom of Information Law, §89(4)(a)].

Lastly, with regard to the role of the Committee on Public Access to Records, it is noted that this office has the capacity to advise; it has no authority to compel an agency to grant or deny access to records. If a records access officer fails to respond to a request within the prescribed time limits, a person may do as you did, i.e., consider the request to have been constructively denied and appeal the denial.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: William Easton, School District Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2701

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

December 8, 1982

Mr. William Gonzalez

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. Gonzalez:

I have received your letter of November 16 in which you requested assistance regarding the use of the Freedom of Information Law (see attached).

According to your letter, you were employed as a bus operator for the New York City Transit Authority. However, you apparently lost your position based upon the Authority's contention that a question that you answered on two separate employment applications was answered differently on the applications. Although you asked to inspect or copy the applications that you completed, your request was denied.

You have requested advice that might help you keep your job.

First, 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.

Second, from my perspective, those portions of the two employment applications that you completed should be available to you, for no ground for denial could in my view be appropriately cited. Further, although the applications might justifiably be withheld if requested by others on the ground that disclosure would result in an unwarranted invasion of personal privacy, the Freedom of Information Law provides contrary direction in a case in which a person seeks a record pertaining to himself. Section 89(2)(c) states that, unless a different ground for denial applies:

> "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
>
> i. when identifying details are deleted;
>
> ii. when the person to whom a record pertains consents in writing to disclosure;
>
> iii. when upon presenting reasonal proof of identity, a person seeks access to records pertaining to him."

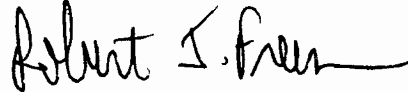
Based upon the language quoted above, if you present "reasonable proof of identity", the applications that you completed should be accessible to you for inspection and copying.

Third, it is noted that the Committee has promulgated regulations regarding the procedural aspects of the Freedom of Information Law. I have enclosed copies of the regulations and an explanatory pamphlet which may be particularly useful to you, for it contains a sample letter of request, as well as a sample letter of appeal that may be used following a denial.

Lastly, it is suggested that you might want to discuss the matter with representatives of the State Division of Human Rights or the New York Civil Liberties Union. The number of the Division of Human Rights in the Bronx is 292-1300; the Civil Liberties Union can be reached in Manhattan at 924-7800.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Personnel Office, NYC Transit Authority

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2702

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 8, 1982

Mrs. Kathy Jordan

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 Mrs. Jordan:

I have received your letter of November 15 in which you requested an advisory opinion under the Freedom of Information Law, as well as the materials attached to it.

According to a letter addressed to Dr. Burggraf, Superintendent of the Lindenhurst School District, you requested a copy of a report submitted to the School Board "regarding the alleged teaching of birth control." The report was referenced in the minutes of a Board meeting held on October 6. In response to an earlier request, you were apparently informed that the report was "considered confidential since it contained personnel names". You indicated in your letter to Dr. Burggraf that you are not interested in any names that may appear in the report, that you believe that the report should be made available because it was referenced in the agenda, attached to the minutes and because the report was not in any way "identified as confidential".

I would like to offer the following comments regarding the situation.

First, in my view, an agency, such as a school district, cannot characterize records as "confidential" unless there is some statutory basis for so doing [see Doolan v. BOCES, 48 NY 2d 341 (1979)].

Second, 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. Therefore, the question involves the extent, if any, to which one or more of the grounds for denial might justifiably be cited to withhold the report in question.

It is noted in this regard that I have no knowledge of the contents of the report. As such, only general advice can be provided.

Under the circumstances, it appears that two of the grounds for denial may be relevant.

One ground for denial of possible significance is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Further, §89 (2)(b) indicates that an agency may delete identifying details to protect privacy when records would otherwise be available.

The cited provisions concerning privacy may be relevant in view of the "personnel names" contained in the report. Nevertheless, in my opinion, the fact that "personnel" might be identified does not necessarily mean that the report may be withheld, or even that the names of personnel may be deleted.

Although the standard in the Freedom of Information Law regarding privacy is flexible and subject to a variety of interpretations, the courts have provided substantial guidance regarding the privacy of public employees. In brief, it has been found in various contexts that public employees enjoy a lesser degree of privacy than others, for it has been determined that public employees are required to be more accountable than others.

Further, the courts have held on several occasions that records which are relevant to the performance of a public employee's officials duties are available, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy

[see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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, Oct. 30, 1980]. Conversely, if records or portions of records are irrelevant to the performance of one's official duties, it has been held that records or portions thereof could 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 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Based upon judicial interpretations of the Freedom of Information Law, once again, the mere identification of public employees in records would not automatically permit a denial of access. On the contrary, the capacity to deny is in my view dependent on the nature and content of the record sought.

The remaining ground for denial of potential significance is §87(2)(g), which states that an agency may withhold records that:

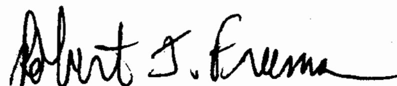
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. Although 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.

Based upon the information that you have provided, the report in question could likely be characterized as "intra-agency" material. To the extent that it contains material accessible under sub-paragraphs (i), (ii) or (iii), it would in my view be available, unless there is a different ground for denial; to the extent that it is reflective of advice, suggestion or recommendation, for example, a denial under §87(2)(g) would in my opinion be 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: Dr. Burggraf

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2703

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 8, 1982

Mr. Frank J. Mauer
Manager
The Travelers
80 Wolf Road
P.O. Box 199
Albany, NY 12201

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. Mauer:

I have received your letter of November 19 in which you requested an advisory opinion under the Freedom of Information Law (see attached).

Specifically, you wrote that several local police departments have recently informed you that they could no longer furnish copies of accident reports. Further, they have directed you to the Department of Motor Vehicles for the purpose of requesting and obtaining copies of accident reports. A letter attached to your inquiry indicates that the reason for directing you to the State Department of Motor Vehicles is an amendment to the Freedom of Information Law that generally restricts fees for photocopies of records to twenty-five cents per photocopy.

In my view, a police department is required to respond to requests for accident reports, and it would be inappropriate to routinely refer requests to the Department of Motor Vehicles.

Section 86(4) of the Freedom of Information Law defines "record" to mean:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including,

> but not limited to, reports, statements, examinations, memoranda, opinions, folders files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

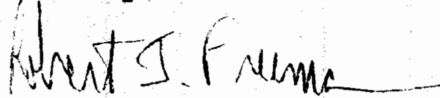
Further, the introductory language of §87(2) states that all agency records are available for inspection and copying, unless one or more of the ensuing grounds for denial may appropriated be asserted.

Since an accident report would be a "record" of an agency, i.e., a police department, I believe that a police department would be required to respond to a request for an accident report in its possession, even if a copy of the same report is maintained by the Department of Motor Vehicles.

Lastly, I would also like to point out that §66-a of the Public Officers Law concerning accident reports kept by police authorities has long been construed to require that police departments make accident reports available, except when disclosure "would interfere with the investigation or prosecution by such authorities of a crime involved in or connected with the accident". The cited provision is in my view consistent with the Freedom of Information Law [see §87(2)(e)(i)].

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2204

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

December 9, 1982

Mr. Clive I. Morrick
Records Access Officer
The City of New York
Department of Investigation
130 John Street
New York, NY 10038

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. Morrick:

I have received your letter of November 19 and appreciate your interest in compliance with the Freedom of Information Law. Your question involves the status of offices of Inspectors General in the City of New York under the Freedom of Information Law.

Your first question is whether the offices of Inspectors General are agencies that fall within §86(3) of the Freedom of Information Law. The cited provision 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, since an office of Inspector General is a "municipal...office" and a "governmental entity performing a governmental...function" for a municipality, in this instance, the City of New York, it is an "agency" that falls within the scope of the Freedom of Information Law.

In a related vein, you indicated that "[I]f the offices of the Inspectors General in New York City are considered agencies then each, of course, will have to implement its own procedures to deal with requests for access to records". I am not sure that I concur with your comment. In this regard, I direct your attention to §87(1)(a) of the Freedom of Information Law, which states in relevant part that:

> "[W]ithin sixty days after the effective day of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation..."

While the uniform rules and regulations promulgated by the Mayor under the Freedom of Information Law might not define "what is or is not a City agency", §87(1)(a) would appear to indicate that the uniform rules are applicable to any entity within New York City government that could be characterized as an agency, including the offices of Inspectors General.

Your second question is whether "there is any objection to requests for access to records in the possession of the offices of the Inspectors General in the City of New York being considered by the Department of Investigation of the City of New York, as well as by the agency to which the request is directed, before a reply is given to the requester". In my view, there is nothing in the Freedom of Information Law that would in any way preclude an official of an agency from seeking views relative to a request from others in the agency or from those outside of the agency. In many instances, agency representatives who receive requests contact this office for the purpose of obtaining advice regarding rights of access. From my perspective, if communication enhances compliance with the Law and the capacity to render a reasoned response, I believe that it should be fostered.

With respect to the problem that you face, which involves the unusual relationship between Inspectors General and the Department of Investigation, I would like to offer the following suggestions.

First, as you may be aware, the regulations promulgated by the Committee in §1401.2 pertain to the designation of a records access officer. The cited provision indicates that there must be one or more records access officers in an agency. Perhaps there could be a specific records access officer in each City agency whose responsibility would involve requests made under the Freedom of Information Law in relation to the duties of Inspectors General. It is possible that better coordination and networking could be accomplished by so doing.

Second, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations indicate that within five business days of the receipt of a request, an agency may acknowledge the receipt of the request and thereafter render a determination. According to the regulations, a reasonable time should not be more than ten business days from the date of the acknowledgment. In this regard, it is suggested that all but routine requests be acknowledged, thereby permitting an additional period of time during which agency officials, Inspectors General and representatives of the Department of Investigation could confer and seek to reach concurring opinions. Such a practice or policy might be developed pursuant either to §3 of the Executive Order issued by the Mayor or §807 of the New York City Charter concerning the duties of the Commissioner of Investigation vis-a-vis the activities of of Inspectors General in agencies "to ensure uniformity of activities by them".

I regret that I cannot be of greater assistance. 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

FOIL-AO-2705

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 9, 1982

Mr. Fred Greenberg

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 letter of November 24 in which you raised questions regarding the implementation of the Freedom of Information Law by New York City School District 21K.

In this regard, you requested that this office investigate District 21K, which in your view has "avoided" a series of requests made under the Freedom of Information Law. You also asked whether the records of the Committee "show a prior history by District 21K of the Board of Education of requests for investigation due to time delay or non-compliance."

I would like to offer the following comments regarding your inquiry.

First, the authority of the Committee on Public Access to Records under the Freedom of Information Law generally involves providing advice. This office does not have the capacity or the resources to "investigate", nor does it have the authority to require an agency to grant or deny access to records.

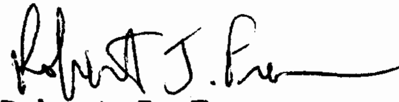
Second, with regard to District 21K, it is noted that this office has few dealings with individual school districts under the aegis of the New York City Board of Education. In the great majority of situations in which there has been communication concerning New York City schools, contact has been made with representatives of the central offices of the Board of Education. Moreover, the relationship between this office and offices of the Board is long-standing. As such, in response to your question, while questions have been raised regarding delays in response to requests relative to New York City school districts, I am not aware of any outstanding problems that have been raised in relation to a particular district, such as District 21K.

As you may be aware, the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed 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 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)].

I hope that I 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-2706

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 15, 1982

Mr. Christopher Hoffins
Great Meadows Correctional Facility
Box 51
Comstock, New York 12821-0051

Dear Mr. Hoffins:

I have today received your request under the Freedom of Information Law regarding records pertaining to the "5% nation" and a specifically named individual.

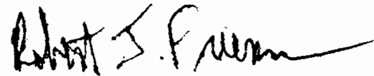
Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. This office does not have possession of records generally, such as those in which you are interested, nor does it have the authority to require an agency to grant or deny access to records.

Under the circumstances, it is suggested that you resubmit a request to the agency or agencies that you believe would have possession of the records that you are seeking.

In addition, it is noted that §89(3) of the Freedom of Information Law states in part that an applicant must request records "reasonably described". In this regard, your request to this office seeks records concerning a named individual, but it contains no other information regarding that person. When making a request, it is suggested that you provide as much detail as possible, including dates, file designations, subject heading and other identifying information that would enable an agency records access officer 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:jm

ERROR
No # F2707

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2208

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~~BASIL A. PATERSON~~ Charles E. Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 15, 1982

Mr. Ernest Schender
81-A-0963 - A-8
Arthur Kill Correctional Facility
2911 Arthurkill Road
Staten Island, NY 10309

Dear Mr. Schender:

Your letter of December 7 addressed to Basil Paterson has been forwarded to the Committee on Public Access to Records, a unit of the Department of State, which is responsible for advising with respect to the Freedom of Information Law. Please note that the Secretary of State is a statutory member of the Committee and that Mr. Paterson recently resigned from the position. The Acting Secretary of State is Charles E. Williams III who will hold that position until December 31. The other members of the Committee are identified in the letterhead.

Section 89(2)(a) of the Freedom of Information Law states that the Committee on Public Access to Records may promulgate guidelines regarding the deletion of identifying details from records that would otherwise be available, and you have asked for a copy of such guidelines pertaining to the Division of Parole.

The cited provision of the Freedom of Information Law is in my view an extension of §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". What might constitute an unwarranted invasion of personal privacy is in my opinion subject to conflicting interpretations and personal judgments. For instance, one reasonable person might review the contents of a record containing information pertaining to a particular individual and believe that disclosure would be

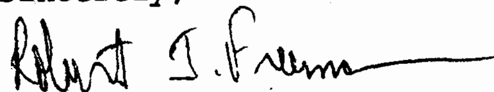
offensive, thereby resulting in an unwarranted invasion of personal privacy. Nevertheless, an equally reasonable person might review the same record and believe that disclosure would be innocuous, thereby resulting in a permissible invasion of privacy.

Since subjective judgments regarding privacy must often be made, the Committee has not issued guidelines regarding the deletion of identifying details. The Committee does not believe that it would be appropriate to impose judgments concerning privacy upon others. Moreover, in the Committee's view, officials of an agency maintaining records might be in a better and more knowledgeable position to be aware of the effects of disclosing particular records. It is also noted that thousands of different types of records contain personal information. Due to the great number of such records, it would not be feasible to develop guidelines regarding each.

In short, the Committee has not adopted the guidelines that you are seeking. I have, however, enclosed a summary of judicial decisions rendered under the Freedom of Information Law. Perhaps a review of the summary will help you to learn of the courts' view regarding unwarranted invasions of personal privacy.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2209

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 15, 1982

Mr. Henry V. Cumoletti

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. Cumoletti:

I have received your letter of November 29 and appreciate your kind words.

Your inquiry concerns the unsuccessful submission of an application for a pistol permit. In this regard, I would like to offer the following comments.

First, as you intimated, the Freedom of Information Law is an access to records law, and not an access to information law that enables the public to cross-examine government officials. Further, §89(3) of the Law states that, as a general rule, an agency need not create a record in response to a request. Therefore, if records reflective of information sought do not exist, the Freedom of Information Law would not oblige a government agency or official to prepare a new record.

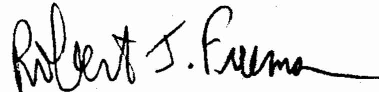
Second, it has become clear that approved pistol license applications are available to the public [see Kwitny v. McGuire, 422 NYS 2d 867, aff'd 77 AD 2d 839, aff'd 53 NY 2d 968 (1981)]. In this regard, §400.00(5) of the Penal Law states that:

> "The application of any license, if granted, shall be a public record. Such application shall be filed by the licensing officer with the clerk of the county of issuance..."

Based upon the language quoted above, it is suggested that you might want to inspect approved pistol licenses. After having reviewed them, perhaps you will be able to determine more about the criteria upon which approval of permit applications are based.

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-2716

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 15, 1982

Ms. Carol J. Garrity
Councilwoman
First Ward
Town of Poughkeepsie
16 Old English Way
Wappingers Falls, NY 12590

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. Garrity:

I have received your letter of November 29 and the materials attached to it.

As a member of the Poughkeepsie Town Board, you recently requested various materials from the Village of Wappingers Falls. According to the correspondence, a similar request was made in April, without specifying that the request was made under the Freedom of Information Law, but no response was given. The records that you seek pertain to the operation and maintenance of a sewer plant in the Village, which is located within the Town of Poughkeepsie.

The records sought include:

"1. Itemization of expenditures for the operation and maintenance of the Village sewer disposal plant, charged to budget account A-8130 (for personal services, purchase of materials, purchase of equipment, etc.) for the last four fiscal years. This information should be readily available in the ledgers and books of accounts of the Village Treasurer. In order of importance, my interest is in the fiscal year ending May 31, 1982 then working backwards to that ending May 31, 1979.

> "2. Revenue amounts, both local, state and contractual amounts, for the same year.
>
> "3. State aid vouchers, submitted for the reimbursement of sewer operation and maintenance, for the last four years."

In view of your earlier difficulties in obtaining the information in question, you have asked that the Committee "monitor" your most recent request. From my perspective, the best method of "monitoring" under the circumstances would involve the transmittal of the following comments to you and the clerk of the Village of Wappingers Falls.

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 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, due to the nature of the records sought, I do not believe that any ground for denial could appropriately be cited to withhold the records. While one of the bases for withholding might appear to apply, its structure in my view indicates that the records should be made available.

Specifically, §87(2)(g) states that an agency may withhold records that:

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

It is 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.

Under the circumstances, while the records in question might be characterized as "inter-agency or intra-agency" materials, it appears that they consist of "statistical or factual tabulations or data" that must be made available under §87(2)(g)(i).

It is also noted that §89(6) 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 this regard, §51 of the General Municipal Law has for decades granted broad rights of access to records of municipalities. The cited provision 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 an 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, and shall be open during all regular business hours..."

As such, I believe that the records sought are accessible under either the Freedom of Information Law or §51 of the General Municipal Law.

Lastly, I would like to point out that the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, prescribe 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 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 tens 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: Leo Lowney, Village Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2711

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 15, 1982

Mr. Murray Bilmes
Town Attorney
Town of Crawford
Box 7
Pine Bush, NY 12566

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. Bilmes:

I have received your letter of Decmeber 2 and appreciate your interest in complying with the Freedom of Information Law.

Your inquiry concerns a request made on behalf of a law firm which has already filed a notice of claim against the Town of Crawford. The records sought involve "copies of all police accident reports that are on file for accidents that occurred at the intersection of Long Lane and Burlingham Rd." Since there may be litigation related to the records sought, and since the Town's insurance carrier requested that the information should not be furnished, you have asked for advice regarding the responsibilities of the Town. You also raised questions regarding the breadth of the request and the charges that might be imposed for the time involved in searching for the records.

I would like to offer the following comments regarding 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 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, although the records sought may relate to litigation, it does not appear that they were prepared for litigation, but rather in the ordinary course of business. Further, it does not appear that any of the exemptions from disclosure appearing in Article 31 of the Civil Practice Law and Rules would be applicable.

Third, it is noted that §66-a of the Public Officers Law has for decades granted access to police accident reports, unless disclosure would interfere with the investigation of a crime relating to an accident. In this regard, §89(6) 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."

Based upon the language quoted above, if the records sought are available under §66-a of the Public Officers Law, the provisions of the Freedom of Information Law could not in my view be cited to withhold the records.

Fourth, the request by the Town's insurance carrier that the records be withheld is in my opinion irrelevant with respect to rights of access. From my perspective, based upon the structure of the Freedom of Information Law and its judicial interpretation, neither a request for nor a promise of confidentiality could validly be asserted to withhold records that would otherwise be available [see e.g., Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979), Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. Further, except to the extent that one or more of the grounds for denial might be applicable, the records would in my view be accessible [see Doolan v. BOCES, 48 NY 2d 341 (1979)].

Fifth, with regard to the scope of the request, you indicated that although the original request involved all accident reports concerning a particular intersection, it appears to have been agreed that reports of accidents at the intersection for the past three years would be sufficient. Here I direct your attention to §89(3) of the Freedom of Information Law, which states in part that a request must pertain to records "reasonably described".

While there are few judicial determinations regarding the standard required by §89(3), it has been held in essence that if the agency can determine the nature of the records requested, the applicant has met his or her burden of requesting records "reasonably described". Since the scope of the request has been narrowed, it would appear that the applicant has "reasonably described" the records sought.

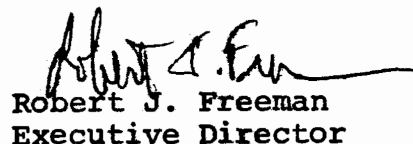
Lastly, you asked whether the "Town can charge for the time of any of the officials that would be involved with regard to such requests". In my view, the only fee that may be assessed involves the fee for photocopying. Section 87(1)(b)(iii) of the Freedom of Information Law refers to regulations required to be adopted by agencies concerning the procedural implementation of the Law, 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 statute."

The cited provision does not in my opinion permit an agency to assess fees for searching or clerical time, for instance. Moreover, §1401.8 of the regulations promulgated by the Committee (see attached), which govern the procedural aspects of the Law, states that no fees may be charged for searching for records. In sum, I believe that the Town may charge up to twenty-five cents per photocopy, unless there is statutory authority for the assessment of a greater 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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2712

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

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 10, 1982

Mr. D. R. Bahlman
Staff Reporter
The Times Record
501 Broadway
Troy, New York 12181

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. Bahlman:

I have received your letter of November 30 in which you requested an advisory opinion under the Freedom of Information Law.

In terms of background, attached to your letter is a request directed to Robert Brier, Records Access Officer for the City of Troy, in which you requested records of sick time used by City employees, including "the names of the employees, the department for which they work, and the number of sick time hours accumulated..." by employees. Mr. Brier denied your request on November 29 "pursuant to Section 87, Subdivision (2)(a)(b)(c), and (g) of the Public Officers Law also known as the FOIL".

I would like to offer the following comments regarding your request and the denial.

First, 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 are available, except to the extent that records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

Since Mr. Brier cited four of the grounds for denial, the ensuing paragraphs will review each of those bases for withholding.

The first ground for denial cited by Mr. Brier is §87(2)(a), which permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". In my view, the quoted language pertains to situations in which a statute, an act of the State Legislature or Congress, prohibits disclosure of certain records.

There is but one statute of which I am aware that might be applicable, and that statute in my opinion relates only to a particular group of City employees.

In this regard, §50-a of the Civil Rights Law contains an exemption from disclosure regarding certain personnel records of policy officers. Specifically, subdivision (1) of the cited provision states in relevant part that:

> "[A]ll personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof...shall be considered confidential and not subject to inspection or review without the express written consent of such police officer or correction officer except as may be mandated by lawful court order."

The language quoted above involves a statutory exemption that is in my view qualified in several respects. First, it applies only to police and correction officers; second, it pertains only to personnel records regarding police and correction officers; and third, it is applicable with respect to personnel records of police and correction officers only to the extent that such records are "used to evaluate performance toward continued employment or promotion." Therefore, if the records sought are not used in the manner described in §50-a of the Civil Rights Law, that provision could not in my opinion be cited as a basis for withholding. Further, as stated earlier, I know of no other statute that would exempt the records in question from disclosure.

The second ground for denial cited by Mr. Brier 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". Although the standard in the Freedom of Information Law regarding privacy is flexible and subject to a variety of interpretations, the courts have provided substantial guidance regarding the privacy of public employees. In brief, it has

been found in various contexts that public employees enjoy a lesser degree of privacy than others, for it has been determined that public employees are required to be more accountable than others.

Further, the courts have held on several occasions that records which are relevant to the performance of a public employee's official duties are available, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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, Oct. 30, 1980]. Conversely, if records or portions of records are irrelevant to the performance of one's official duties, it has been held that records or portions thereof could 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 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Under the circumstances, it would appear that records indicating the amount of sick time accumulated or used, for instance, would be relevant to the performance of public employees' official duties. It is noted that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could in my view be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would in my view constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time accumulated or used would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that §87(2)(b) could be asserted to withhold the information sought.

The third ground for denial cited by Mr. Brier 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, it is difficult to envision how the exception quoted above has any application to the records sought, particularly in view of the Court of Appeals' decision in Doolan v. BOCES [48 NY 2d 341 (1979)]. In that case, it was found that compilations of salary and fringe benefit data derived from a number of agencies was available, and that §87(2)(c) could not be cited to justify a denial.

The remaining ground for denial cited by Mr. Brier 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..."

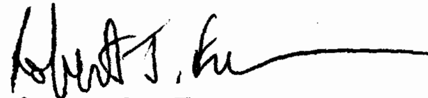
It is noted that the language quoted above contains what in effect is a double negative. Although inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, the records in question could in my view be characterized as "intra-agency" materials. However, it would appear that they would consist solely of "statistical or factual tabulations or data" that are available under §87(2)(g)(i).

In sum, it is my view that the records sought are available, except to the extent that §50-a of the Civil Rights Law might be applicable to a limited class of employees and 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
Executive Director

RJF:jm

cc: Robert T. Brier
William Miller

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL AO-2713

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

December 15, 1982

Ms. Eleanor Dixson
City of Niagara Falls
Department of Law
City Hall
Main Street
Niagara Falls, NY 14302

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. Dixson:

I have received your letter of November 30 and appreciate your interest in complying with the Freedom of Information Law.

According to your letter, the City of Niagara Falls, pursuant to a local law, has charged four dollars for copies of police accident reports. You wrote further that the fee of four dollars has been suspended "pending determination of its validity, under New York Session Law 1982, Chapter 73; where it appears that fees other than $.25 must be provided for by statute". Since you are unaware of any statute that permits the assessment of the four dollar fee, you have asked "whether, and under what circumstances the City of Niagara Falls may charge a fee other than $.25 per page."

I would like to offer the following comments regarding your inquiry.

First, I am unaware of any statute that could permit or require a municipality, such as the City of Niagara Falls, to assess a fee for copies of police accident reports, up to nine by fourteen inches, greater than twenty-five cents per photocopy. It is noted that §202 of the

Vehicle and Traffic Law, a statute, permits the State Department of Motor Vehicles to assess a fee well in excess of twenty-five cents per page for copies of accident reports. However, since the cited provision applies only to the State Department of Motor Vehicles, I do not believe that it could be relied upon by a municipality as the basis for assessment of a fee higher than twenty-five cents per photocopy.

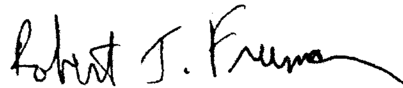
Second, in terms of background, the change in the Freedom of Information Law regarding fees for photocopying was apparently based in part upon a recommendation made by the Committee in its 1981 annual report to the Governor and the Legislature on the Freedom of Information Law. In discussing the intent of the proposed change, the Committee wrote that:

> "[T]he existing provision states that an agency may assess a fee of no more than twenty-five cents per photocopy, unless a different fee is required by some other provision of law. The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

In sum, I do not believe that there is a statute under which the City could charge more than twenty-five cents per photocopy in response to requests for copies of police accident reports.

I hope that I 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-2714

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BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

December 16, 1982

Mr. Elbert Crum
81-A-1585
Drawer B
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. Crum:

I have received your letter of December 12 in which you requested assistance from this office.

Since you have requested information concerning the Freedom of Information Law in general, I would like to offer the following comments.

First, the Freedom of Information Law (see attached) 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).

Second, when making a request, the Law requires that an applicant for records submit a request in writing "reasonably describing" the records sought. I am aware that in some instances, requests have been made that are so broad that the agency officials in receipt of the request have been unable to determine the nature of information being sought. For example, a request for all records pertaining to oneself might not meet the standard that records be "reasonably described", for records concerning an individual may be broad in nature and kept in a variety of locations.

Third, a potentially useful tool in assisting you in narrowing the areas of records in which you are interested is a "subject matter list". In this regard, §87(3)(c) of the Freedom of Information Law requires each agency to prepare a list, in reasonable detail, by subject matter, of all of its records, whether or not the records are available.

Lastly, in terms of procedure, §89(1)(b) of the Freedom of Information Law requires the Committee to promulgate regulations which govern the procedural implementation of the Freedom of Information Law. In turn, §87(1) requires that each agency develop its own regulations in conformity with those of the Committee. The Department of Correctional Services has promulgated regulations, and §5.20 of those regulations pertains to the examination of records by inmates and their attorneys. I have enclosed a copy of those regulations for your consideration and a copy of an explanatory pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door", which 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

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-2715

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 20, 1982

Mr. Donald A. Rettaliata
Attorney and Counselor at Law
285 West Main Street
P. O. Box 493
Sayville, NY 11782

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. Rettaliata:

I have received your letter of December 7 in which you raised a series of questions relative to the Freedom of Information Law.

According to your letter, a town in Suffolk County recently enacted an ordinance "requiring non-residential carters to file a notarized list of the name and address of each of their customers with their permit application", as well as various other items of information pertaining to each client. Although the ordinance apparently indicates that the customer list and other items are considered to be trade secrets and, therefore, could be withheld, you wrote that your clients are "reluctant" to submit the information because it "may become known to their competitors".

You have asked whether the records in question would be available to the public under the Freedom of Information Law and what penalties or safeguards might exist to preclude the intentional or inadvertent disclosure of the records by town officials.

I would like to offer the following comments regarding your inquiry.

First, I do not believe that the provisions of an ordinance or a local law adopted by a municipality, such as a town, can restrict rights granted by a statute enacted by the State Legislature. In the context of the situation described, the restriction to which you referred that prohibits disclosure would in my view be void to the extent that it might conflict with the Freedom of Information Law, a statute.

Second, it would appear that the information in question could likely be withheld under the Freedom of Information Law. The provisions of the local law are likely based upon §87(2)(d) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "are trade secrets or are maintained for the regulation of commerical enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

The applicability of the standard found in §87(2)(d) would depend upon specific circumstances and facts. Nevertheless, it appears that the records in question are maintained for the regulation of commercial enterprise and that disclosure could cause substantial injury to the competitive position of a commercial enterprise. If that is so, §87(2)(d) would be applicable, even if the town law was silent regarding disclosure.

In addition, there may be another ground for withholding. Section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy". Further, §89(2)(b) lists five examples of unwarranted invasions of personal privacy. Of possible relevance under the circumstances is §89(2)(b)(iii), which 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..."

While only some of the records in question might constitute a "list", the language quoted above might be useful or relevant in terms of direction and the capacity to withhold.

Third, it is noted that the Freedom of Information Law is permissive. Stated differently, as a general rule, the Law indicates that records falling within one or more of the grounds for denial may be withheld. However, even if a ground for denial applies, there is nothing in the Law that would prohibit an agency from disclosing, unless there is statutory direction to do so.

Fourth, in response to a request for the records in question, if the town denied access and litigation ensued, the town would have the burden of proving that the records fell within a ground for denial [see Freedom of Information Law, §89(4)(b); also see 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)]. As such, even though the town might assert a basis for withholding, that alone would not in my view guarantee that the records would indeed be withheld.

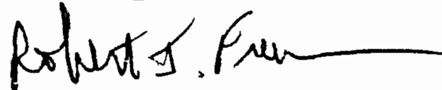
Lastly, in terms of penalties and/or safeguards, in short, I am unaware of any penalty that could apply under the facts as you presented them, i.e., in a situation in which the records might be intentionally or inadvertently disclosed. Nevertheless, perhaps other provisions of the Freedom of Information Law might be used as a guide.

Specifically, new provisions of the Freedom of Information Law pertain to trade secrets in possession of state agencies only [see §89(5)]; they do not apply to towns or other municipalities. Under those provisions, if a commercial enterprise, acting pursuant to law or regulations, submits records to a state agency that it considers to be trade secrets, the company could request that the agency maintain the records securely and apart from other agency records. In addition, in such cases, a state agency would be required to notify the submitter of records characterized as trade secrets prior to a disclosure made in response to a request under the Freedom of Information Law or on its own initiative. By giving prior notice, the commercial enterprise has an opportunity to indicate reasons for contending that disclosure would be damaging to its competitive position.

It may be possible for the town to adopt a procedure similar to that found in §89(5). While the grounds for denial in the Freedom of Information Law or the adoption of a procedure analogous to §89(5) might not guarantee that intentional or inadvertent disclosures will not occur, they might serve to allay the fears of your clients.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2716

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

December 20, 1982

Mr. Walter L. Moriarity
82-A-3664
Box 367
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. Moriarity:

I have received your letter of December 8 in which you asked how you might obtain your "personal history records", as well as "court papers".

I would like to offer the following comments regarding your inquiry.

First, there is likely no single source or agency that maintains all records pertaining to you. It is suggested that you submit requests for records to the agency or agencies that you believe maintain the records in which you are interested.

Second, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". As such, when making a request, as much detail as possible should be included, such as dates, file designations, subject matter, index and docket numbers, and similar information that might enable an agency to locate the records sought.

Third, it is noted that, as required by the Freedom of Information Law, the Department of Correctional Services has adopted regulations of a procedural nature concerning access to Department records. Several provisions within

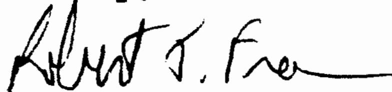
those regulations, which are attached, pertain to requests by inmates for records pertaining to them. It is suggested that you closely review the regulations, for they may be particularly useful to you.

Lastly, with respect to "court papers", I would like to point out that the Freedom of Information Law does not include the courts or court records within its scope. However, various provisions of law, such as §255 of the Judiciary Law (see attached), grant access to court records. Therefore, it is suggested that requests for court records be directed to the clerks of the courts that maintain the records you are seeking.

Also enclosed for your consideration is an explanatory pamphlet concerning the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-835
FOIL-AO-2717

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ROBERT J. FREEMAN

December 20, 1982

Ms. Hilary Gal

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. Gal:

I have received your letter of November 30 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry focuses upon one of the grounds for executive session and you are seeking an opinion:

> "...on the issue of whether meetings of public bodies involving the evaluation of applications for grants or public contracts between privacy parties and the State of New York fall within the ambit of Section 100(1)(f) of the Open Meetings Law permitting closed executive session, in and of themselves regardless of the particular agency involved."

I would like to offer the following comments regarding your inquiry.

First, to the best of my knowledge, there are no judicial determinations that pertain specifically to the scope of §100(1)(f) in the context of the issues that you identified.

Second, as you are aware, the Open Meetings Law is permissive. While a public body may enter into an executive session in certain circumstances, there is no requirement that an executive session must be convened, even if one or more of the grounds for executive session may be present.

Third, from my perspective, the Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings of public bodies are presumed to be open, except to the extent that an executive session may appropriately be convened.

The provision that is the subject ot your questions, §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..."

In my opinion, there may be distinctions between to two situations that you mentioned, the awarding of contracts and the evaluation of applications for grants, in terms of the application of §100(1)(f). Further, the propriety of the assertion of the cited provision would in my view be dependent upon the specific nature of a discussion.

For instance, a discussion of the award of a contract to perform services might in my opinion constitute a "matter leading to the employment of a particular...corporation". If a discussion focused upon hiring a particular individual there would likely be no question but that §100(1)(f) would apply; I believe that a similar discussion relative to a particular corporation would also fall within the scope of §100(1)(f). If, however, the discussion involves a contract for the purchase of goods, it does not appear that such a discussion would involve a matter leading to employment. It might nonetheless touch upon the credit or financial history of a corporation and, to that extent, an executive session would likely be proper.

Different considerations might be present in relation to an evaluation of grant applications. A discussion regarding a grant application would not involve a matter pertaining to employment, but it might in part pertain to the employment or financial history of a particular corporation. Once again, to that extent, I believe that §100(1)(f) could properly be asserted.

In sum, the authority to enter into an executive session is in my view dependent upon the nature of a discussion and the extent to which the specific language of §100(1)(f) might apply.

Lastly, it is possible that a vehicle other than the Open Meetings Law might be useful as a means of obtaining information in your areas of interest. Specifically, the Freedom of Information Law (see attached) provides broad rights of access to records and, like the Open Meetings Law, is based upon a presumption of access. Section 87(2) of the Freedom of Information Law states that all agency records are available except to the extent that records or portions thereof fall within one or more among eight grounds for denial.

In the context of your inquiry, if, for instance, a contract is to be awarded following public bidding, the bids would likely be available when the deadline for the submission of bids is reached. Relevant would be §87(2)(c) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that:

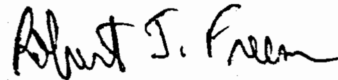
> "if disclosed would impair present or imminent contract awards or collective bargaining negotiations..."

If a request is made prior to the submission of all bids, perhaps disclosure would "impair present or imminent contract awards". However, after all bids have been submitted, in many instances, the "impairment" that may have existed might disappear, requiring disclosure.

As such, it is possible in some circumstances that a discussion by a public body may be closed under the Open Meetings Law, but that records related to the discussion might be available under the Freedom of Information Law, and vice versa.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2718

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 20, 1982

Mr. Theodore W. Roth
Missing Heirs International, Inc.
19 West 44th Street
New York, New York 10036

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. Roth:

Thank you for your thoughtful letter of December 2. Please accept my apologies for the delay in response.

Your inquiry once again pertains to your capacity to locate "missing heirs", who might have the ability to claim monies due them from deceased members of the New York City Retirement System. Following your successful efforts to obtain a list of deceased members of the Retirement System, you have inquired with respect to the applications originally submitted by deceased members in order to determine the identities of possible beneficiaries.

In my view, rights of access would be questionable relative to the applications or portions of those records identifying beneficiaries.

As in the case of your request for a list of deceased members of the system, the applicable provision of the Freedom of Information Law is §87(2)(b). The cited provision permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

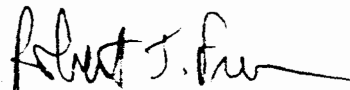
Since the records that were earlier sought pertained to deceased persons, it could not under those circumstances in my opinion be contended or advised with justification that disclosure would constitute an unwarranted invasion of personal privacy. Nevertheless, the identities of those who are the subject of your request may be alive. Further, presumably, your request would involve names as well as last known addresses.

Since the standard in the Law is flexible and subject to conflicting interpretations among reasonable people, I do not believe that I could appropriately advise that disclosure of the information sought would result in an unwarranted or permissible invasion of privacy.

It is suggested that you discuss the matter with officials of the Retirement System in order to reach some sort of accommodation under which considerations of privacy may be recognized concurrently with the interests of those who may be due significant sums of money.

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. Raymond Ragonese

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2719

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 20, 1982

Mr. Lance Screven
81-A-5746
Box 149
Attica, New York 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. Screven:

I have received your letter of December 5 in which you asked how you might obtain records pertaining to a case in which you are involved, as well as court records.

I would like to offer the following comments regarding your inquiry.

First, there is likely no single source or agency that maintains all records pertaining to you. It is suggested that you submit requests for records to the agency or agencies that you believe maintain the records in which you are interested, such as police departments, or an office of a district attorney, for example.

Second, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". As such, when making a request, as much detail as possible should be included, such as dates, file designations, subject matter, index and docket numbers, and similar information that might enable an agency to locate the records sought.

Third, it is noted that, as required by the Freedom of Information Law, the Department of Correctional Services has adopted regulations of a procedural nature concerning access to Department records. Several provisions within

those regulations, which are attached, pertain to requests by inmates for records pertaining to them. It is suggested that you closely review the regulations, for they may be useful to you.

Fourth, the Freedom of Information Law (see attached) 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) of the Law.

Under the circumstances, I believe that you should pay particular attention to §87(2)(b) concerning unwarranted invasions of personal privacy, and §87(2)(e), which permits an agency to withhold records compiled for law enforcement purposes based upon the potentially harmful effects of disclosure described in the cited provision.

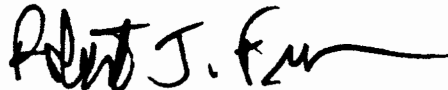
Fifth, with respect to court records, I would like to point out that the Freedom of Information Law does not include the courts or court records within its scope. However, various provisions of law, such as §255 of the Judiciary Law (see attached), grant access to court records. Therefore, it is suggested that requests for court records be directed to the clerks of the courts that maintain the records you are seeking.

Lastly, you might want to contact a representative of Prisoners' Legal Services or a similar group for the purpose of obtaining advice regarding specific aspects of your problem.

Also enclosed for your consideration is an explanatory pamphlet concerning the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2720

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 20, 1982

Mr. Charles J. Theophil

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. Theophil:

I have received your letter of December 6 in which you requested assistance in your efforts to gain access to records under the Freedom of Information Law.

According to your letter, the New York City Department of Finance "maintains a computerized sales file which contains sales prices of real property arranged by tax lot and tax block. It also indicates whether the parcel is a one- or two-family home and states its assessed valuation, street address, and the name of the buyer and seller." Although you believe that the New York Public Interest Research Group (NYPIRG) obtained the information in question under the Freedom of Information Law, your request was denied by the Department's records access officer, Barbara Germani, and the denial was affirmed by the appeals officer, Mr. Rosenthal.

It is your view that the information should be made available. If my understanding of the nature of the information sought is accurate, I would agree with your contention. In this regard, I would like to offer the following comments.

First, I have discussed the matter with representatives of NYPIRG, who informed me that the information obtained in conjunction with its study was not made available under the Freedom of Information Law, but rather by other means.

Second and more importantly, the information in question was the subject of a decision recently rendered by the Court of Appeals, the state's highest court [see attached, Morris v. Martin, 55 NY 2d 1026 (1982)]. The records sought in Morris were:

> "...computerized lists, compiled by the city from information contained in New York City real property tax returns, contained names and addresses of the buyer and seller, location of the property sold by block and lot number, sale date and sale price, assessed valuation of the land and total valuation, and the ratio price" (id. at 1026, 1027).

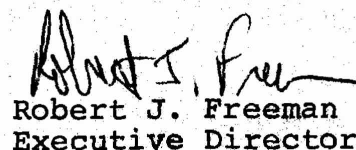
The Supreme Court, Albany County, held that the lists were available, the Appellate Division reversed, and the Court of Appeals reversed, stating that "the material requested by petitioner is not exempted from disclosure under Public Officers Law, §87 (subd. 2, pars. [a], [b] or [g])."

Assuming that the records sought in Morris are the same as those you requested, I believe that the decision is controlling and that the records should be made available upon payment of the appropriate fees for copying [see Freedom of Information Law, §87(1)(b)(iii)].

In order the provide the same advice to the Department of Finance, copies of this opinion will be sent to Ms. Germani and Mr. Rosenthal.

I hope that I 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: Barbara Germani
Jerry Rosenthal

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2721

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~~[struck out]~~ Charles E. Williams III
STEPHEN PAWLINGA
BARBARA SHACK
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 21, 1982

Mr. Leonard Klestzick

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. Klestzick:

As you are aware, your letter of December 1 addressed to the Attorney General was forwarded on December 17 to the Committee on Public Access to Records. The Committee is responsible for advising with respect to the Freedom of Information Law.

According to the correspondence attached to your letter, you have been unsuccessful in your efforts to gain access to a copy of a "traffic survey done in Far Rockaway". In response to a request sent to the New York City Department of Transportation on June 7, Mr. Azadian, the records access officer, informed you that it would take time to determine the existence of the records sought and the extent to which rights granted by the Freedom of Information Law might be applicable.

I would like to offer the following comments regarding the situation.

First, the Freedom of Information Law is applicable to virtually all units of government in the state. 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."

As such, the Department of Transportation and other agencies of New York City government are subject to 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 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, without greater knowledge of the survey, it is impossible to provide specific direction regarding rights of access. For instance, if the survey was prepared for litigation, it would likely be deniable, for §3101 of the Civil Practice Law and Rules indicates that material prepared for litigation may be kept confidential. In turn, §87(2)(a) of the Freedom of Information Law permits an agency to withhold records that are specifically exempted from disclosure by statute, such as §3101. On the other hand, if a survey was prepared in response to citizen complaints or in the ordinary course of business, it would appear to be available, at least in part.

Here I direct your attention to §87(2)(g) which permits 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 noted that the language quoted above contains what in effect is 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.

Therefore, if, for example, the Department prepared the survey, those portions consisting of "statistical or factual tabulations or data" would be available under §87(2)(g)(i).

Fourth, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, prescribe time limits for responses to requests for records. 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 with 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)].

Lastly, it is noted that the Freedom of Information Law generally does not require that an agency create or prepare a record in response to a request. Therefore, if no survey exists analogous to that which you requested, the agency would have no obligation to create such a record on your behalf.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations to which reference was made earlier, 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: Samuel Azadian
Richard Redlo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2722

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 21, 1982

Ms. Jody Adams
[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. Adams:

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

Specifically, you have raised questions regarding an aspect of a form prepared by the Southold Town Police Department in which an applicant for a record sought is asked to indicate his or her "interest, connection and/or need of requested records".

In my view, the "interest, connection and/or need" of an applicant for records is largely irrelevant to rights of access granted by the Freedom of Information Law. Soon after the Freedom of Information Law was enacted, the Committee adopted a series of resolutions dealing with basic issues. One of the resolutions indicated that if records are accessible under the Freedom of Information Law, they should be made equally available to any person, without regard to status or interest. Moreover, this view was adopted judicially by an appellate court in Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], which cited the Committee's resolution. As such, if, for example, a police blotter is available, I believe that it should be made available to any person, and that a demonstration of interest in, need for or connection with records is unnecessary.

Your second area of inquiry concerns the administrative arms of the court system. While the Office of Court Administration (OCA) has contended that it is outside the scope of the Freedom of Information Law, the only two judicial determinations on the subject of which I am aware indicate that OCA is an "agency" that falls within the scope of the Law. Enclosed are two decisions 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

cc: Southold Town Police

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2723

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 21, 1982

John F. Dowd
Superintendent of Schools
Odessa-Montour Central School District
Box 48
Odessa, New York 14869

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 Superintendent Dowd:

I have received your letter of December 16 and the materials attached to it. Your interest in complying with the Freedom of Information Law is much appreciated.

Attached to your letter are various appeals and the ensuing determinations, each of which upheld denials of access to records, at least in part.

I would like to offer the following comments regarding the determinations.

First, one of the appeals deals with bills submitted by an attorney for services rendered to the School District. Certain aspects of the bills were deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy.

In this regard, 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)]. If, however, portions of the bills contain information that is confidential under the attorney-client relationship, those portions could in my view be deleted under §87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". Therefore, while some identifying details in bills might justifiably be withheld, others might be available. For example, if the District is involved in ongoing litigation, any person could likely become familiar with the litigation by reviewing court records, many of which are available to the public (see Judiciary Law, §255). In such cases, the parties' identities would have been disclosed by means of a different vehicle and deletion of identifying details would not in my view be appropriate.

Second, records pertaining to attendance were withheld, also on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law.

Although the standard in the Freedom of Information Law regarding privacy is flexible and subject to a variety of interpretations, the courts have provided substantial guidance regarding the privacy of public employees. In brief, it has been found in various contexts that public employees enjoy a lesser degree of privacy than others, for it has been determined that public employees are required to be more accountable than others.

Further, the courts have held on several occasions that records which are relevant to the performance of a public employee's official duties are available, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., 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, Oct. 30, 1980]. Conversely, if records or portions of records are irrelevant to the performance of one's official duties, it has been held that records or portions thereof could 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 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

It has been consistently advised that records concerning the attendance of public employees are available. From my perspective, records indicating the number of days charged by a public employee for vacation, sick, personal, or time taken for military leave are relevant to the performance of one's official duties, and are therefore available on the ground that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. For instance, often, a public employee is permitted to be absent with pay for only a specific number of personal or vacation days. If more than the requisite number of days is taken, the public should in my view have a right to know whether whatever rules or contracts concerning absences have been followed appropriately. Such information would in my view be relevant not only to the official duties of a particular public employee, but also to the agency itself. Further, that type of information would not alone disclose any intimate details of an individual's life. If attendance records include a description of an illness or other medical problems, those portions of an attendance record could in my view be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy. However, portions of an attendance record indicating only the number of days taken for sick, vacation or military leave should in my view be available, for any invasion of privacy would be minimal and not "unwarranted".

Another possible ground for denial regarding attendance records 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. Although 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.

The records in question could in my view be characterized as "intra-agency" materials. However, it would appear that those aspects of the records reflective of time used or accumulated would consist solely of "statistical or factual tabulations or data" that are available under §87(2)(g)(i).

Once again, your transmittal of the determinations is much appreciated.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-837
FOIL-AO-2224

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 22, 1982

Ms. Carol Mailloux

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. Mailloux:

I have received your recent letter as well as a tape recording of portions of a recent meeting of the Lindenhurst Board of Education. You have raised several questions relative to both the Freedom of Information and Open Meetings Laws, and I will attempt to respond to each.

Your first question concerns the responsibility of an agency to provide access to records on a timely basis. Apparently the attorney for the District believes that if a request is answered within five business days, the agency can fulfill the request by providing records at any time thereafter. The problem, according to your letter, is that the records are often made available weeks after a request may be granted, "usually thirty days later".

From my perspective, the Law and the regulations promulgated by the Committee, which have the force and effect of law, require that records be made available within prescribed time limits. Further, from my perspective, access delayed is often the equivalent of access denied.

In terms of time limits, §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 acknoweldged 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 with 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)].

Your second area of inquiry concerns the process by which a person may appeal a denial of access. Your letter and the tape recording indicate that the president of the School District stated that "we don't have an appeal system". She also asked whether the capacity to appeal is a "should be or must be".

The capacity to appeal a denial of access is statutory. In this regard, §89(4)(a) of the Freedom of Information Law states 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. 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 the School District must have a person or body designated to render determinations on appeal following a denial of access to records. Additional information regarding the appeal procedure is found in §1401.7 of the enclosed regulations.

Your third area of inquiry pertains to access to tape recordings of meetings. It appears that tape recordings are withheld until minutes of meetings to which the tape recordings relate have been approved. Further, minutes are not made available until they are approved, which may be several weeks following a meeting.

Here it is noted that the Freedom of Information Law contains a broad definition of "record". Section 86 (4) 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 view, once a tape recording exists, it constitutes a "record" subject to rights of access granted by the Freedom of Information Law. Further, it has been held judicially that a tape recording of an open meeting is a "record" that is available [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

It is difficult to envision a rationale for delaying access to a tape recording until minutes have been approved. Minutes as initially prepared may be subject to review, correction, or modification, for example. Nevertheless, the contents of a tape recording would not change, regardless of the nature of minutes that may be developed following a meeting.

Moreover, the fact that the School Board has adopted a policy which precludes Board members from obtaining tape recordings until minutes have been approved in my opinion has no bearing upon rights of access granted by the Freedom of Information Law. In addition, if the rights of Board members under District policy represent lesser rights than those accorded to members of public under the Freedom of Information Law, it would appear that the policy may be void to that extent.

With respect to minutes, the Open Meetings Law contains specific direction regarding the time within which minutes of open meetings must be prepared and made available. Section 101(3) of the Open Meetings Law states that:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting..."

As such, it is in my opinion clear that minutes of open meetings must be prepared and made available within two weeks of meetings, whether or not the minutes have been approved.

I would like to point out that shortly after the Open Meetings Law was amended in 1979, but before the amendments took effect on October 1 of that year, the Committee sent a memorandum to which the amended Open Meetings Law was attached in which the changes in the Law were explained to public bodies throughout the state, including school boards.

In recognition of the fact that some public bodies might not meet within two weeks and therefore might not have the capacity to approve minutes within two weeks, it was suggested in the memorandum that, to comply with the Law, minutes should be prepared and made available within the appropriate time period but that they may be marked as "unapproved", "non-final", "draft", for instance. By so doing, the requirements of the Open Meetings Law can be met; concurrently, members of the public who receive the minutes are aware that the contents may change. Further, members of public bodies are given a measure of protection.

Next, you raised a question regarding the authority of the Committee. It is true that the Committee on Public Access to Records is an advisory body; it has no authority to compel compliance with either the Freedom of Information Law or the Open Meetings Law. Nevertheless, there are numerous judicial decisions which have cited the opinions of the Committee, including appellate court decisions which indicate that the advice of the Committee, as the administrative agency charged with oversight of the two laws within its jurisidiction, should be given great weight [see e.g., Sheehan v. City of Binghamton, 59 AD 2d 808 (1977); Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979); and Sciolino v. Ryan, 103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 2d 475, 440 NYS 2d 795 (1981)].

You asked what the law is with respect to the capacity of an individual to tape record an open meeting "as long as he/she does not interfere with the meeting."

It is noted that the Open Meetings Law is silent with respect to the use of tape recorders and other broadcasting or televising devices at open meetings. As such, the issue has been dealt with judicially in relation to rules adopted by public bodies, and whether or not such rules are reasonable.

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 advised that the use of tape recorders should not be prohibited in situations in which the devices uses 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 in Suffolk County. 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 possiblity 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.

It is important to point out that an 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 that 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."

Finally, when a secretary is present at open meetings and takes shorthand during the meeting, you have asked whether the notes taken are "also part of the public record".

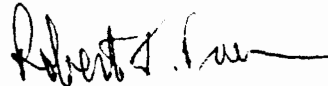
In my view, the notes to which you made reference would be subject to rights of access granted by the Freedom of Information Law.

In a similar situation, a lawsuit was initiated against the Board of Regents with respect to notes taken by the secretary to the Board that were used as an aid in preparing minutes. In Warder v. Board of Regents, 410 NYS 2d 742 (1978)], the Court held that the notes do not constitute personal property but rather were "records" required to be made available in accordance with the Freedom of Information Law.

It is noted that shorthand may be illegible to all but the person who took the notes. In such instances, I would like to point out that the Freedom of Information Law grants access to the records as they exist and that an interpretation or transcription of the notes would not in my view be required.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: William FitzGibbons
Mrs. Russo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2725

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 22, 1982

Mr. Tyrone Tatum
82-B-918
Box 51
Comstock, NY 12821-0051

Dear Mr. Tatum:

I have today received your request under the Freedom of Information Law regarding records pertaining to the "Destruction of the Five Percent Nation of Islam and Malcom X".

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 fo records generally, such as those in which you are interested, nor does it have the authority to require an agency to grant or deny access to records.

Under the circumstances, it is suggested that you resubmit a request to the agency or agencies that you believe would have possession of the records that you are seeking.

In addition, it is noted that §89(3) of the Freedom of Information Law states in part that an applicant must request records "reasonably described". In this regard, your request to this office seeks records concerning a named individual, but it contains no other information regarding that person. When making a request, it is suggested that you provide as much detail as possible, including dates, file designations, subject heading and other identifying information that would enable an agency records access officer 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2726

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 24, 1982

John Robert De Zimm
82-C-127
Clinton Annex
P.O. Box 367
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. De Zimm:

I have received your letter of December 14 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns requests directed to each house of the New York State Legislature in which you sought the Senate and the Assembly "subject matter lists" required to be prepared pursuant to §88(3)(c) of the Freedom of Information Law. You also requested a further breakdown of records that relate to "electronic surveillance and monitoring...by law enforcement and other governmental agencies". Although your request was made on November 15, as of the date of your letter to this office, you had received no response from either the Senate or the Assembly.

I would like to offer the following comments regarding your inquiry.

First, although both houses of the Legislature are required to prepare and make available for public inspection and copying subject matter lists relative to their available records, there would be no requirement that either house prepare a detailed list or index pertaining specifically to records of electronic surveillance and monitoring by

government agencies. In my view, a subject matter list need not identify all records of an agency or the State Legislature, but rather should indicate the categories of the types of records in possession of an entity subject to the Freedom of Information Law. Moreover, §89(3) of the Freedom of Information Law states that, as a general rule, an agency need not create a new record in response to a request. Therefore, if, for example, neither house of the Legislature maintains a detailed index regarding surveillance records, there would be no requirement in the Freedom of Information Law that such indices be prepared on your behalf. In addition, in a situation in which an applicant requested greater detail in a subject matter list, it was held that the existing subject matter list of an agency was sufficient and that such a list is required to identify only a broad variety of records in possession of the agency [D'Alessandro v. Unemployment Insurance Appeal Board, 56 AD2d 962].

Second, it is in my view unlikely that the State Legislature would maintain the types of records that you are seeking. It is suggested that you direct requests for subject matter lists to the agencies that might maintain possession of records pertaining to electronic surveillance and monitoring, such as the Division of the State Police.

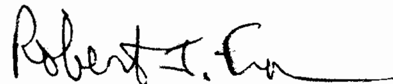
Third, the Freedom of Information Law contains prescribed time limits for responses to requests. Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency or the State Legislature must respond to a request within five business days of the 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 or State Legislature 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)].

Lastly, it is suggested that you might want to renew your requests if you continue to believe that the State Legislature maintains records in which you are interested. In this regard, requests might be directed to the Assembly Public Information Office, Concourse Level, Empire State Plaza, Albany, New York 12241, and in the case of the Senate, to the Secretary of the Senate, 321 State Capitol, Albany, New York 12247.

I hope that I 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: Sharon Galarneau
Stephen Sloan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-841
FOIL-AO-2727

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 28, 1982

Barry P. Abisch, Editor
The Standard Star
92 North Avenue
New Rochelle, NY 10802

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. Abisch:

I have received your recent letter in which you raised questions under both the Freedom of Information and Open Meetings Laws concerning the upcoming sale of real property by the New Rochelle Board of Education.

More specifically, you wrote that the Board:

> "...is trying to sell a surplus schoolhouse. Developers had to be pre-qualified, and now those developers which have been deemd eligible have been instructed to submit their final offers by Jan. 10, 1983. The school board is scheduled to discuss those offers at a meeting on Jan. 11."

It is your view that, since the offers will be final and will include indication of the possible uses of the property, "publicity can in no way affect the price". It is also your belief that "the offers should become public after the Jan. 10 deadline". Nevertheless, you have asked when the offers become available under the Freedom of Information Law and whether discussion of the offers must "take place in public session".

I would like to offer the following comments in response to your questions.

First, with respect to access to the offers, 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 circumstances, it would appear that there is only one ground for denial of possible significance. Specifically, §87(2)(c) states that an agency, such as a school district or school board, may withhold records or portions thereof that:

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

From my perspective, the language quoted above is based upon potentially harmful effects of disclosure. For instance, if offers submitted to date are disclosed today, those who already submitted offers would likely be placed at a competitive disadvantage, for others might have the capacity to submit slightly higher offers by the January 10 deadline. Moreover, if the offers become known prematurely, the School Board might not receive the best possible offer. Nevertheless, once the deadline has been reached and all the offers have been submitted, it would appear that any "impairment" would have disappeared. As such, based upon your description of the facts, I would agree with your contention that the offers should become available when all of them have been submitted, i.e., when the deadline of January 10 is reached.

With respect to the discussion by the Board of Education regarding the offers, in a manner analogous to the Freedom of Information Law, the Open Meetings Law is based upon a presumption of openness. All meetings and deliberations of public bodies are required to be held open to the public, except to the extent that one or more among eight grounds for executive session apply.

It appears that only one of the grounds for executive session relates to the sale of the schoolhouse. Specifically, §100(1)(h) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

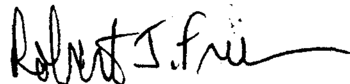
> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

Based upon the language quoted above, it is clear that not every discussion pertaining to the sale of real property may be discussed in an executive session. On the contrary, an executive session would properly be called under §100(1)(h) only when "publicity would substantially affect the value" of the property.

Under the circumstances, since the developers were "pre-qualified", since the offers are final and since the nature and location of the property to be sold is known, it is difficult to envision how publicity could at this juncture "substantially affect" the value of the property. If my assumptions are accurate, I do not believe that §100(1)(h) or any other ground for executive session could justifiably be cited to discuss the sale of the schoolhouse during an executive session.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2728

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 28, 1982

Mr. Joseph R. Lewis
Executive Director
Town-Village Aircraft Safety
& Noise Abatement Committee
196 Central Avenue
Lawrence, NY 11559

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. Lewis:

As you are aware, I have received your letter of December 8 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the materials attached to it, you have directed a series of requests for records to the Port Authority as executive director of the Town-Village Aircraft Safety and Noise Abatement Committee (TVASNAC). The requests, all of which involve "daily sound monitor logs of departures at Kennedy Airport" for specific dates, have been constructively denied due to failures to respond. Further, your appeals addressed to Patrick J. Falvey, General Counsel to the Port Authority, have not been answered.

In an effort to assist you and obtain additional information regarding your request, I contacted the Office of Counsel to the Port Authority on your behalf. As you know, Mr. Falvey has opted not to render a determination on appeal due to his involvement in litigation initiated against the Port Authority by TVASNAC and others regarding noise allegedly caused by aircraft operating at Kennedy Airport. Further, in a letter dated December 17 sent by Robert J. Aaronson, Director of Aviation, to Senator Carol Berman, it was indicated that the Authority's policy of

releasing sound monitoring logs would be curtailed, since disclosure of the logs "may be prejudicial to the defense of this suit". In addition, a determination concerning your request will apparently be made by the Hon. Charles Breitel, formerly Chief Judge of the Court of Appeals.

Notwithstanding the forthcoming issuance of a determination by Judge Breitel, you have requested an advisory opinion. It is noted, too, that I have received requests for assistance sent on your behalf by Senators Berman and Levy.

I would like to offer the following comments regarding your inquiry.

It is noted initially that the scope of the Freedom of Information Law is determined in part by the definition of "agency". Section 86(3) of the Law defines "agency" to include:

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

From my perspective, it is questionable whether the Port Authority is an "agency" subject to the provisions of the Freedom of Information Law. The Port Authority is a bi-state entity, for its jurisdiction and functions extend to New Jersey, as well as New York. In my view, since New York cannot generally impose its legislative enactments beyond its borders, it is questionable whether the Freedom of Information Law applies to the Port Authority, and it has been suggested in the past that, since it is a bi-state agency, the Port Authority likely falls outside the scope of the Freedom of Information Law.

Nevertheless, I believe that the Port Authority several years ago adopted a policy designed to be consistent with the spirit of both the New York and New Jersey access statutes. If that policy provides access substantially the same as that granted by the New York Freedom of Information Law, two of the grounds for denial appearing in the Freedom of Information Law would in my opinion be of significance.

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.

The first ground for denial of possible significance is §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute". Since litigation is pending against the Port Authority regarding the level of noise at Kennedy Airport, the question is whether the logs that you are seeking were prepared for litigation. If they were prepared for litigation, they would in my view be exempt from disclosure pursuant to §3101(d) of the Civil Practice Law and Rules and, therefore, would fall within the scope of §87(2)(a) of the Freedom of Information Law.

If, however, the records sought are prepared in the ordinary course of business or if they were prepared for multiple purposes, one of which is litigation, I do not believe that either §3101(d) of the Civil Practice Law and Rules or §87(2)(a) of the Freedom of Information Law could justifiably be cited as bases for withholding.

In Westchester-Rockland Newspapers v. Moscydlowski [58 AD 2d 234 (1977)], the Appellate Division, Second Department, found that material prepared for litigation is deniable, but that records prepared for multiple purposes, one of which might be litigation, fell outside the exception envisioned in the cited provision of the Civil Practice Law and Rules. Moreover, in another decision of the Appellate Division, it was found that records accessible under the Freedom of Information Law should be made equally available to any person, regardless of status or interest, and notwithstanding the fact that the request was made by a litigant [Burke v. Yudelson, 51 AD 2d 673 (1976)].

In short, based upon judicial interpretations of the Freedom of Information Law, if the records sought were prepared solely for litigation, they could in my opinion be denied; if they were prepared in the ordinary course of business or for multiple purposes, one of which is litigation, neither Article 31 of the Civil Practice Law and Rules nor §87(2)(a) of the Freedom of Information Law could in my view be cited to withhold the records.

The remaining ground for denial of potential significance is §87(2)(g) concerning inter-agency or intra-agency materials. The cited provision states that an agency may withhold records that:

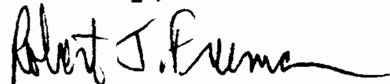
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. Although inter-agency 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 dterminations must be made available.

Under the circumstances, if the Freedom of Information Law were to apply to the Port Authority, the records in question could likely be characterized as "intra-agency materials". However, it would appear that they consist of statistical or factual information available under §87(2)(g)(i) [see also Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979); Ingram v. Axelrod, Sup. Ct., Albany Cty., May 13, 1982, App. Div. 3rd Dept., October 7, 1982; and Kheel v. Ravitch, 454 NYS 2d 413].

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Patrick J. Falvey
Jay Selcov
Senator Carol Berman
Senator Norman J. Levy

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2729

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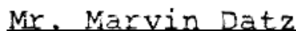
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 29, 1982

Mr. Marvin Datz



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. Datz:

I have received your letters of December 16, which pertain to your unsuccessful attempts to gain access to records of the New York City Board of Education.

I would like to offer the following comments regarding your situation.

First, it appears that numerous requests have been made over a lengthy period of time, but that responses to many of the requests have not been given on a timely basis. In this regard, the Freedom of Information Law and the regulations promulgated by the Committee prescribe time limits for responding 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. Moreover, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

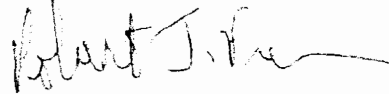
Moreover, it has been held judicially that a failure by an agency to respond to an appeal within the statutory period prescribed in §89(4)(a) constitutes the exhaustion of administrative remedies and may be followed by the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd, Matter of v. McGuire, 108 Misc. 2d 536, 87 AD 2d 388, ___ NY 2d ___ (1982)]. As such, if you have exhausted your administrative remedies under the Freedom of Information Law, your recourse would appear to involve a lawsuit.

Second, you requested the intercession of this office relative to compliance by the Board with an order signed by a federal judge. Once again, under the circumstances, I do not believe that it would be appropriate to become involved in a matter determined by a federal court. Presumably, your action in federal court was initiated based upon provisions of federal law and not the Freedom of Information Law. As such, it would appear that your remedy would also lie in the federal courts and federal law.

Lastly, you referred to and attached a request directed to the Board on October 6, 1977, which has not yet been answered. I would conjecture that the request made more than five years ago has likely been mislaid or forgotten. If you continue to want the records sought in that request, it is suggested that you submit a new 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

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STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2730

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 29, 1982

Mr. Fred Greenberg

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 letter of December 16 in which you described delays on the part of the New York City Board of Education regarding requests made under the Freedom of Information Law.

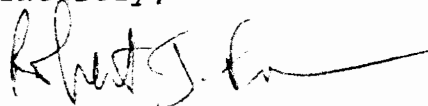
More specifically, you wrote that: "[I]t appears to be the Board's position that until a record is specifically denied, any appeal of denial is premature." In this regard, without restating the advice given in my letter to you of November 9, it is my belief that a failure to grant or deny access within the time limits specified in the Freedom of Information Law and the regulations promulgated thereunder results in a constructive denial of access that may be appealed. Further, when an appeal is made, §89(4)(a) of the Law specifies that the agency must render a determination within seven business days of receipt of the appeal.

If the time for rendering a determination on appeal has transpired without a determination, it has been held that the applicant has exhausted his or her administrative remedies and may initiate a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd, Matter of v. McGuire, 108 Misc. 2d 536, 87 AD 2d 388, ___ NY 2d ___ (1982)].

Should the delays continue, it is possible that your only recourse might involve the initiation of such a proceeding.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm