STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2231

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

January 3, 1983

Mr. Louis B. Young
U.C.I. 64-106
#065-716
Box 221
Raiford, FL 332083

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Young:

I have received your letter of December 24 in which you requested that the Committee on Public Access to Records monitor compliance with the law in conjunction with a request directed to the Commission on Patents and Trademarks.

Please be advised that, since your request was directed to a federal agency, the applicable statute under which the request was made is the federal Freedom of Information Act (5 U.S.C. §552). The Committee on Public Access to Records was created by the New York Freedom of Information Law and is responsible for advising and monitoring with respect to rights of access to records of government in New York. As such, the Committee has no jurisdiction or legal capacity to advise concerning a request to or a denial by a federal agency, such as the Commission of Patents and Trademarks.

I have, however, enclosed a copy of a publication of the U.S. Department of Justice entitled "Your Right to Federal Records" which contains the text of the federal Freedom of Information Act and advice regarding its use.

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-2732

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

January 3, 1983

Dr. Maurice Green
[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 Dr. Green:

I have received your letter of December 28 in which you asked how you might request and obtain records pertaining to you regarding investigations by the FBI and Army Intelligence.

I would like to offer the following comment 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 in New York. Since the records you are seeking, to the extent that they exist, would appear to be in the possession of federal agencies, rights of access would be governed by the federal Freedom of Information Act (5 U.S.C. §552).

Nevertheless, to help you in making a request under the federal Freedom of Information Act, I have enclosed a copy of a publication of the U.S. Department of Justice entitled "Your Right to Federal Records", which contains the text of the Freedom of Information Act and advice regarding its use.

It is suggested that you direct your requests to the agencies that you believe maintain the records that you are seeking. In addition, the Act requires that an applicant "reasonably describe" the records sought. Therefore, as much detail as possible should be given, including names, dates, descriptions of events, identification numbers and similar details that would enable the agency to locate 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

RJF:PPB:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2733

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

January 5, 1983

Mr. Alvin Walker
82-A-2689 A-BIK
N-524
354 Hunter Street
Ossining, NY 10562

Dear Mr. Walker:

I have received two letters from you dated January 3 in which you requested records, one addressed to this office and the other addressed to the "Freedom of Information Unit" in Washington, DC.

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

First, the Committee on Public Access to Records is responsible for advising with respect to the New York Freedom of Information Law. As such, 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 that an agency grant or deny access to records.

Second, if the records are in possession of a unit of government in New York, the statute that you cited, the federal Freedom of Information Act, would not be applicable. That act pertains to records in possession of federal agencies; the New York Freedom of Information Law pertains to records in possession of units of government in New York.

Third, although the Freedom of Information Law is broad in its scope, the courts and court records are specifically excluded from the coverage of the Law [see attached, Freedom of Information Law, §86(3) and §86(1) regarding definitions of "agency" and "judiciary"]. While the Freedom of Information Law does not include the courts and court records, various provisions of the Judiciary Law and other court acts, however, grant substantial rights of access to court records.

In this regard, since your inquiry involves indictments, sentencing minutes and related information, it would appear that such records would be in possession of the courts in which the proceedings were conducted. As such, it is suggested that you direct your requests to the clerks of the appropriate courts. Further, although you provided some identifying details, it is recommended that additional information be provided in order to enable court officials to locate the records sought, including index, indictment and docket numbers, specific dates, names and similar details.

Lastly, it is suggested that you might want to discuss the matter with a representative of Prisoners' Legal Services or a legal aid group.

I hope that I 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-2734

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

January 5, 1983

Mr. Albert Bell
78-B-1769
B-1-5
Box 51
Comstock, NY 12821

Dear Mr. Bell:

I have received your letter of January 2 in which you requested your criminal record from this office, including an indication of all 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. The Committee does not have posession of records generally, such as those in which you are interested, nor does it have the authority to require that an agency grant or deny access to records.

It is noted, however, that the regulations developed by the Department of Correctional Services under the Freedom of Information Law make specific reference to the capacity of an inmate to gain access to his criminal history record, which is also known as the "DCJS report".

I have enclosed a copy of those regulations, which indicate in §5.22 that the DCJS report should be made available by directing a request for the report to the facility superintendent pursuant to §5.20.

It is suggested that you review the enclosed regulations closely, for they will be useful to you in terms of the information sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2735

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

COMMITTEE MEMBERS

[redacted]OMAS H. COLLINS
ALFRED DEL BELLO
JOHN C. EGAN
MICHAEL FINNERTY
WALTER W. GRUNFELD
MARCELLA MAXWELL
STEPHEN PAWLINGA
BARBARA SHACK
GAIL S. SHAFFER
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 5, 1983

Mr. Harvey M. Elentuck
[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. Elentuck:

I have received your letter of December 20, as well as the correspondence attached to it, in which you requested an advisory opinion under the Freedom of Information Law. It is assumed that the issues raised in that letter are unrelated to the litigation that you have commenced.

Your inquiry pertains to records regarding the employment of Ms. Virginia E. Morrissey by the Middle Island Central School District. In this regard, in response to a request for evaluation reports filed by Ms. Morrissey concerning the service of non-tenured teachers, you were informed that such records would be withheld on the advice of counsel. Since you had obtained similar materials from the New York City Board of Education, you questioned whether "it was the intention of the Freedom of Information Law to make such materials available in New York City while allowing similar items to remain inaccessible on Long Island".

I would like to offer several comments regarding the situation.

First, the records kept by various school districts might differ in terms of form and content. As such, I could not conjecture as to whether the materials made available in New York City are indeed similar to those on Long Island.

Second, the Freedom of Information Law is permissive. Stated differently, although an agency may withhold certain records based upon a ground for denial, there is generally no requirement that such records must be withheld. As such, it is possible that records were made available in New York City, notwithstanding the legal authority to deny access.

Third, it is not inconceivable that the records in question were properly denied. As you are aware, §87(2)(g) of the Freedom of Information 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..."

If the evaluations are reflective of opinion or recommendation, for example, the denial may have been appropriate.

With respect to Ms. Morrissey's record of attendance and the use of sick or personal leave time, I believe that such records are available. Rather than providing the details upon which my opinion is based, I have enclosed a copy of a recent opinion on the subject. A copy will also be sent to the Superintendent of the Middle Island Schools.

Lastly, you indicated what you feel is an inconsistency between the holding in Herald Co. v. City of Syracuse (430 NYS 2d 460) and the publication of materials regarding tenure proceedings. Although this office does not have jurisdiction to provide advice under the Education Law, I do not believe that there is necessarily any inconsistency. It is suggested that you review subdivisions (4) and (5) of §3020-a of the Education Law. In brief, in some cases, the tenure proceeding may end in conjunction with subdivision (4); in others, as in those in which an appeal is made to the Commissioner of Education, the proceeding may continue under subdivision (5).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Dr. Nick F. Muto, Superintendent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2736

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

January 5, 1983

Joseph S. Dominelli
Executive Secretary
NYS Association of Chiefs
of Police, Inc.
Suite 1114
112 State Street
Albany, New York 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 Chief Dominelli:

As you are aware, I have received your letter and a copy of a request made by Dan Pochoda of the New York Civil Liberties Union under the Freedom of Information Law sent to Chief David J. Buckley of the Suffolk County Police Department. You have asked that I review and comment with respect to the request.

The inquiry, which has apparently been sent to several large police departments in the state, concerns the use of deadly force by police departments, including various areas of statistical information regarding shootings, and rules and regulations and other procedural mechanisms employed by police departments concerning the monitoring and investigation of incidents in which deadly force may have been involved.

I would like to offer a number of observations regarding the nature of the request and the information sought.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a police department, are available, except to the extent that records or portions thereof fall within one or more grounds for denial enumerated in §87(2)(a) through (h) of the Law.

Second, §89(3) of 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.

In this regard, there are numerous areas of information sought which might not exist in the form requested. For example, one aspect of the request concerns "firearms use" and indicates that the applicant is interested in obtaining records for the past five years concerning:

> "...(a) the total number of firearms discharges by Police Department personnel, (excluding, of course, training sessions, target practice, etc.) (b) the number of shootings resulting in bodily injury to (i) non-departmental persons and (ii) police department personnel, and (c) the number of shootings resulting in death to (i) non-departmental persons, and (ii) police department personnel. For a, b, and c, and subdivisions above, the number in each category of shootings by Department personnel who were 1) off duty, 2) black, Hispanic and white, 3) male and female, and 4) had been employed for less than three years in the Department, less than 10 years and less than 20 years."

While a police department might have the capacity to determine the number of firearms discharges within a particular time period and categories of shootings by department personnel who may have been off-duty, whether police officers involved in shootings are black, hispanic, or white, or the length of time in which such individuals may have been employed, I would conjecture that departments might not maintain statistics specifically reflective of the information sought. For instance, it may be possible to review records for the purpose of tabulating the numbers of police officers involved in shootings who represent particular ethnic or racial groups. Nevertheless, if figures do not now exist containing those breakdowns, the Freedom of Information Law would not in my view require that a police department review its records for the purpose of preparing tabulations or new records in response to the request.

On the other hand, if the statistical data sought does exist, it would in my opinion be available. Although one of the grounds for denial might apply to such information, the structure of that ground for denial indicates that statistical information developed by a police department is 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, the statistics derived by a police department could be characterized as "intra-agency" materials. However, they would be accessible under §87(2)(g)(i), which grants access to "statistical or factual tabulations or data".

The two points made in the preceding paragraphs are in my view applicable with respect to several aspects of the request, i.e., that if statistics or other tabulations do not exist, a police department would not be obliged to prepare new records containing the statistics sought; and that to the extent that the figures requested do exist, they would likely be available.

At this juncture, I would like to comment with respect to each of the six areas of the request made by Mr. Pochoda.

The first aspect of the request pertains to firearms policies, and Mr. Pochoda asked for:

> "[A]ll regulations, directives, bulletins, procedures, policies etc. concerning the carrying, maintaining, and use including firing-of-weapons by Police Department personnel, with the date of adoption. These include all general directives and procedures, as well as any concerning use of firearms in specific situations, such as when off-duty, when on limited duty or suspended status, while patrolling in a car or confronting someone in a car, when encountering a seemingly mentally ill or 'temporarily deranged person,' etc."

To the extent that the records described above exist, I believe that they are available in part, if not in toto.

Once again, I direct your attention to §87(2)(g) concerning inter-agency or intra-agency materials. As noted earlier, in addition to statistical or factual information, the cited provision grants access to "instructions to staff that affect the public" and "final agency policy or determinations". The materials sought, such as regulations, directives, procedures and the like in my opinion constitute either instructions to staff that affect the public or final agency policies. Therefore, I believe that although the records might fall within §87(2)(g), the cited provision could not serve as a basis for denial.

There is a second ground for denial of possible significance, but I do not believe that it could justifiably be asserted. Section 87(2)(e) states that an agency may withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Some of the records in question might have been prepared not for law enforcement purposes, but rather in the ordinary course of business. To that extent, §87(2)(e) would not in my opinion be applicable. Even if the records were prepared for law enforcement purposes, it does not appear that any of the bases for withholding described in sub-paragraphs (i) through (iv) of §87(2)(e) would apply. Further, while some aspects of the records might be reflective of criminal investigative techniques or procedures, it appears that those requested are generally applicable and, therefore, would be "routine".

A third ground for denial of possible relevance is §87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person". Without knowledge of the contents of the records, I could not conjecture as to the extent, if any, to which §87(2)(f) might be applicable.

The second aspect of the request concerns firearms use. For reasons described earlier, if numerical totals in relation to the information sought do not exist, a police department would not be required to create totals in response to a request.

In another area of that inquiry, Mr. Pochoda requested that the Department copy or, "if not available" identify:

> "...all statements, testimony, reports, evaluations, analyses, articles, books, descriptions, etc. concerning the use of firearms by all or a portion of Suffolk County Police Department personnel, including those statements, testimony, etc. done for or about the Department by Department personnel, by any federal, state or city givernmental official, body, agency, committee or commission, or by any private individual, consultant, business, agency, organization or academic institution."

Due to the breadth of the request, it is difficult to provide specific advice regarding rights of access. However, I believe that two points of possible significance should be offered.

First, those involved in providing information regarding the use of firearms might not include only governmental officials. If others, such as private citizens, have been involved, there may be implications relative to privacy. 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". From my perspective, the extent to which §87(2)(b) would apply can be determined only by reviewing records individually. Further, it is possible that, in some cases, identifying details could be deleted from records to protect privacy, while the remainder of the records could be available.

Second, some of the records in question might be confidential. Section 50-a of the Civil Rights Law pertaining to police officers' personnel records 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 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...except as may be mandated by the lawful court order."

Some of the records sought might be considered personnel records, and some of those might be used to evaluate performance toward continued employment or promotion. To that extent, the records would fall within §50-a of the Civil Rights Law and, therefore, §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by state or federal statute" would be applicable as a basis for withholding.

I would like to point out, too, that the most recent judicial interpretation of which I am aware that dealt with §50-a provided a broad capacity to withhold [see Gannett Co. v. James, 86 AD 2d 744 (1982)]. In addition, the Court in Gannett, supra, also considered access to "Use of Force" forms and found that:

> "...the 'Use of Forms' forms (request [2] above), while not personnel records used to evaluate performance, are nonetheless exempt from disclosure as intra-agency materials which are not statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations (Public Officers Law, § 87, subd. 2, par.[g], cl i, ii, iii). This inter or intra-agency exemption is important in that it permits police officers to express their views of events candidly and in writing" (id. at 746).

The extent to which the decision cited above may be relevant to the records sought is likely dependent upon the nature and content of the records kept by police departments.

The third area of the request pertains to "shootings of police". The information sought is statistical in nature, and rights of access would in my view be determined by the existence of the records sought. If records have been created reflective of the data sought, I believe that they would be available; if no such records exist, the departments would not be obliged to prepare new records in response to the request.

The fourth aspect of the request is entitled "Internal Monitoring/Investigation of Shootings". It involves rules, policies, procedures and similar records "concerning the reporting and investigation of an incident, involving the use of firearms by a Department employee", including forms that may be used. Other records sought pertain to the authority, activities and staff of oversight boards and statistics regarding their findings.

Once again, the key provision appears to be §87(2)(g) concerning inter-agency and intra-agency materials. Existing policies, procedures and the like would in my view be available under §87(2)(g)(iii), which grants access to final agency policies. Blank forms would also be available under §87(2)(g)(iii) or perhaps under §87(2)(g)(ii) concerning instructions to staff that affect the public.

With respect to the composition of oversight boards, their staffs and similar information, as well as statistics regarding their findings, such information would in my opinion be available to the extent that it exists, under §87(2)(g)(i), which grants access to "statistical or factual tabulations or data". It is noted that the phrase quoted above has been interpreted to include factual information, whether or not it appears in tabular form [see e.g., 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].

Other available records might also contain some of the information sought. For example, organization charts, staff rosters, directives, resolutions by governing bodies establishing oversight boards or functions and payroll lists required to be maintained under §87(3)(b) might be relevant to the request.

The fifth area of the request entitled "External Monitoring" concerns actions referred to or taken by other law enforcement agencies, as in the case of shootings by department personnel that resulted in felony indictments or misdemeanor charges. The request also involves the nature of legal representation in such cases and the ensuing verdicts or judgments.

If such records exist, they would in my opinion be available in terms of statistics from the departments, and in cases where determinations have been rendered, from the departments involved and/or from the courts in which the proceedings were determined.

It is possible, however, that some of the records pertaining to specific cases might be sealed under §160.50 of the Criminal Procedure Law concerning situations in which criminal charges against an accused have been dismissed in favor of the accused.

The last area of inquiry concerns recruitment and training and includes records of the criteria and qualifications required to be eligible for employment, oral and written tests given to applicants, materials pertaining to the use of force employed for training purposes and practices and procedures used to identify those who do not meet applicable criteria. Similar records were requested regarding the suitability to use or possess a firearm.

Much of the extant information sought would in my view be available, perhaps from a number of sources, such as civil service announcements, training manuals, statutes (i.e., Penal Law, §400.00) and departmental rules and policies.

With respect to examinations, it is noted that §87 (2)(h) of the Freedom of Information Law permits an agency to withhold records that:

> "are examination questions or answers which are requested prior to the final administration of such questions."

As such, examination questions or answers may be withheld if the questions will be used 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

cc: Dan Pochoda

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2737

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

January 10, 1983

Mr. Abilio Tavares, Jr.
Hesson, Ford, Sherwood & Whalen
90 State Street
Albany, New York 12207-1797

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Taveres:

I have received your letter of December 17 and the materials attached to it. Please accept my apologies for the delay in response.

Your inquiry concerns a request for records related to a fatal motor vehicle accident. Although it was determined that certain records pertaining to the accident would be made available, the County Clerk, Guy D. Paquin, wrote that:

> "[W]ith respect to your request for the investigative report and statements of witnesses, such records are exempt from disclosure as such disclosure would constitute an unwarranted invasion of personal privacy of the persons named in such investigation and statements.
>
> "With respect to your request for blood test results, such results are exempt from disclosure pursuant to Section 677 of the County Law, which requires a court order authorizing the release of such information."

In your letter to this office, you indicated that you would prefer to obtain the reports in their entirety, but you expressed a willingness "to accept the reports with names deleted if its the only way we can have access to the information".

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

First, I have contacted the County Clerk on your behalf in an effort to learn more about the contents of the records. While I was unable to obtain additional information regarding the records, Mr. Paquin indicated that his response inadvertently failed to refer to the right to appeal his denial under §89(4)(a) of the Freedom of Information Law. He informed me that the person designated to render determinations on appeal is Joseph Dolan of the County Attorney's office. It is suggested that you appeal the County Clerk's denial.

Second, accident reports are generally available, not necessarily pursuant to the Freedom of Information Law, but rather under §66-a of the Public Officers Law. The cited provision states that:

> "[N]otwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of any county, city, town, village or other district of the state, shall be open to the inspection of any person having an interest therein, or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection any reports or records the disclosure of which would interfere with the investigation or prosecution by such authorities of a crime involved in or connected with the accident."

Based upon the language quoted above, accident reports are available, except to the extent that disclosure would interfere with the investigation or prosecution of "a crime involved in or connected with the accident." I am not aware that the records in question pertain to a crime.

Third, the provisions of the Freedom of Information Law are in my view consistent with the direction given in §66-a of the Public Officers 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Of relevance under the circumstances is §87(2)(e), which permits an agency to withhold records or portions thereof that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudiciation;
>
> 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;

As in the case of §66-a, the Freedom of Information Law permits an agency to withhold records compiled for law enforcement purposes when disclosure would interfere with law enforcement investigations. The questions are whether a criminal investigation was initiated and the extent, if any, to which disclosure would interfere with an investigation.

Fourth, with respect to one of the asserted bases for withholding, that disclosure would result in an unwarranted invasion of personal privacy, if the records would otherwise be available under §66-a of the Public Officers Law, I believe that they remain available, notwithstanding the Freedom of Information Law. Section 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 rights of access exist under another provision of law, nothing in the Freedom of Information Law may in my opinion be successfully asserted to diminish those rights.

Further, assuming that §66-a does not apply, and that the only basis for withholding certain materials is §87(2)(b) of the Freedom of Information Law concerning an unwarranted invasion of personal privacy, §89(2)(b) indicates that identifying details may be deleted, while the remainder of the records should be available.

Lastly, with respect to the denial of your request for blood test results, §677 of the County Law deals with autopsy reports and similar information prepared by the coroner. Section 677(3)(b) states that:

> "[S]uch records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of the investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Assuming that §677 of the County Law is applicable, I concur with the County Clerk's assertion that the blood test results may be made available only by means of a court order.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Guy D. Paquin
Joseph Dolan

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-843
FOIL-AO-2238

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

January 10, 1983

Mr. John J. Byczkowski
Reporter
Democrat and Chronicle
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 Mr. Byczkowski:

I have received your letter of December 23 in which you raised questions regarding the application of the Freedom of Information Law and the Open Meetings Law to a not-for-profit corporation.

The corporation is known as North East Area Development (NEAD), and you have asked whether its board is required to conduct its business in public, whether it is required to disclose its funding sources, whether its receipt of public funds would bring it within the scope of the Freedom of Information and Open Meetings Laws, and the nature of documents it is required to file with the state.

Without more detailed information regarding NEAD, I regret that I cannot provide specific advice. However, I would like to offer the following general comments.

First, the coverage of the Open Meetings Law is determined in part by its definition of "public body" and §97(2) defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for

> an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Many not-for-profit corporations have a relationship with government, but might not themselves conduct public business or perform a governmental function. In short, unless each of the ingredients found in the definition of "public body" are present, the meetings of the NEAD board of directors would in my view fall outside the coverage of the Open Meetings Law.

Assuming that NEAD is indeed a not-for-profit corporation, it would likely be required to file a certificate of incorporation with the Department of State at the same address as indicated on the Committee's letterhead. To reach the Division of Corporations by telephone, you can call (518) 474-6200. The certificate of incorporation might provide you with additional information that may be useful.

For example, if the certificate indicates that NEAD is a local development corporation performing its duties under §1411 of the Not-for-Profit Corporation Law, I believe that its meetings would be subject to the Open Meetings Law. Otherwise, the meetings of the Board would likely fall outside the requirements of the Open Meetings Law.

Second, in terms of rights of access to records, the Freedom of Information Law applies to entities of government, and §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."

Under the circumstances, NEAD as a not-for-profit corporation probably is not a governmental entity performing a governmental function. If that is so, it would neither be an "agency", nor would its records fall within the scope of the Freedom of Information Law.

Lastly, if NEAD maintains some sort of relationship with government, whether contractual or by means of funding, for example, there may be an indirect method of obtaining records.

Specifically, §86(4) of the Freedom of Information Law expansively 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."

Due to the breadth of the definition, documentation relating to NEAD in possession of an agency would constitute a "record" subject to rights of access granted by the Freedom of Information Law. For instance, if NEAD has received a grant from an agency or maintains a contractual relationship with an agency, the agency with which the relationship exists would likely maintain possession of records pertaining to NEAD subject to 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2739

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

January 10, 1983

Janet MacAdam Gatto
Community School Board District 3
300 West 96th Street
New York, NY 10025

The staff of the Committee on Public Access 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. Gatto:

I have received your letter of December 16 regarding records sought under the Freedom of Information Law, which reached this office on December 24. Please accept my apologies of the delay in response.

According to your letter, in March, 1982, as a member of a Community School Board, you requested various records from the New York City Board of Education involving "correspondence and other papers" transmitted between the Board and the Superintendent and Community School Board District 3. Your request was apparently precipitated because, when the former superintendent was terminated, "certain important files vanished". You wrote further that "[I]t was the belief of this school board that the files had been taken by the Superintendent, Mr. Clinton Howze, and that the board ordered him to return them; however, they were never received".

Although you received a letter from the Central Board in June indicating that you are entitled to the records sought at no charge due to your membership on a community school board, you have yet to receive any of the records requested.

Based upon the problems that you have encountered, you have requested that the Committee "intercede with the New York City Board of Education and require the release of the records" that you requested.

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

First, the Committee on Public Access to Records has the authority to advise with respect to the Freedom of Information Law. The Committee has no legal authority to compel an agency, such as the New York City Board of Education, to grant or deny access to records. However, as a means of interceding on your behalf, copies of this opinion will be sent to the Board's records access office and its office of counsel.

Second, 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)].

Under the circumstances, since so much time has elapsed since your initial request was made, it is suggested that you contact the Board's access office again to speak with Ms. Ruth Bernstein, initiate a new request, or appeal on the ground that your request has been constructively denied.

Third, aside from the fact that you serve on a community school board and that you might have a need to obtain the records to carry our your official duties, 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.

In this regard, one of the grounds for denial likely relates to the records in which you are interested. However, due to the structure of that provision, the records would in my view likely be available in great measure to any person. 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 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.

It would appear that many of the materials involve fiscal records. To the extent that such records are reflective of "statistical or factual tabulations or data", for example, they are in my view available under §87(2)(g)(i).

Lastly, there may be particular requirements concerning record-keeping and the nature of information sought. It is suggested that you review §§2590 through 2590-n of the Education Law pertaining to the New York City Community School District System, as well as the by-laws of both the Central Board of Education and Community District 3.

To provide you with general information, I have enclosed 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

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Ruth Bernstein
Office of Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2740

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

January 11, 1983

Leo H. Connick
Chief of Police
City of Plattsburgh
Police Department
Pine Street
Plattsburgh, NY 12901

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Connick:

I have received your letter of December 17 in which you requested assistance from this office.

You have raised a series of questions concerning the effect of a recent amendment to the Freedom of Information Law relative to an executive order of the City of Plattsburgh which imposes a fee of $5.00 per copy of accident reports. Additionally, you have inquired as to the propriety of including charges within the $5.00 fee for searching, photocopying and mailing the accident reports.

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

First, in terms of background, the amendment to the Freedom of Information Law contained in Chapter 73 of the Laws of 1982 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."

Therefore, after October 15, 1982, the effective date of Chapter 73 of the Laws of 1982, I do not believe that a municipality can charge more than twenty-five cents per photocopy by means of an executive order issued by a Mayor or by means of a local law, for example, in response to requests for copies of police accident reports.

Second, you have questioned whether your fee is legal in terms of the costs of searching, photocopying and mailing of copies to a requesting person or agency. Although it has been suggested that applicants supply a stamped self-addressed envelope with their requests, you may not in my opinion charge for any administrative time involved in locating and copying the record.

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.

Third, you requested advice concerning the existence of any requirement that the Plattsburgh Police Department supply copies of accident reports if the original reports are on file with the New York State Department of Motor Vehicles (DMV), and you have suggested referring the applicants to DMV.

In this regard, the Freedom of Information Law requires an agency to respond to a request under the Law [see §87(2)] even if the same document may be in the possession of another agency.

Further, §66-a of the Public Officers Law has for decades granted access to police accident reports unless disclosure would interfere with the investigation or prosecution of a crime relating to an accident. Further, §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 be cited to withhold the records.

Lastly, I have been informed that under §65-b of the Public Officers Law, which deals with the retention and disposal of records, it has been determined by the State Education Department that accident reports must be retained by a municipal police department for a minimum of six years.

I hope 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-2741

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

January 11, 1983

Mr. Ernest Schender
81-A-0963 A-8
2911 Arthurkill Road
Staten Island, NY 10309

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schender:

I have received your letter of December 22 in which you requested assistance regarding a request directed to the Division of Parole under the Freedom of Information Law.

Your inquiry concerns a denial of access to copies of "documents in the employment history folders of three members of the Board of Parole." Earlier correspondence transmitted to this office by the Board indicates that you were specifically interested in learning of the educational and vocational credentials of particular Board members.

In response to the request, you were informed that the documents, "should such information exist", are "confidential" to the Division of Parole.

You have questioned the denial and asked whether the Division should, under its regulations, have certified that "although the division is the custodian of the record requested, the records cannot be found after diligent search..."

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

First, since a determination has been rendered following your appeal, it would appear that your only legal recourse in terms of the denial would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

Second, with respect to the certification, in my view the provisions concerning certification are not invoked automatically, but rather on request. Section 89(3) of the Freedom of Information Law states 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."

As such, I believe that you may obtain a certification given in accordance with §89(3), but only upon request.

Lastly, with regard to rights of access, I am not sure that I agree with the denial. While certain aspects of materials found within personnel files might justifiably be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)], others might be available on the ground that disclosure would result in a permissible invasion of personal privacy.

In this instance, the Executive Law provides direction regarding the qualifications of members of the Board of Parole. Specifically, §259-b(2) of the Executive Law states that:

> "[E]ach member of the board shall have graduated from an accredited four-year college or university with a degree in the field of criminology, administration of criminal justice, law enforcement, sociology, law, social work, corrections, psychology, psychiatry, or medicine or shall have had at least five years of experience in one or more such fields."

Due to the statutory requirements for membership, it is in my view possible that a court might find that those portions of personnel files indicating the required qualifications would be accessible. Moreover, it is possible that when members of the Board are appointed, information regarding their "qualifications" may be indicated in a news release, for example. If such releases have been publicly issued, presumably considerations of privacy would be minimized when the information contained in a news release is requested at some later date.

I hope that I 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: Herman Graber

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2742

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

January 12, 1983

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 28 which pertains in part to the Freedom of Information Law as it applies to the court system.

As indicated in previous correspondence, it has consistently been advised by this office, and held judicially in cases cited for you in the past, that the Office of Court Administration (OCA) is not a court, but rather an "agency" that is required to comply with the Freedom of Information Law.

With respect to "the individual administrative offices and officers of the individual court systems", in all honesty, I am not sufficiently familiar with those offices to provide specific advice. If they are, however, "outbranches" of the OCA, as you characterized them, or could be considered analogous to regional offices of OCA, I would conjecture that, as a part of OCA, they, too, would be subject to the Freedom of Information Law.

In conjunction with your questions regarding district court procedures, it is noted that there is a Uniform District Court Act, as well as District Court Rules. You might want to review those provisions at a local law library.

You requested that attempts be made to clarify the Freedom of Information Law by clearly bringing the administrative arms of the court system within the Freedom of Information Law. I believe that OCA is now clearly subject to the Freedom of Information Law. Nevertheless, the matter will be raised before the Committee prior to issuance of its next annual report. In addition, you might want to contact local state legislators for the purpose of bringing your problems to their attention.

Lastly, you asked whether this office has considered "compiling a list of lawyers interested in handling F of I cases". In short, this office has no way of knowing the identities of attorneys who might be interested in such cases. Further, I question whether it would be appropriate to provide such a service since the Committee's statutory duties are well defined in §89(1) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO - 844
FOIL-AO-2743

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

January 12, 1983

V. James Granito, Jr.
D'Arrigo & Granito
Suite 300
290 Elwood Davis Road
Liverpool, NY 13088

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Granito:

I have received your letter of December 28 and the correspondence attached to it. You have requested an advisory opinion regarding a denial of a request for records of the Hudson River - Black River Regulating District.

Specifically, the correspondence appended to your letter indicates that you requested from the District copies of "the Preliminary Economic Report and the Executive Summary" pertaining to the Hawkinsville Dam Project. In response to the request, the Board's chief engineer, Kenneth H. Mayhew, denied access, stating that:

> "1) The reports you have requested are not in final form and have not yet been presented to and accepted by the District's Board.
>
> "2) Disclosures of the request reports in their present form is exempt under Section 87(2)(g) of the Freedom of Information Law (Public Officer's Law) as intra agency materials."

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

It is noted at the outset that I have no knowledge of the nature or contents of the records sought. Nevertheless, I disagree with the bases for the denial offered by Mr. Mayhew.

The first basis for withholding is that the records sought are "not in final form", nor have they been presented to or accepted by the Board. In this regard, 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 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."

In view of the breadth of the language quoted above, if the District maintains possession of the materials in which you are interested, they would in my view constitute "records" as defined in §86(4) of the Freedom of Information Law.

Further, §87(2) indicates that all records of an agency are available, except to the extent they fall within one or more among the eight ensuing grounds for denial.

The second basis for withholding cited by Mr. Mayhew 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.

Under the circumstances, it appears that the "executive summary" could properly be characterized as "intra-agency" material. The preliminary economic report was apparently prepared for the District by an engineering firm serving the District as a consultant. While the firm would likely fall outside the definition of "agency" [see Freedom of Information Law, §86(3)], there is case law indicating that, in a similar situation, records forwarded by a consulting engineer to an agency may be considered "intra-agency" materials [see Sea Crest Construction Corp. v. Stubing, 442 NYS 2d 130, 82 AD 2d 546 (1981)].

Notwithstanding the status of the records in question as inter-agency or intra-agency materials, as you indicated, those portions of the records consisting of "statistical or factual tabulations or data" would be available under §87(2)(g)(i). Moreover, the cited provision has been found to grant access to statistical tabulations that may be reflective of advice [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 Ad 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)] and to factual information appearing in narrative form [see 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].

Lastly, viewing the records sought from a different perspective, I believe that the District's Board is a "public body" subject to the Open Meetings Law. Having reviewed §15-2137 and §15-2139 of the Environmental Conservation Law, the Board consists of more than two members, is required to carry out its duties by means of a quorum pursuant to §41 of the General Construction Law, and in my view it clearly conducts public business and performs a governmental function.

If indeed the Board is a public body that falls within the scope of the Open Meetings Law, it is possible that some of the information found in the records sought have been publicly disclosed at its meetings. Further, information similar or related to records sought might be found within minutes of meetings required to be prepared under §101 of the Open Meetings Law.

In short, it may be that the substance of the information sought has been publicly disclosed by means of a vehicle other than the Freedom of Information Law, in this instance, the Open Meetings Law. To that extent, there may be inconsistencies between the bases for withholding offered by Mr. Mayhew and the information that has actually been disclosed to date.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth H. Mayhew
Edwin B. Haverly

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2744

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

January 12, 1983

Mr. Mercy MelSun
82-A-5717 D-7-16
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. MelSun:

I have received your letter of December 30 in which you requested assistance under the Freedom of Information Law.

According to your letter, you are attempting to obtain that portion of a "911 tape" of December 29, 1981, which apparently led to your arrest. You have requested information regarding access to the tape, the form used to submit a request and the address of the office to which a request should be directed.

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 envisioned by its language, for a trial has already been held and judicial proceedings have been completed.

Third, 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 defendent 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.

Lastly, there is no specific form that must be used when making a request under the Freedom of Information Law. Section 89(3) of the Law states that a request should be made in writing for records "reasonably described". To "reasonably describe" the records in which you are interested, it is suggested that you provide as much detail as possible, including names, dates, the time and location of the occurrence, index and docket numbers and similar information that would enable an agency to locate the records.

Since the arrest occurred in the forty-third precinct in the Bronx, it is recommended that you submit requests to the public information officer at the forty-third precinct, and to the Records Access Officer, New York City Police Department, 1 Police Plaza, New York, NY 10038.

Enclosed for your consideration 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2745

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

January 12, 1983

Mr. John Stone
82-A-1575
Box 149 BW-24
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 January 10 in which you raised a series of questions regarding your rights as an inmate.

In this regard, please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information and Open Meetings Laws. It does not have possession of records generally, nor does it have the jurisdiction or expertise to respond to your questions.

To obtain answers to your questions, it is suggested that you write to your facility superintendent or the Department of Correctional Services, or that you contact a representative of Prisoners' Legal Services or a similar group.

With regard to Department rules and regulations relative to the subjects that you mentioned, I believe that such records would be available to you pursuant to the Freedom of Information Law, §87(2)(g)(iii). Further, I have enclosed a copy of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law.

It is suggested that you review those regulations carefully, for they contain provisions that deal specifically with requests by inmates. In most instances, requests made under the Freedom of Information Law should be sent to the facility superintendent.

Also enclosed is 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:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2746

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

January 12, 1983

Mr. Seymour Katz
[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. Katz:

I have received your letter of January 2 and the correspondence attached to it. Your inquiry concerns a request directed under the Freedom of Information Law to the New York City Board of Education.

Specifically, according to your request of October 11, 1982, you have asked for the following information as it pertains to a named individual:

> "1. All degrees granted and dates of same beyond high school.
>
> "2. In chronological order, all licenses granted and dates of same issued following successful completion of Board of Examiners examination.
>
> "3. In chronological order, all licenses granted and dates of same issued through means other than Board of Examiners examination.
>
> "4. In chronological order, all assignments, inclusive dates, job titles within the New York City Board of Education.

"5. In chronological order, all job titles and names of employers for the five (5) years preceding coming to the NYC Board of Education. Please include the length of time spent at each position.

"6. All positions held, job titles and inclusive dates of same for assignments given through means other than examination and name of unit or individual that made the assignment.

"7. All licenses, certificates and other credentials issued by all agencies other than the NYC Board of Education."

Since you have not yet received any of the information sought, you have requested the "intervention" of this office "by instructing the Board of Education to satisfy..." your request.

I would like to offer the following comments in response to 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 has no authority, however, to "instruct" or otherwise compel an agency, such as the Board of Education, to grant or deny access to records.

Second, 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 pertains to existing records, and §89(3) of the Law states that, as a general rule, an agency is not required to create or prepare a new record in response to a request.

For instance, the sixth area of your request involves positions held, job titles and dates of assignment "given through means other than examination and name of unit or individual that made the assignment". In this regard, there may not be any record that exists which contains the specific information sought. If that is so, the Board of Education would not in my view be required to create a record containing the information sought. The same principle would apply to other areas in which the information does not exist in a record.

Third, with respect to the request generally, the Freedom of Information Law is based upon a presumption of access. Section 87(2) states that all records of an agency are available, except to the extent that records fall within one or more among eight ensuing grounds for denial.

From my perspective, to the extent that the information sought exists in the form of records, there are two grounds for denial of possible significance.

The first is §87(2)(g), which states that an agency amy 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, extant records falling within the scope of your request could likely be characterized as "intra-agency materials". However, it would appear that they consist solely of factual information. If that is so, §87(2)(g) could not in my view be cited as a basis for withholding.

A second ground for denial of potential relevance 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".

There may be several aspects of the information sought that might, if disclosed, constitute an unwarranted invasion of personal privacy. For instance, the first area of your request involves degrees awarded and the dates on which they were conferred. It is questionable in my view whether the

the information in question is required to be made available. In some instances, a degree might have no connection with the performance of one's official duties. Contrarily, other aspects of your request concerning licenses or certification, for example, would in my opinion be available, for such records relate to one's duties. Further, licenses and similar records have long been generally available, for they indicate that governmental agency has determined that a particular individual is qualified to engage in a special endeavor. A license also permits the public to know that an individual is qualified to carry on such an endeavor.

Another area of information sought that might fall within §87(2)(b) involves job titles and names of employers prior to working for the Board of Education. Here I direct your attention to §89(2)(b) which 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..."

Based upon the language quoted above, it appears that records of employment history prior to employment by the Board of Education could be withheld. In addition, disclosure of the identities of previous employers might also result in an unwarranted invasion of personal privacy.

With respect to information indicating positions, job titles and assignments while under the employ of the Board of Education, I believe that such records, if they exist, would likely be available. It is noted that one of the exceptions to the general rule that records need not be created under the Freedom of Information Law 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 can determine who is employed by an agency, as well as that person's title, public office address and salary.

In my opinion, payroll or other records of the Board containing former job titles of a particular individual and his assignments, for example, would be available based upon the direction given by §87(3)(b). Moreover, in a variety of contexts, it has been found judicially that similar information would, if disclosed, result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1979); 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].

Lastly, it is noted 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 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 ir 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)].

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Lillian Delseni
John Nolan
Irene Impellizzeri

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2747

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

January 13, 1983

Mr. Theodore S. Jankowski
[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. Jankowski:

As you are aware, your letter 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 and Open Meetings Laws.

Attached to your letter is a news article that precipitated your question. Specifically, the article stated that the Town Board, apparently in Cheektowaga, "[S]et fees ranging from $2 to $5 for citizens who want to inspect Town records". Your letter indicates that you "have always had the opinion that Town records are public information."

I would like to offer the following comments regarding the information that you have provided.

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.

Therefore, I concur with your general statement that records of a Town, as well as other units of government subject to the Freedom of Information Law, are presumptively open to the public for inspection and copying.

Second, although an agency, such as a town, may charge a fee when photocopies of records are requested, no fee may in my view be assessed for the inspection of records or for the search time involved in locating records. In this regard, §87(1)(b)(iii) of the Freedom of Information Law pertains to procedures that must be adopted by agencies under the Freedom of Information Law, and that such procedures must make 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 statute."

Based upon the language quoted above, it is in my opinion clear that the only fee that may be assessed under the Freedom of Information Law would involve a fee for reproducing records.

Moreover, the Committee is required to promulgate general regulations pursuant to §89(1)(b) of the Freedom of Information Law concerning the procedural aspects of the Law. The regulations have the force and effect of law. With respect to fees, §1401.8(a) states that:

> "There shall be no fee charged for the following:
>
> (1) Inspection of records;
>
> (2) Search for records..."

Lastly, I would like to point out that a local enactment by a town board, for example, such as a local law, resolution, or ordinance, could not require the payment of a fee that is not permitted by the Freedom of Information Law. An amendment to the Freedom of Information Law effective on October 15, 1982, altered a provision which might previously have permitted an agency to enact a local law or ordinance

enabling an agency to assess a fee in excess of twenty-five cents per photocopy. Nevertheless, since §87(1)(b)(iii) currently permits a fee for photocopying of up to twenty-five cents per photocopy, unless a different fee is prescribed by "statute", an act of the State Legislature, the Town's enactment to which reference was made in the news article is in my view void to the extent that it conflicts 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: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2748

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

January 14, 1983

Ms. Roseann Skidmore
[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. Skidmore:

As you are aware, I have received your letter of January 5, in which you raised a series of questions regarding a request for records directed to the Department of Labor.

The first question raised in your letter involves fees for photocopies of records. Specifically, you wrote that the fee for copies is twenty-five cents per page, but that the file in which you are interested is large and the photocopy machine "gives unsatisfactory copies". As such, you have contended that "the cost of copies should be based upon the actual cost of reproduction."

From my perspective, the fee of twenty-five cents per photocopy is permissible. Section 87(1)(b)(iii) of the Freedom of Information Law states that an agency's procedures must make 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 statute."

Under the circumstances, it would appear that records indicating attendance, such as 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 regarding attendance.

Similarly, records reflective of the expenditure of public monies by an employee in the performance of his or her official duties, such as travel vouchers, would in my view clearly result in a permissible invasion of personal privacy if disclosed. Therefore, I believe that the travel vouchers sought should be made available.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Florence Dreizen
Chaim S. Malks

Based upon the language quoted above, I believe that an agency may charge up to twenty-five cents per photocopy. In cases in which records cannot be photocopied (i.e., tape recordings, computer discs, etc.), an agency may assess a fee based upon the actual cost of reproduction.

Implicit in the Law in my view is that photocopies should be legible. If the copies that you obtained are illegible, it would appear to be reasonable to return them and request new copies at no charge.

The second area of inquiry concerns the Freedom of Information Law in relation to unemployment insurance records. I agree that some of the records pertaining to unemployment insurance fall outside the scope of the Freedom of Information Law. The first ground for denial of access to records in the Freedom of Information Law is §87 (2)(a) concerning records that are "specifically exempted from disclosure by state or federal statute". One such statute is §537 of the Labor Law, which states in part that:

> "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."

The language quoted above indicates that information acquired from employers and employees in conjunction with unemployment insurance are generally confidential. However, §537 also states that information "material to the making and determination of a claim for benefits shall be available to the parties affected..." Therefore, rights of access to records might exist under the Labor Law, rather than the Freedom of Information Law, depending upon your status as a party and the nature of the records.

The final area of inquiry involves your request for attendance records and travel vouchers pertaining to a named employee of the Department of Labor. The request was denied on the ground that disclosure of such records "would constitute an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law.

Although disclosure of the records in question might result in an invasion of privacy, judicial interpretations of the Freedom of Information Law in my view indicate that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. As such, I believe that the records in question should be made available.

While 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); and 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].

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2749

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

January 14, 1983

Donald G. Brandon
Chief Inspector
New York State Police
State Campus
Albany, NY 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:

Thank you for forwarding a copy of your determination in response to an appeal made under the Freedom of Information Law by Mr. Donald Schanbarger.

In conjunction with a request for the New York State Police Manual, you denied access, stating that:

> "...it has been determined that the document which you seek to review was compiled for law enforcement purposes, and that such review would reveal criminal investigative techniques and procedures. In addition, the New York State Police Manual is an intra-agency document which is exempt from disclosure under Public Officers Law § 87(2)(g), and which does not come within the exceptions to such exemption contained in sub-paragraphs (i), (ii) or (iii) of such section."

I respectfully disagree with your determination, for I believe that the manual is available in great measure, if not in toto.

The first basis for withholding to which you alluded was §87(2)(e) of the Freedom of Information Law. 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 and judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Although the manual in question might if disclosed "reveal criminal investigative techniques and procedures", as you indicated, the specific language of §87(2)(e)(iv) refers to "criminal investigative techniques or procedures, except routine techniques and procedures" (emphasis added).

From my perspective, much if not all of the manual, would be reflective of "routine" techniques and procedures. To that extent, I do not believe that §87(2)(e) could be cited as a basis for withholding. Further, while the Court of Appeals has indicated that "the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations, nor to use that information to construct a defense to impede a prosecution" (Fink v. Lefkowitz, 47 NY 2d 568, 572), it was also found that disclosure of routine techniques and procedures may be beneficial. In so holding, the Court stated that:

> "[T]o be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate

> the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to the requirements..." (id.).

The other basis for withholding cited in your determination was §87(2)(g). That provision states that an agency may deny records that:

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

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

Under the circumstances, I believe that the manual could likely be characterized as "intra-agency" materials. Nevertheless, its contents would in my view be reflective of "instructions to staff that affect the public" available under §87(2)(g)(ii) or perhaps the policy of the Division of State Police and, therefore, available under §87(2)(g)(iii).

In sum, it would appear that the only aspects of the manual that could justifiably be withheld involve those portions consisting of non-routine criminal investigative techniques or procedures.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Schanbarger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 670
FOIL-AO-2750

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

January 19, 1983

Mrs. Barbara Broderson
[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 Mrs. Broderson:

I have received your letter of January 6 in which you requested an advisory opinion regarding a denial of a request for records.

According to the correspondence attached to your letter, you requested a copy of the Annual Report of the Curriculum Development Committee from the Ballston Spa Central School District. Dr. George Finnigan, the District's Records Access Officer, denied the request based upon §87 (2)(g) of the Freedom of Information Law.

From my perspective, a denial of access to the report is likely inappropriate in view of the terms of the collective bargaining agreement between the Superintendent and Ballston Spa Education Association, portions of which were enclosed with your letter, and the provisions of the Freedom of Information and Open Meetings Laws.

In this regard, I would like to offer the following comments.

First, §86(3) of the Freedom of Information Law defines "agency" to include:

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2251

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

January 19, 1983

Mr. Charles Ramos
Attica Correctional Facility
C-36-22
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. Ramos:

I have received your letter of January 6 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, various records were requested from the New York City Police Department, some of which were made available, while others were withheld. You have asked whether the Police Department can claim an exemption from the Freedom of Information Law with respect "to documents they suppressed during the course of [your] criminal proceeding." You indicated that you requested the records in question prior to trial pursuant to the Criminal Procedure Law.

Since there is little case law that deals with the type of situation that you described, I would like to offer the following general comments.

First, the decision that appears to be most relevant to your situation is People v. Billups (Sup. Ct., Queens Cty., Criminal Term, NYLJ, July 13, 1981). In Billups, the petitioner attempted to gain access to records under the Freedom of Information Law after a criminal proceeding.

The court found that Article 240 of the Criminal Procedure Law establishes the procedure for criminal discovery and that the Freedom of Information Law could not be employed as a substitute for discovery following a proceeding.

The distinction between the situation that you described and Billups appears to be that you employed the discovery tools available to you under the Criminal Procedure Law, while the petitioner in Billups apparently did not.

I have enclosed a copy of the Billups decision for your consideration. In all honesty, the effect of Billups under your specific circumstances is in my view questionable.

Second, assuming that the Freedom of Information Law can be used as a basis for requesting records, rights of access would in my view be dependent upon the nature of the records sought. Without knowledge of the contents of records, I could not conjecture as to the extent to which the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law might apply.

Enclosed for your review are copies of the Freedom of Information Law and an explanatory pamphlet that might 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

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2752

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

January 19, 1983

Ms. Carol Mailloux
[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. Mailloux:

I have received your letter of January 7, in which you requested an advisory opinion under the Freedom of Information Law.

Once again, your inquiry concerns the implementation of the Freedom of Information Law by the Board of Education of the Lindenhurst School District. Specifically, according to your letter, Mr. Charles Schlesinger has been designated as both records access officer and appeals officer. You have questioned the legality of one person serving in both capacities.

In my view, a single individual cannot serve as both records access officer and appeals officer.

As you are aware, §89(4)(a) of the Freedom of Information Law provides that a person denied access to records has the right to appeal the denial. From my perspective, the purpose of §89(4)(a) is to permit an applicant for records to seek impartial review of a denial. Obviously, if a single individual makes both the first and second determinations, the right to appeal would be effectively nullified.

It is noted that §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations regarding the procedural aspects of the statute. Based upon that grant of statutory authority, the Committee's regulations have the force and effect of law. In turn, §87 (1) requires the School Board to promulgate its own regulations "pursuant to such general regulations as may be promulgated by the committee on public access to records..."

In this regard, enclosed is a copy of the regulations promulgated by the Committee, which in §1401.7(b) states in part that:

> "The records access officer shall not be the appeals officer."

As such, the regulations require that the records access and appeals officers be different people.

Copies of the regulations, as well as this opinion, will be forwarded to Mr. Schlesinger and Ms. Russo, President of the Board of Education.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Ms. Russo, President
Charles Schlesinger

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2753

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

January 19, 1983

Lloyd Sokolow, Esq.
[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. Sokolow:

I have received your letter of January 6 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you read recently of an amendment to the Freedom of Information Law that limits fees that may be assessed for photocopies to twenty-five cents per photocopy. In this regard, you asked whether the amendment affects the fee of one dollar per page assessed by the Albany County Clerk's Office for photocopies of records of court proceedings.

From my perspective, the amendment to the Freedom of Information Law does not affect the fees to which you made reference.

In brief, §87(1)(b)(ii) of the Freedom of Information Law provides that an agency may charge no more than twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". A statute that permits a county clerk to charge a fee in excess of twenty-five cents per photocopy is §8021(a)(7) of the Civil Practice Law and Rules, which entitles the clerk to charge a fee of one dollar per photocopy.

Since the fee assessed by the County Clerk is based upon a statute, it is my view that it remains in effect and unchanged by the amendment 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2254

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

January 19, 1983

Mr. Richard Cunningham
78-A-2374
135 State Street
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. Cunningham:

I have received your letter of January 11 in which you requested assistance regarding the use of the Freedom of Information Law.

According to your letter, you are interested in obtaining a portion of your presentence report. As such, you asked whether that records may be made available under the Freedom of Information Law.

In my view, presentence reports fall outside the scope of the Freedom of Information Law. The first ground for denial of access to records in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". A statute that specifically exempts records from disclosure concerns presentence reports and related records. Specifically, §390.50(1) of the Criminal Procedure Law 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."

Based upon the language quoted above, it appears that the only method of obtaining the record in question would involve a request directed to the sentencing judge. Therefore, it is suggested that you discuss the matter with an attorney.

As requested, enclosed are 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2755

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

January 19, 1983

Mr. Darrel Howard
80-A-2481
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. Howard:

I have received your letter of January 15 in which you requested various records from 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. As such, 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 comments regarding your inquiry.

First, requests for records should be addressed to the agencies that maintain the records. For example, if you believe that the records you are seeking are maintained by the New York City Police Department, a request should be directed to the Department.

Under the circumstances, it is suggested that requests for records of the New York City Police Department be directed to both the precinct where the arrest occurred and the central office of the Department, which is located at One Police Plaza, New York, New York 10038.

Second, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". As such, it is suggested that you include as much detail as possible, including names, dates, addresses, indictment and docket numbers, and similar information that might enable agency officials to locate the records sought.

And third, it is emphasized that the Freedom of Information Law does not apply to the courts or court records [see attached, Freedom of Information Law, §86(3), which defines "agency", and §86(1), which defines "judiciary"]. While the Freedom of Information Law does not include court records within its scope, various provisions of the Judiciary Law and specific court acts often grant broad rights of access to court records. Therefore, it is suggested that requests for records in possession of a court be directed to the clerk of the appropriate court. Again, as much detail as possible should be included in a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2256

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

January 19, 1983

Mr. Richard A. De Lorenzo
Deputy Town Attorney
Town of Cortlandt
Office of the Town Attorney
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. De Lorenzo:

I have received your letter of January 17 addressed to Ms. Baldasaro of this office. Please note that the letter reached this office on January 17.

As Deputy Town Attorney for the Town of Cortlandt, you wrote that:

> "[D]uring the course of the Prosecutions of Town cases we made a confidential report to the Town Board and Supervisor on a regular basis reporting the various cases involving Open Container Violations, Zoning Violations, Dog Ordinance Violations, Fire Zone Violations, etc.
>
> "Such reports have been sought by the news media under the Freedom of Information Law. Some matters contained therein were comments on pending cases and the report was intended for the Town Board to keep them apprised of the various cases being handled in Court. At the time that they were made the contained some confidential information relative to the cases in progress."

You have asked whether the reports in question "are subject to release under the Freedom of Information Law".

Although there is no statutory provision specifically stating that a town attorney has a privileged relationship with town officials, case law indicates that municipal attorneys may have an attorney-client relationship with officials of the municipalities by which they are employed when they act in their capacity as attorneys. Bernkrant v. City Rent and Rehabilitation Administration [242 NYS 2d 750 (1968); aff'd 17 AD 2d 932] held that the work product and reports containing advice prepared by an attorney of a New York City agency are exempt from disclosure pursuant to the attorney-client relationship established between the attorney and the agency.

The same conclusion has been reached by New York courts for almost a century. In 1889, in discussing the duties of the New York City Corporation Counsel, it was held that:

> "...he is to furnish to every department and officer of the city government such advice and legal assistance as counselor or attorney, in or out of court, as may be required by such officer or department, and the advice which he gives...I regard as privileged under Section 835 of the Code of Civil Procedure and the respondents are not bound to disclose it" [People ex rel. Updyke v. Gilon, 9 N.Y.S. 243, 244 (1889)].

More recently and under similar circumstances, it was held that a county attorney:

> "...was following his duty to the Board as its counsel (County Law, §500; People ex rel. Updyke v. Gilon, Sup., 9 N.Y.S. 243) and, as a lawyer (Canons of Professional Ethics, Canon 15, Judiciary Law Appendix; Civil Practice Act, §353) and what transpired between him and his clients, the public officials, is privileged (People ex rel. Updyke v. Gilon, supra)" [Pennock v. Lane, 231 N.Y.S. 2d 897, 898 (1962)].

Therefore, it appears that an attorney-client relationship may exist between a town attorney and his clients, the town board and those other town officials to whom legal counsel is given.

With respect to the Freedom of Information Law, §87(2)(a) permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". In this regard, §4503 of the Civil Practice Law and Rules states that:

> "[U]nless the client waives the privilege, an attorney or him employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative act, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof."

It appears, therefore, that confidential communications between a town attorney and his clients are exempted from disclosure pursuant to §87(2)(a), which incorporates the privilege envisioned by §4503 of the Civil Practice Law and Rules.

It is important to emphasize that such communications remain confidential only during the period in which the client maintains the privilege. As held judicially decades ago:

> "A party who has the right to claim the privilege of a communication made to him by his attorney must himself respect such privilege, and, if it is disclosed by him to any one, the right

> to such claim is endangered, and he cannot disclose a part of the communication or knowledge received from his attorney, and close the door to future inquiry" [People v. Higgins, 160 N.Y.S. 721, 723 (1916)].

The Freedom of Information Law, like other access laws, is permissive; although there may be no right of access to certain records, a government custodian of such records may disclose them. However, in the case of communications made within the attorney-client privilege, only the client can waive the privilege [see e.g., Republic Gear Co. v. Borg-Warner Corp., C.A.N.Y. 1967, 381 F 2d 551]. Therefore, disclosure of a privileged communication by a public officer who is attorney for a municipality [a town attorney is a public officer; see 1948 Op.St.Compt. 397; 1972 Op.Atty.Gen. Oct. 19] may be violative of the Canons of Ethics [see Appendix of Legal Ethics, Canon 4].

Lastly, it is noted that the records upon which privileged communications are based might be accessible under the Freedom of Information Law. For instance, records reflective of the violations to which you made reference are in my view likely accessible. However, rights of access to those records may in my opinion be distinguished from reports made by a town attorney to a client, such as a town board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 846
FOIL-AO-2757

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

January 19, 1983

Mr. Charles J. Theophil
[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. Theophil:

I have received your letter, which reached this office on January 13.

Based upon the correspondence attached to your letter, a communication that you sent to Ms. Lee Goldman, President of the Community School Board 26, questions have been raised that relate to both the Freedom of Information and Open Meetings Laws.

Prior to responding in relation to two specific events described in the correspondence, I would like to comment with respect to the final aspect of your letter to Ms. Goldman. Specifically, that letter refers to a statement by Ms. Esther Grodman, executive assistant to Ms. Goldman, in which she wrote that "[W]e do not give out minutes of Executive Sessions as those are unofficial meetings".

If that statement accurately reflects the policy of the Board of Education, it would appear that there may be a fundamental misunderstanding of the Open Meetings Law.

It is noted in this regard that the Open Meetings Law defines "meeting" broadly [see Open Meetings Law, §97(2)] and that the term has been expansively interpreted by the courts. Specifically, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals, the state's highest court, found that the term "meeting" includes any gathering of a quorum of a public body 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.

Further, §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. In addition, §100 (1) of the Law prescribes a procedure that must be accomplished by a public body before it may enter into an executive session. In relevant part, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, it is in my view clear that an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting.

It is also noted that a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §100(1) of the Law specify and limit the areas of discussion that may appropriately be considered during an executive session.

To provide the Board of Education with information regarding the Open Meetings Law, copies of the Law and explanatory pamphlet dealing with both the Freedom of Information Law and Open Meetings Law will be sent to the Board. Perhaps greater familiarity with the specific provisions of the Law will enhance compliance.

The first specific situation described in your letter involves a meeting held on November 18 in which the agenda referred to a resolution to purchase tickets to a scholarship dinner dance. However, the resolution was prefaced by a statement that:

> "[B]ecause time was of essence, action has been taken on resolution 1, which is herein presented for ratification only."

Since the resolution was approved "after the fact", it is your contention that the vote and the action by the Board were illegal "and must be voided".

In my view, although the action that you described might have violated the Open Meetings Law (and perhaps the by-laws of the New York City Board of Education), it remains valid unless and until a court determines otherwise. With respect to the enforcement of the Open Meetings Law, §102(1) states in part 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 for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

As such, if the Open Meetings Law is violated, the possibility of a remedy would involve the initiation of a lawsuit under Article 78 of the Civil Practice Law and Rules.

The second situation also pertains to the meeting held on November 18. In this regard, you wrote that the notice of the meeting included, in the form of an agenda, a list of seven resolutions to be considered. You also indicated, however, that "a hidden agenda of two more resolutions" was added and later "revealed in a two (2) page copy of the minutes of the Nov. 18, 1982 CSB 26 Public Meeting".

Those minutes apparently referred to two resolutions in which a total of more than nine thousand dollars was appropriated. Further, you wrote that the minutes indicate that the resolutions were unanimously approved, "even though one school board member was absent during the voting".

Assuming that the appropriating resolutions were approved at a closed meeting or meetings, I believe that the Open Meetings Law was violated. As indicated earlier, §100(1) of the Law prohibits a public body from appropriating public monies during a closed or executive session. Moreover, it is in my view questionable whether the subjects under discussion leading to the resolutions could properly have been considered during closed sessions.

Lastly, with respect to the unanimous vote, I direct your attention to the Freedom of Information Law. 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." Therefore, even though the votes may be unanimous, there should in my opinion be an indication of those members who were present or absent.

I hope that I 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: Ms. Lee Goldman
Ms. Esther Grodman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2758

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

January 19, 1983

Ms. Jeanne M. Bollen
[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. Bollen:

I have received your recent letter in which you requested assistance regarding the use of the Freedom of Information Law.

Attached to your letter is a copy of a request made under the Freedom of Information and Privacy Acts addressed to the Elmira Police Department in which you asked for "a copy of all documents retrievable in a search for files listed in [your] name". Also attached is a letter addressed to you by James G. Levins III, a Chemung County Assistant District Attorney. In response to a request. Mr. Levins wrote that records kept by the Office of the District Attorney "are for law enforcement purposes and we, therefore, refuse to comply with your request".

I would like to offer the following comments regarding your letter and the attached correspondence.

First, the statutory provisions that you cited in your request to the Elmira Police Department are the federal Freedom of Information and Privacy Acts. Those Acts apply only to records in possession of federal agencies. However, the New York Freedom of Information Law does apply to records in possession of both the Elmira Police Department and the Chemung County Office of the District Attorney.

Second, although some of the 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; and Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., NYLJ, June 24, 1982]. Therefore, based upon the specific language of the Freedom of Information Law and its judicial interpretation, I disagree with Mr. Levins' response.

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.

Without knowledge of the contents of the records that might exist, I could not conjecture as to the extent, if any, to which the grounds for denial might apply. To assist you, however, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject that may be useful to you.

Fourth, it is emphasized that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". In this regard, depending upon the manner in which an agency maintains or files its records, a request for records pertaining to you, without more, might not meet the standard that records be "reasonably described". It is suggested that you might want to submit new requests, providing as much detail as possible, including names, addresses, dates, descriptions of events, and similar information that would enable agency officials to locate the records sought.

Lastly, a potentially useful tool in obtaining the information that you are seeking may be the police blotter. While the term "police blotter" is not specifically defined in any provision of law of which I am aware, 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 [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. It was also found in Sheehan, supra, that since a police blotter is merely a summary of events or occurrences, it does not contain investigative information and is, therefore, available under the Freedom of Information Law. It is suggested that you attempt to review the police blotter or its equivalent regarding particular time periods. Perhaps a review of blotter entries would enable you to seek particular related records.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Elmira Police Department
James G. Levins III

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2759

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

January 20, 1983

Richard De Lorenzo
Deputy Town Attorney
Town of Cortlandt
Office of the Town Attorney
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. De Lorenzo:

I have received your letter of January 10, 1983 in which you requested assistance from this office.

Your inquiry concerns a denial of access to correspondence between the Town Justice Count and the Town Board of the Town of Cortlandt. It is your belief that access to these records was denied due to possible unwarranted invasions of personal privacy and interference with judicial proceedings or deprivation of the right to a fair trial or impartial adjudication.

Since I am not familiar with the contents of the records in question, I can only offer the following general comments.

First, you indicated that the Town's public information officer withheld the correspondence on the ground that disclosure would result in an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. Without knowledge of the specific contents of

of the records, I could not conjecture as to the extent to which §87(2)(b) would be applicable. If you could provide greater detail, perhaps I could offer more pertinent advice.

Second, it is possible that §87(2)(g) of the Freedom of Information Law might be an appropriate ground for withholding. The cited provision permits an agency, such as a town, 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. 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.

However, while the definition of "agency" in §86(3) of the Law includes all units of government in the State, it specifically excludes the judiciary, i.e., courts and court records. Therefore, since a town justice court is part of the unified court system, it would fall outside the scope of the definition of "agency", and records emanating from a justice court may not constitute "inter-agency or intra-agency materials".

Third, 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..."

Once again, without greater familiarity with the records in question, it cannot be ascertained whether §87(2)(e) could be cited to withhold records in their entirety or perhaps in part.

Lastly, it is noted that the Freedom of Information Law is permissive; although an agency may withhold records falling within one or more of the eight grounds for denial appearing in §87(2), there is no requirement that such records must be withheld. Therefore, while records may be withheld, as a general rule, they need not be withheld.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2760

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

January 21, 1983

Mr. Ralph Buonome
[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. Buonome:

As you are aware, I have received various items of correspondence from you regarding your efforts to obtain records from the City of Schenectady.

As I understand the situation, you are most interested in obtaining complaints made against you. In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, in my view, there is only one ground for denial that might be applicable, in part, relative to complaints submitted by members of the public to an agency, such as the City of Schenectady.

Specifically, §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 regard to complaints in general, it has consistently been advised that the name or other identifying details regarding a complainant are deniable on the ground that disclosure would result in an unwarranted invasion of personal privacy. The identity of a complainant is likely irrelevant to the work of the agency, which is concerned only with the validity of a complaint. Further, disclosure of the identity of a complainant might result in "personal or economic hardship" [see Freedom of Information Law, §89(2)(b)(iv)]. As such, it has been suggested that the substance of a complaint is accessible, but that any identifying details regarding the complainant may be deleted on the ground that disclosure of the identifying details would result in "an unwarranted invasion of personal privacy".

Lastly, as I informed you, I have contacted the Office of Corporation Counsel regarding your request on your behalf. I was told that few records exist in relation to your request. However, most of those that do exist were prepared for litigation or consist of communications between City officials and Corporation Counsel. In my opinion, those records may be likely withheld under §87(2)(a) of the Freedom of Information Law, which refers to records that "are specifically exempted from disclosure by state or federal statute". Since material prepared for litigation is exempt from disclosure under §3101 of the Civil Practice Law and Rules and records falling within the scope of the attorney-client relationship are privileged under §4503 of the Civil Practice Law and Rules, it appears that those remaining records may be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph A. Drago

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2761

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

January 21, 1983

Warren Jay Grossman
[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. Grossman:

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

Specifically, according to your letter, Mr. John H. Galloway, III, Appeals Officer for the Village of Scarsdale, "upheld a decision to deny access to the Tax Field Books of Scarsdale". You wrote further that Tax Field Books had been available in the past but that Mr. Galloway indicated that "the State Committee on Public Access to Records has also recently put out a directive on this subject with takes essentially the same position as I do herein". Mr. Galloway withheld the records on the ground that disclosure would result in an unwarranted invasion of personal privacy. In addition, you have attached copies of what appear to be various aspects of the contents of the Tax Field Books.

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, based upon the Freedom of Information Law, §51 of the General Municipal Law, and judicial determinations, it has consistently been advised that nearly all records in possession of a municipality pertaining to assessment and the assessment process are available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 759 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969); and Szikszay v. Buelow, 436 NYS 2d 558, Misc. 2d 886].

It is emphasized that rights of access to the types of records that you are seeking were established long ago. For instance, in Sears Roebuck, supra, the Court dealt with rights of access to the contents of a so-called "Kardex system" used by assessors in the City of Watertown. In terms of background, the Court found that:

> "[S]ome time prior to 1940, the two assessors of the City of Watertown worked out a certain Kardex system to be installed by and at the expense of the city, and to be used by the two assessors then in office, as to each improved parcel of real property located in the city. Each card, approximately nine by seven inches (comprising the Kardex System), contains many printed items for insertion of the name of the owner, selling price of the property, mortgage, if any, frontage, unit price, front foot value, details as to the main building, including type, construction, exterior, floors, heating, foundation, basement, roofing, interior finish, lighting, in all, some eighty subdivisions, date when built or when remodeled, as well as details to any minor buildings. From date of installation of the Kardex system to the present time, it is admitted that the assessors placed thereon such information as they were able to obtain, either from the owners or from others" [id. at 758].

Unless I am mistaken, the contents of the Tax Field Books to which you made reference are analogous to the contents of the Kardex system as described above. If that is so, I believe that such records are available, for they were found to be available more than three decades ago.

Third, it is noted that the Freedom of Information Law preserves existing rights of access. Section 89(6) of the Law states that:

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

Based upon the language quoted above, if rights of access have been established by law or by means of judicial determination, I believe that such rights continue to exist, notwithstanding the provisions of the Freedom of Information Law. Therefore, if rights of access to the records in question have been established, I do not believe that §§87(2)(b) or 89(2)(b) of the Freedom of Information Law could justifiably be cited to withhold the records.

Lastly, to the best of my recollection, there are but two situations in which advice has been provided to the effect that records relative to assessments may be withheld. Most recently, an amendment to §574 of the Real Property Tax Law made confidential real property transfer forms, except when those forms are requested for administrative or judicial review of assessments. I do not believe, however, that the records in which you are interested could be equated with real property transfer forms. The other instance in which it has been advised that records might be withheld would involve situations in which a senior citizen, for example, is required to submit an income tax return or its equivalent in order to establish eligibility for a senior citizen exemption. Once again, I do not believe that the records that you seek concern that type of information.

I sum, assuming that my understanding of the records sought is accurate, it is my view that they are accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John H. Galloway, III

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2762

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

January 21, 1983

Howard Kramer, Supervisor
Town of Springwater
R.D. #1
Wayland, NY 14572

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kramer:

I have received your thoughtful letter of January 14.

You have expressed consternation with respect to an amendment to the Freedom of Information Law which precludes agencies from charging more than twenty-five cents per photocopy, unless a different fee is prescribed by statute. Although I appreciate your concerns, I would like to explain the background for the establishment of the limitation relative to fees for photocopying.

In 1974, when the Freedom of Information Law was initially enacted, there was no specific provision in the Law relative to a limitation on the fees that might be assessed for photocopies. At the time, the Committee discussed the matter with representatives of the Office of General Services (OGS), the major contracting agency of the state. Based upon information provided by OGS, it was found that the average actual cost per photocopy was approximately six cents per photocopy. In view of the fact that agencies must in some cases spend time searching for records or evaluating the contents of records to determine rights of access, a fee of twenty-five cents per photocopy was established by regulation. Since 1974, due to advances in technology and the sophistication of photocopy machines, the actual cost of reproduction now may be as low as one cent per photocopy. As such, in many instances, the actual cost of reproduction, unlike most costs, has decreased in the past decade.

You assumed correctly that the change in the Law was based upon a recommendation made by the Committee. That proposal was made in the Committee's fifth annual report to the Governor and the Legislature on the Freedom of Information Law, which was issued on December 3, 1981, and in which it was stated that:

> "[T]he existing provisions 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 lay 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 work '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, the problem that many taxpayers faced was that fees for photocopies established by law far exceeded twenty-five cents per photocopy, or the actual cost of reproducing records.

Moreover, the amendment regarding fees was part of a bill containing other amendments to the Freedom of Information Law. The Governor twice vetoed the measure, but never in a veto message did the Governor object to the amendment regarding fees for photocopying. Further, having reviewed comments submitted to the Governor prior to his approval of the bill, there were no statements of objection to the provision that you have questioned.

Once again, the problems faced by local government have in my view been recognized by the Committee and it is my hope that the amendment to which you have objected will not cause undue hardship to 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:jm

cc: Senator Dale M. Volker
Assemblyman Richard Wesley

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2763

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

January 21, 1983

Mr. Stanley Allen
Town Clerk
Town of Brookhaven
Office of the Town Clerk
Town Hall
Patchogue, LI, NY 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. Allen:

I have received your letter of January 17 and appreciate your interest in the Freedom of Information Law.

According to our conversation and your letter, the Town of Brookhaven has set fees under the Freedom of Information Law of twenty-five cents per copy when records are photocopied by Town employees, or ten cents per copy when a member of the public uses a photocopy machine himself or herself. Based upon your letter, a local newspaper "has urged the Town Board to make an exception in the case of the press and make copies available to the press at no charge". You have expressed the contention that all citizens and residents should be treated in a like manner and that the press should have no special privileges.

Although I am not aware of any provision of law that would preclude the Town from altering its practice by making records available free of charge to members of the news media, I do not believe that such a change would be completely consistent with the Freedom of Information Law or its judicial interpretation.

In this regard, the Freedom of Information Law prescribes in §87(1)(b)(iii) that each agency, including a town, must adopt regulations dealing with 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 statute".

As such, I believe that the fees established to date are consistent with the Freedom of Information Law.

In terms of rights of access to records, the Freedom of Information Law does not distinguish among applicants. In one of the early cases decided under the Freedom of Information Law, it was determined by the Appellate Division that accessible records should be "made equally available to any person, without regard to status or interest" [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. From my perspective, if accessible records are made available at no cost to one group of applicants but a fee for copies of the same records is assessed with respect to others, the records would not in my view be "equally available to any person".

In sum, based upon the general direction given by the Freedom of Information Law, as well as that rendered in Burke, supra, I tend to agree with your contention that fees should be assessed equally and without regard to the status, identity or interest of an applicant for records requested under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2764

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

January 24, 1983

Mr. George D. Bernstein
Business Editor
Poughkeepsie Journal
P.O. Box 1231
85 Civic Center Plaza
Poughkeepsie, NY 12602

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bernstein:

I have received your letter of January 14 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, the Poughkeepsie Journal is "seeking access to a timetable for personnel layoffs at the Western Publishing Co., which is closing its Poughkeepsie plant". In response to your request, you were denied by the manager of the Employment Service of the Department of Labor in Poughkeepsie as well as a senior attorney at the Department. You indicated that both cited §537 of the Labor Law as the reason for rejecting your request.

In my opinion, the records that you are seeking should be made available under the Freedom of Information Law. In this regard, I would like to offer the following comments.

First, as you are 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.

Second, one of the grounds for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". Section 537 of the Labor Law exempts certain records pertaining to unemployment insurance from disclosure. Subdivision (1) of the cited provision states that:

> "[I]nformation acquired from employmers 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."

Although the Committee on Public Access to Records is authorized to provide advice with respect to the Freedom of Information Law, often it is necessary to review other provisions of law as they relate to the Freedom of Information Law in order to provide a reasonable response.

Under the circumstances, the question involves the extent to which §537 of the Labor Law indeed prohibits the disclosure of records. I have attempted to obtain information regarding the intent of §537 of the Labor Law and have reviewed various judicial determinations rendered pursuant to or in conjunction with that statute. There is no information that I could find in the nature of legislative history (i.e., bill jackets) that indicates the specific purpose of §537 of the Labor Law. However, its language and judicial interpretation in my view indicate that its thrust involves an intent to protect personal privacy of both employers and employees that submit information to the Department of Labor. The statute itself refers to parties to actions or proceedings and to information "material to the making and determination of a claim for benefits". The records that you seek apparently do not contain any information regarding proceedings or claims, nor do they identify any particular person or persons. Further, in the only judicial

decision that I could locate that pertains to the intent of §537 of the Labor Law, which had been §524 of the Labor Law, it was found that:

> "...section 524 of the Labor Law prohibits the use of such records in the courts unless the Industrial Commissioner is a party to the action or proceeding. While the act does not disclose the object of the Legislature, it undoubtedly was to prevent exposure to public gaze of the names of applicants who are receiving benefits under the auspices of the statute and under which the employer bears the burden. This is a reasonable objective" [Andrews v. Cacchio, 35 NYS 2d 259, 260; 264 App. Div. 791 (1942)].

Although Andrews, supra, was decided in 1942, there is no decision of which I am aware that indicates a different intent than that quoted above. Moreover, the Andrews decision has been cited as recently as 1982 [see Clegg v. Bon Temps., Ltd., 452 NYS 2d 825 (1982)].

The only item of legislative history regarding what had been §524 involves a memorandum to Counsel to the Governor regarding Chapter 117 of the Laws of 1936 in which it was stated that §524 "makes formal changes in order to comply with the provisions of the federal Social Security Act".

In order to determine whether federal law prohibits disclosure of the records that you are seeking or records analogous to those sought, I have contacted the U.S. Department of Labor on your behalf. Having spoken with an attorney in the Office of the Solicitor of the Department of Labor, I was informed that no provision of federal law would prohibit disclosure of the records in question. It was, however, stated that, depending upon the circumstances, such information might be considered a trade secret that could be withheld under the federal Freedom of Information Act, 5 U.S.C. §552(b)(4).

While the New York Freedom of Information Law contains a basis for withholding concerning trade secrets, I do not believe that it could justifiably be cited in this instance. 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..."

If the timetable for layoffs had commercial importance and could if disclosed be used to the disadvantage of a commercial enterprise by its competition, §87(2)(d) might be applicable as a basis for withholding. Nevertheless, you indicated in your letter that the firm in question is closing its plant and that its plans to close the facility have become generally known to the public. As such, it is difficult to envision how the record in question could be characterized as a trade secret or how disclosure could cause substantial injury to the competitive position of the firm that is about to close its plant.

In sum, if indeed §537 of the Labor Law is intended to protect personal privacy, I do not believe that it is applicable to the records that you are seeking, for there are no privacy considerations present. Further, in view of the fact that the firm is in the process of closing its Poughkeepsie plant, no other basis for withholding in the Freedom of Information Law could in my view justifiably be cited to deny access to the records sought.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Fred Hmiel, Senior Attorney
Lillian Roberts, Commissioner
Florence Dreizen

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2765

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

January 25, 1983

Mr. Donald E. Deubler
[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. Deubler:

I have received your letters of January 18, both of which concern unanswered requests for records made under the Freedom of Information Law and directed to officials of the Town of Ashland.

Specifically, as of the date of your letters, no response had been given regarding requests made on January 3 to the Town Clerk and the Town Zoning Officer. Also enclosed is a request of July 10, 1981, which apparently remains unanswered.

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

First, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, 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 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, 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. As indicated above, if records are denied, a written reason for the denial must be given. Further, in the case of a denial, whether it is given in writing or by means of a failure to respond, you may appeal.

Third, each agency, including a town, is required to adopt regulations under the Freedom of Information Law consistent with those promulgated by the Committee. It is suggested that you review the Town's regulations to determine the identities of the records access and appeals officers.

Fourth, the fact that you might not be a resident of the Town does not in my view affect rights of access to its records. As indicated in the Freedom of Information Law and its judicial interpretation, if records are accessible, 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; and Duncan, Matter of, 394 NYS 2d 362].

Fifth, I noticed that carbon copies of your correspondence were sent to the Justice Department in Washington. In this regard, I would like to point out that the New York Freedom of Information Law is a state law applicable to governmental entities in New York. As such, the Justice Department does not have jurisdiction relative to the New York Freedom of Information Law.

Lastly, to aid you in your efforts, copies of this opinion, the Freedom of Information Law and the regulations promulgated by the Committee will be sent to the Ashland Town Clerk and Zoning Officer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Clerk
Zoning Officer

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2266

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

January 25, 1983

Ms. Debra F. Winthrop
Associate Counsel
Adirondack Park Agency
P. O. 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 Ms. Winthrop:

As you are aware, I have received your letter of January 18, as well as that sent to Patrick J. Cea, Principal Attorney at the Department of State. Your interest in complying with the Freedom of Information Law is much appreciated.

According to your letter "[T]he Adirondack Park Agency is in the process of more clearly defining its policies and procedures regarding the protection of trade secrets and other confidential information under the Freedom of Information Law". You have asked whether this office "has an established policy on the types of information which are routinely treated as confidential under the Freedom of Information Law and, if so, what types of information are routinely protected" (emphasis yours). You also included a "sample list" of documents submitted to the Adirondack Park Agency that might include trade secret information.

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

First, from my perspective, the only records that could be "routinely treated as confidential" are those that are "specifically exempted from disclosure by state or federal statute" [see Freedom of Information Law, §87(2)(a)]. Stated differently, I believe that records may be considered "confidential" only when a statute other than the Freedom of Information Law permits or requires that particular records be kept confidential. In all other cases, I believe that records might better be characterized as "deniable".

Second, it may be inappropriate in most instances to classify records as confidential or routinely withheld. In this regard, many of the grounds for withholding listed in §87(2)(a) through (h) of the Freedom of Information Law are based upon potentially harmful effects of disclosure. As such, determinations regarding rights of access must often be made on a case by case basis and in conjunction with the specific contents of records.

The focal point of your inquiry, §87(2)(d) of the Freedom of Information Law, is based upon potentially harmful effects of disclosure, for it permits an agency to withhold records or portions thereof that:

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

In my view, the key question that must be raised in conjunction with the provision quoted above or a request that records submitted to a state agency be characterized as trade secrets involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position of the subject enterprise".

There may be several considerations relative to a determination that records are deniable under §87(2)(d). For instance, a lengthy document might be accessible under the Freedom of Information Law in great measure, but certain aspects of it might be reflective of trade secrets. In such a case, a record would have to be reviewed in its entirety to determine which portions consist of trade secrets. Another consideration might involve

the nature of an industry and the degree of competition within an industry. Moreover, it is possible that harmful effects of disclosure might disappear over the course of time. Financial data submitted by a corporation might cause substantial injury to its competitive position if it is disclosed now; yet, two years from now, it is possible that disclosure would have no effect upon its competitive position. Similarly, records indicating a particular process or technological breakthrough might if disclosed cause substantial injury to the competitive position of a corporation; nevertheless, over the course of time, the breakthrough might become generally known within an industry. Therefore the "substantial injury" that might have arisen due to disclosure could have disappeared.

In sum, due to the language of §87(2)(d) of the Freedom of Information Law and the considerations that should be made to determine its application, I do not believe that it would be appropriate to treat any class of records as trade secrets routinely.

With respect to the categories of records described in your sample list, I would like to offer the following brief remarks.

The first category, personal financial statements, might in some instances be considered trade secrets. It is more likely, however, that they could be withheld under §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records which if disclosed would result in "an unwarranted invasion of personal privacy". The same might be true in relation to the seventh category, credit references [see e.g., Freedom of Information Law, §89(2)(b)(i)].

Sales contracts or leases between firms and agencies are in my opinion available under the Freedom of Information Law. I believe that Dun and Bradstreet reports and similar analyses are also available, for they can be readily obtained from the sources of such reports.

The remaining categories of records must, as indicated earlier, be reviewed on a case by case basis in order to determine the extent to which they might contain trade secrets.

Lastly, with regard to regulations that must be promulgated by state agencies concerning their treatment of records characterized as trade secrets, it has been suggested that the regulations be as simple and general as possible. Often it may be difficult for agency personnel to ascertain the existence of trade secrets and, as a consequence, it is recommended that regulations ensure flexibility. It has also been advised that the corporate submitters of records identify those portions of records that they consider to be 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

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2767

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

January 25, 1983

Ms. June E. Peoples
Editor
Think, Ink
Wilkes Avenue
Box 482
Bath, NY 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 Ms. Peoples:

I have received your letter of January 19 in which you requested an advisory opinion regarding several aspects of the Freedom of Information Law.

Your first area of inquiry pertains to a denial of a request for "the notification of disciplinary action taken against an employee of the Steuben County Highway Department."

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.

Further, the Freedom of Information Law defines "record" broadly in §86(4) to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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, even though records might be kept within personnel files, for example, they are nonetheless subject to rights of access granted by the Freedom of Information Law.

From my perspective, the most significant basis for withholding a record of disciplinary action taken against a public employee 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". However, based upon judicial interpretations of the Freedom of Information Law, I believe that such a record is available.

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 a decision dealing specifically with a request for the terms of disciplinary action taken against a public employee, it was stated in Geneva Printing, supra, that the records were available for "[T]hey deal with a matter of public concern, that being a public employee's accountability for misconduct".

Based upon the judicial determinations cited above, I believe that a record of disciplinary action is accessible, for disclosure would in my view result in a permissible rather than an unwarranted invasion of personal privacy. Moreover, the record would in my opinion be accessible on the ground that it constitutes a "final agency determination" available under §87(2)(g)(iii) of the Freedom of Information Law.

Your second area of inquiry involves a request for Steuben County's subject matter list. The County's records access officer, Mr. Russell Kemple, apparently informed you that the record has been "lost". You have asked for advice regarding "a county's responsibility to maintain a reasonably detailed list of all records".

Section 89(3) of the Freedom of Information Law states that, as a general rule, an agency, such as a county, need not prepare or create a record in response to a request. However, the exception to that rule is §87(3) of the Law, which requires that "[E]ach agency shall maintain" certain records.

One of the records required to be maintained is:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article" [see §87(3)(c)].

In view of the direction given by §87(3)(c), I believe that it is clear that the County must maintain a subject matter list. It is also noted that the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Informtion Law, state in §1401.2(b) that:

> "[T]he records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list..."

In addition, §1401.6(c) of the regulations provides that:

> "[T]he 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."

Your final area of inquiry pertains to a list of all county employees, their positions and annual salaries. You wrote, however, that Mr. Kemple informed you that "these records will be quite lengthy (and thus expensive) because he does not believe that it is maintained as a list..."

Once again, the records sought represents an exception to the general rule that an agency need not create records under the Freedom of Information Law. Specifically, §87(3)(b) requires that each agency shall maintain:

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

Therefore, a "record" containing the information sought must be maintained.

As you requested, a copy of this opinion will be forwarded to Mr. Kemple. Copies of the Freedom of Information Law and the regulations to which reference was made earlier will also be sent to him.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Russell Kemple

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2768

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

January 27, 1983

Mr. Samuel L. Sommer
71-A-141
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. Sommer:

I have received your letter of January 10 in which you requested advice under the Freedom of Information Law and the federal Privacy Act.

According to your letter, you are interested in obtaining copies of "all documents, records and transcribed copy of monitored tape recordings into the 1972 Investigation of Harold Goberman".

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

First, the jurisdiction of the Committee on Public Access to Records is limited to advising under the Freedom of Information and Open Meetings Laws. 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 Privacy Act, 5 U.S.C §552-a, applies only to records in possession of federal agencies. Therefore, neither the federal Freedom of Infor-

mation Act nor the Privacy Act would in my view apply to records in possession of New York State law enforcement agencies. To the extent that you believe federal agencies may have possession of the records you are seeking, you should direct your requests to those agencies involved in the investigation.

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

Assuming that the monitored tape recordings that you are seeking remain in existence, there may be grounds for withholding. Section 87(2)(e) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

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

The provision quoted above is based largely upon potentially harmful effects of disclosure. Given the passage of time since the tape recordings were created or compiled for law enforcement purposes, it is difficult to determine whether disclosure could interfere with an investigation, deprive a

person of a right to a fair trial, or reveal non-routine criminal investigative techniques or procedures. Additionally, the tape recordings might contain information regarding a confidential informant, for instance. If that is the case, portions of tapes or transcripts of the tape recordings could likely be withheld.

Third, other grounds for denial, such as §87(2)(b) concerning unwarranted invasions of personal privacy and §87(2)(f) concerning the endangerment of "the life or safety of any person" could be applicable. Since I have no information regarding the parties whose voices might have been recorded, specific advice regarding the extent to which one or more of the grounds for denial could apply cannot be offered.

Lastly, it is possible that records prepared more than ten years ago might no longer exist. If the records in question do not exist, an agency would not be obliged to prepare new records in response to a request [see Freedom of Information Law, §89(3)].

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive
Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2269

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

February 1, 1983

Ms. Stephanie Bethea
[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. Bethea:

I have received your recent letter concerning information that you seek to obtain under the Freedom of Information Law.

Specifically, you indicated that you are seeking transcripts of police calls made on particular dates to the thirty-second precinct in Manhattan.

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 compel an agency to grant or deny access to records.

Second, the Freedom of Information Law pertains to existing records and states in §89(3) that an agency is not required to create a record in response to a request. Therefore, if the transcripts that you are seeking no longer exist, the New York City Police Department would not be obligated to prepare a new record on your behalf.

Third, if the transcripts do exist, I believe that they would be available, at least in part. 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.

In my opinion, there are two grounds for denial that might conceivably be cited to deny access.

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

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

From my perspective, it is questionable whether §87(2)(e) may justifiably be cited to withhold the transcript, for the record in question was likely compiled in the ordinary course of business, rather than for law enforcement purposes.

By means of analogy, it is noted that police blotters have long been available. Although the term "police blotter" is not specifically defined by any provision of law, it has been held by the Appellate Division that a police blotter is a log or diary in which any event report by or to a police department is recorded [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

The court found that a police blotter is merely a summary of events or occurrences, and that is contains no investigative information. In my opinion, the use of a 911 number and the tape recording or transcript is essentially the equivalent of what is considered to be a police blotter. I do not believe that the form in which the substance of a police blotter exists can be cited to distinguish rights of access. In this instance, it is possible that the transcript was compiled in the ordinary course of business, and not for law enforcement purposes.

The remaining ground for denial that may have relevance is §87(2)(b), which states that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". If the transcript identifies the person or persons who made the calls, perhaps the identifying details could be deleted to protect privacy. However, those portions of the transcripts in which you are most interested, i.e., those indicating the times that incidents occurred or were reported, would in my view be available based upon the information that you have supplied.

Fourth, §89(3) of the Freedom of Information Law requires that a written request "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you provide as much detail as possible, including names, dates, times, locations, descriptions of events and similar information that would enable agency officials to locate the records sought.

Lastly, it is recommended, under the circumstances, that you submit requests for the records in question to both the thirty-second precinct and to the records access officer at the central office of the New York City Police Department, which is located at One Police Plaza, New York, New York 10038.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet on the subject 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:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2770

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

February 1, 1983

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 January 21 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, on January 10, you submitted a written request to the Chief of Police of the City of Beacon in which you "asked for manufacturer's name, address and model number of Breathalyzer machine used by Beacon Police Department and also a copy of rules and regulation establishing procedures for the administration of Breath tests."

The Chief denied your request, and you have asked for advice regarding the "steps [you] should take under the Freedom of Information Law."

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

First, following an initial denial of access to records, you may appeal the denial under §89(4)(a) of the Freedom of Information Law. That provision 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."

Second, to ascertain the identity of the person or body to whom an appeal should be directed, it is suggested that you review the regulations promulgated by the City of Beacon under the Freedom of Information Law. In this regard, §89(1)(b) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations concerning the procedural implementation of the Law. In turn, §87(1) requires all agencies, including the City of Beacon, to adopt regulations consistent with those of the Committee.

Section 1401.7(a) of the Committee's regulations states that:

> "The 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."

As such, the City's regulations must identify the person or body to whom an appeal may be made.

Third, I believe that the records sought are available. 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, the only ground for denial of possible significance is §87(2)(e). That 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 disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Informational materials sent by the manufacturer to the Police Department, a contract, a bill or vouchers containing the manufacturer's name, address and the model number of the machine, would not in my opinion constitute records "compiled for law enforcement purposes". As such, I do not believe that any ground for denial would apply regarding those records.

Moreover, while procedures concerning the "administration of breath tests" might "reveal criminal investigative techniques or procedures" under §87(2)(e)(iv), that ground for withholding does not apply to "routine techniques and procedures". Since the administration of breathalyzer tests may be considered "routine", I believe that procedures regarding the administration of breath tests are accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Ashburn

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2771

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

February 1, 1983

Mr. Richard A. Gander
[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. Gander:

I have received your letter of January 18, which concerns a request for records submitted under the Freedom of Information Law to the West Hempstead Fire District.

Specifically, according to your letter, you "hand delivered" a request to the District for:

> "A. All board minutes Jan 1980 to present
>
> B. All claims paid Jan 1980 to present
>
> C. All requests from Fire Chiefs Council".

Based upon the correspondence attached to your letter, there appears to be no question but that the records sought are accessible under the Law. However, your problem is that the District has determined to make the records available for inspection for a period of one hour per review. The first hour of review occurred on January 12; a second hour long review appears to have occurred on January 24.

It is your contention that the time permitted for reviewing the records is insufficient and that you have effectively been denied access to records. The Chairman of the Board of Fire Commissioners has contended that the time allotted to you for reviewing records is fair, "since the amount of records you requested is sizable and this Board has no full time employees."

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

First, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, contain 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 receitp 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, §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."

From my perspective, if records sought are available for review for only an hour per week or per review, I concur with your contention that records were constructively denied. While I am not suggesting that the Board make records available for review during the equivalent of "regular business hours", the limited period available for review of records is in my view inadequate. Further, the records sought appear to be routine in nature. As such, there appears to be no necessity that the contents of the records be screened or evaluated prior to making them available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-852
FOIL-AO-2772

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

February 1, 1983

Ms. Marcia Rubin
[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. Rubin:

I have received your letter of January 20 in which you raised a series of questions regarding the implementation of the Freedom of Information Law and, in a related sense, the Open Meetings Law, by the Williamsville School District.

Your first question is "[A]t what point does a document become public information and covered under the Freedom of Information Law?" In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which 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."

Due to the breadth of the language quoted above, it is my view that the Freedom of Information Law becomes applicable as soon as a "record" exists or comes into the possession of an agency, such as a school district. Therefore, if a document has not yet been reviewed or "adopted", for example, it is nonetheless a "record" subject to whatever rights of access might exist under the Freedom of Information Law.

Further, 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. Consequently, when a request for records is made, the question involves the extent, if any, to which its contents fall within one or more of the grounds for denial.

The second area of inquiry concerns the adequacy of Board policy #3300, a copy of which is attached to your letter. The policy, which is entitled "Public Access to Records", states that:

> "Access of residents of the Williamsville District to records of the District shall be consistent with the rules and regulations established by the State Committee on Public Access to Records and shall comply with all requirements of Section 88 (2) of the Laws of 1974."

I would like to offer several comments regarding the statement of policy.

First, it refers to "access of residents" of the District. Here I would like to point out that the Freedom of Information Law does not distinguish among applicants for records or those who might seek to request records. It has consistently been advised and 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]. Moreover, although §2116 of the Education Law states that District records are available to "qualified voters of

the district", it has been held that "[T]he Freedom of Information Law broadens the category of those to whom records are required to be made available beyond the disclosure required by Education Law, §2116" [Matter of Duncan v. Bradford Central School District, 394 NYS 2d 362, 363 (1977)]. As such, the Freedom of Information Law may be used by any person, and not only residents of the District, to obtain records from the District.

Second, the policy refers to "Section 88(2) of the Laws of 1974". The cited provision refers to the Freedom of Information Law as enacted in 1974. However, the Freedom of Information Law was repealed and replaced with a new statute enacted in 1977 and effective on January 1, 1978. Currently, §88 refers only to records of the State Legislature.

Third, the policy is in my view inadequate in many respects. Section 89(1) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations regarding the procedural implementation of the Law. In turn, §87(1) requires the School Board to adopt regulations in conformity with those promulgated by the Committee.

Rather than reviewing each area of deficiency, copies of this opinion, the Freedom of Information Law, and the Committee's regulations will be sent to you, as well as the School Board. In addition, to assist agencies regarding their responsibility to adopt procedures, the Committee has developed "model regulations" that enable agencies to comply by filling in the appropriate blanks. Copies of the model regulations will also be sent to you and the Board.

Your third question is whether, in an open meeting of the Board, the "audience is entitled under the law to receive a copy of the documents being discussed by the Board of Education at that time". You also asked whether reports discussed at an open meeting are available "after the meeting".

It is noted in this regard that the Open Meetings Law permits the public to attend and listen to deliberations of public bodies, such as school boards (see attached, Open Meetings Law, §95). However, the Open Meetings Law is silent with respect to public participation. Therefore, while a public body may permit public participation at meetings, it need not.

Further, in a technical sense, under the regulations required to be promulgated, requests for records should be directed to one or more designated "records access officers" (see §1401.2) during "regular business hours" (see §1401.4). Therefore, it is suggested that requests for records to be used at meetings be made prior to the meetings.

Perhaps most importantly, rights of access to the records considered at meetings are determined by the extent to which the grounds for denial might be applicable. It is also emphasized that the grounds for withholding records under the Freedom of Information Law may not be entirely consistent with the grounds for executive session listed in §100(1)(a) through (h) of the Open Meetings Law. Even though records might justifiably be withheld under the Freedom of Information Law, there may not be a ground for executive session under the Open Meetings Law.

By means of example, a memorandum from the Superintendent to the School Board in which the Superintendent recommends that a particular school be closed could be denied, for §87(2)(g) permits a denial with respect to intra-agency materials to the extent that such materials are reflective of advice or opinion. Nevertheless, when the issue is discussed by the Board, none of the grounds fro executive session would apply, and the matter would have to be discussed publicly.

In short, there is no general rule that can be cited regarding access to materials discussed at a meeting of the Board. If a request is made prior to a meeting, the records access officer would in my view be obliged to review the materials in their entirety to determine with portions, if any, could justifiably be withheld. Those portions might be deleted, while the remainder would be available. Therefore, if, for example, a memorandum contains advice as well as statistical or factual information, the advice might be deleted, while the statistical or factual information would be available.

I would also like to stress that the Freedom of Information Law is permissive; although certain records or portions of records may be withheld, there is no requirement that they must be withheld. As a consequence, many public bodies prepare extra packages of materials for the public that are distributed to board members in order that members of the public can have a better understanding of a discussion.

Following a meeting, often records that could have been withheld become available. A recommendation previously deniable might become the policy of an agency when it is reviewed and adopted. In such cases, it would become available under §87(2)(g)(iii) of the Freedom of Information Law, which grants access to inter-agency or intra-agency materials that are reflective of "final agency policy or determinations". Further, a review of the grounds for denial indicates that many are based upon potentially harmful effects of premature disclosure. Often, however, after a matter is discussed, the harmful effects of disclosure essentially disappear, and the records might, therefore, become available.

In addition, §101 of the Open Meetings Law requires that minutes of open meetings must be prepared and made available within two weeks.

Lastly, you asked whether school districts are required to "clock in" mail and whether "that act" would "qualify" records "as public information".

I know of no such specific requirement. However, I believe that most agencies operate under a procedure in which mail is generally "clocked in" or logged in some fashion. Additionally, as noted earlier, based upon the definition of "record", documents are "records" subject to rights of access as soon as they are "kept, held, filed, produced or reproduced by, with or for an agency..."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2273

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
ALFRED DEL BELLO
JOHN C. EGAN
MICHAEL FINNERTY
WALTER W. GRUNFELD
MARCELLA MAXWELL
STEPHEN PAWLINGA
BARBARA SHACK
GAIL S. SHAFFER
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 1, 1983

[redacted]
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 [redacted]:

I have received your letter of January 19 in which you requested that this office "order" an employee of the Department of Correctional Services to make certain records available to you.

In terms of background, it appears that you have been engaged in a series of psychiatric evaluations during your incarceration. In this regard, you are seeking to obtain various memoranda and reports pertaining to you. Those records were apparently denied by a staff psychologist at the Clinton Correctional Facility.

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, this office has no authority to compel or "order" an agency to grant or deny access to records.

Second, it is possible that the denial of your request was appropriate. 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..."

In this regard, it has been advised that factual information found within an inmate's medical records, such as laboratory test results, are available. However, it has also been advised that such records insofar as they contain diagnostic opinion or evaluations are likely deniable. Therefore, if the records in question are reflective of psychiatric opinions, for instance, it appears that they may be withheld.

Third, it is noted that that Department of Correctional Services has promulgated regulations regarding access to Department records, including medical records. Enclosed is a copy of those regulations, which makes specific reference to medical records in §5.24. It is suggested that you review the regulations carefully, for you might want to discuss your situation with an attorney, particularly in conjunction with §5.24(9).

Lastly, §89(4)(a) of the Freedom of Information Law and §5.45 of the enclosed regulations permits a person denied access to records to appeal the denial. Under the regulations, an appeal may be directed to Counsel, Department of Correctional Services, Building 2, State Campus, Albany, NY 12226.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2774

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

February 1, 1983

Mr. Walter Grant
77-A-2462
Drawer B
Stormville, NY 12582

Dear Mr. Grant:

I have received your letter of January 28 in which you requested from this office "records or portions thereof pertaining to Miranda Report of District Attorney Justin Tobia on January 1, 1977..."

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 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.

Under the circumstances, it is suggested that you submit a request to the agency that maintains the records in question, the Office of the District Attorney. In addition, although you provided some detail regarding the report, it is recommended that other identifiers be included in your request, such as index, docket or indictment numbers, charges and similar information.

It is also possible that the same records might be in possession of the court in which your proceeding was conducted. Although the Freedom of Information Law does not include the courts and court records within its coverage, many court records are available. Consequently, if your request to the District Attorney is unsuccessful, you might consider requesting the same records from the clerk of the appropriate court.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2725

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

February 1, 1983

Dr. George Sebouhian
Associate Professor of English
State University of New York
Fredonia, NY 14063

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Professor Sebouhian:

I have received your letter of January 23 in which you requested a "ruling" regarding the assessment of fees for photocopying under the Freedom of Information Law.

Specifically, according to your letter, pursuant to a request made under the Freedom of Information Law, the records access officer for Fredonia State University College made photocopies of records available to you at the rate of fifteen cents per photocopy. You wrote further that the access officer informed you "that he was required by law to charge for the copies and that the charge had to be fifteen cents each". Your understanding, however, is that "organizations are permitted to charge a fee, but not required to do so".

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

In terms of the statutory basis for the assessment of fees, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations concerning the procedural implementation of the Law. In turn, §87(1) requires each agency, including the State University, to adopt regulations consistent with those of the Committee.

With regard to fees, agencies' regulations are required to make 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 statute" [see §87(1)(b)(iii)].

Therefore, as a general rule, the regulations adopted by an agency may establish a fee of up to twenty-five cents per photocopy.

In this instance, it is possible that regulations promulgated by the State University and applicable to colleges and universities under its aegis require the assessment of the fee to which the records access officer made reference. While some agencies' regulations permit the waiver of fees, I believe that the Freedom of Information Law enables an agency to charge a standard fee in every case in which photocopies of records are requested.

Further, it is noted that there is often confusion between the Freedom of Information Law, which applies to entities of government in New York, and the Freedom of Information Act, which applies to federal agencies. Under the federal Act, §552(a)(4)(A) states that:

> "...each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency, Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."

As such, federal agencies appear to have greater latitude than agencies subject to the New York Freedom of Information Law relative to the capacity to waive fees.

Lastly, although you requested a "ruling", I would like to stress that the Committee on Public Access to Records has the authority to advise under the Freedom of Information Law; it has no authority to issue what might be characterized as a "ruling" or otherwise compel an agency to take specific action under the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Walter Schultze

FOIL-AO-2776

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Glenn Relyea

February 2, 1983

FROM : Bob Freeman

SUBJECT : Purchase of Lists

I have received your memo of February 1 in which you expressed concern that the distribution or sale of daily reports published by the Bureau of Corporations might violate the Freedom of Information Law or the Committee's regulations.

In conjunction with your memo, I have reviewed Part 145 of the Department's regulations. In relevant part, §145.1 states that "The daily reports of corporation certificates filed in the Department of State will be furnished to all persons upon application..." Some applicants are furnished with the reports at no charge, and others are required to pay based upon a schedule indicated in the regulations.

In my view, the existing practice does not in any way violate the provisions of the Freedom of Information Law for the following reasons.

First, the Freedom of Information Law is permissive. Stated differently, §87(2) states that an agency may withhold records that fall within one or more among the eight ensuing grounds for denial. Nevertheless, the Law does not require that records be withheld, even if a basis for withholding might be applicable.

Second, the provision of the Freedom of Information Law that is the focal point of your inquiry 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..."

Once again, although an agency may withhold lists of names and addresses under certain circumstances, there is in my opinion no requirement that such lists must be withheld. Further, having briefly reviewed the list, it is questionable whether there are privacy implications, particularly, if as you indicated, the information contained within the list is available from other sources.

Lastly, §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 on in equity of any party to records."

Consequently, if rights of access to records are established by other provisions of law or by means of judicial determination, nothing in the Freedom of Information Law may be cited to diminish those rights. In this instance, it would appear that a right to the list has been established by means of law, i.e., Part 145. Therefore, I do not believe that any of the grounds for denial in the Freedom of Information Law could appropriately be cited to withhold the records in question, which are accessible by means of regulation.

In sum, it is my view that the sale of the lists in question would not constitute a violation of the Freedom of Information Law.

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2777

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

February 3, 1983

Mr. Umar Majeer
81-A-1100 E-49-31
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. Majeer:

I have received your recent letter concerning information that you seek to obtain under the Freedom of Information Law.

Specifically, you indicated that you are seeking transcripts of police calls made to the thirty-second precinct in Manhattan, March 13, 1980 from 10 p.m. to 3 a.m. on the following morning.

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 compel an agency to grant or deny access to records.

Second, the Freedom of Information Law pertains to existing records and states in §89(3) that an agency is not required to create a record in response to a request. Therefore, if the transcripts that you are seeking no longer exist, the New York City Police Department would not be obligated to prepare a new record on your behalf.

Third, if the transcripts do exist, I believe that they would be available, at least in part. 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

In my opinion, there are two grounds for denial that might be cited to deny portions of the transcripts.

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

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

From my perspective, it is questionable whether §87(2)(e) may justifiably be cited to withhold transcripts, for the records in question may have been compiled in the ordinary course of business, rather than for law enforcement purposes.

By means of analogy, it is noted that police blotters have long been available. Although the term "police blotter" is not specifically defined by any provision of law, it has been held by the Appellate Division that a police blotter is a log or diary in which any event reported by or to a police department is recorded [see Sheehan v. City of Binghamton, 59 AD 2d 808(1977)]. The court found that a police blotter

is merely a summary of events or occurrences, and that it contains no investigative information. In my opinion, the use of a 911 number and the tape recording or transcript is essentially the equivalent of what is considered to be a police blotter. I do not believe that the form in which the substance of a police blotter exists can be cited to distinguish rights of access. In this instance, it is possible that the transcripts were compiled in the ordinary course of business, and not for law enforcement purposes.

The remaining ground for denial that may have relevance is §87(2)(b), which states that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". If the transcript identifies persons who made the calls, perhaps the identifying details could be deleted to protect privacy. However, the portions of the transcripts in which you are most interested, i.e., those indicating the times that an incident occurred or was reported, would in my view likely be available based upon the information that you have supplied.

Fourth, §89(3) of the Freedom of Information Law requires that a written request "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you provide as much detail as possible, including names, dates, times, locations, descriptions of events and similar information that would enable agency officials to locate the records sought.

Lastly, it is recommended, under the circumstances, that you submit requests for the records in question to both the thirty-second precinct and to the records access officer at the central office of the New York City Police Department, which is located at One Police Plaza, New York, New York 10038.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet on the subject 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:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2778

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

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 3, 1983

Mr. Robert L. Bobbie
Vice President of the
Board of Education
Moriah Central School
138 Silver Hill Road
Witherbee, NY 12998

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bobbie:

I have received your letter of January 21 in which you requested an advisory opinion.

According to your letter, the Moriah Central School District recently sent the following notice to parents of students in the District:

> "All excuses for early dismissal or prior absence because of dentist or doctor appointments must contain the following information:
>
> Name of doctor or dentist, his or her phone number & the time of the appointment."

You indicated that the "directive" quoted above has been viewed by some parents as a "violation of their right to privacy". As such, you have asked whether the District may require parents to submit the information in question.

Although your inquiry does not fall squarely within the scope of the Committee's jurisdiction, it deals with information related to the Freedom of Information Law and another law pertaining to records that identify students. Therefore, as a service to you and the District, I would like to offer the following comments.

First, there is a provision of the Education Law that could likely be cited as a basis for inferring that the information sought by the District could not be required. Specifically, §3212-a of the Education Law states that:

> "1. Each school shall maintain a record of the telephone number of each pupil enrolled in the school and each person in parental relation to such pupil including the residential and business telephone numbers of persons in parental relation to pupils unless such person or pupil chooses not to supply such numbers. The record of such telephone numbers shall, except as otherwise provided by law, be accessible solely for emergency purposes.
>
> "2. The provisions of this section shall not be applicable to any school district in which the board of education has adopted a resolution providing that the record otherwise required hereby shall not be maintained."

According to the language quoted above, telephone numbers of parents may be requested "solely for emergency purposes", but subdivision (1) indicates that parents or students may choose not to supply telephone numbers, and subdivision (2) states that §3212-a does not apply in school districts that have resolved that such information need not be maintained.

Since the information sought in this instance goes beyond that envisioned by §3212-a of the Education Law, I would conjecture that the District could not require its submission.

Second, viewing the issue from a different vantage point, assuming that parents do submit the information requested by the District, I believe that it could be withheld from the public under the Freedom of Information Law, and that it would likely be required to be kept confidential under federal law.

One of the grounds for denial of access to records under the Freedom of Information Law is §87(2)(b), which permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". Under the circumstances, I believe that if the information in question comes into the possession of the District, it could be denied, if requested, on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

The applicable federal law is the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment". In brief, the Buckley Amendment states that any "education record", a term that is broadly defined, maintained by the District that identifies a particular student or students must be kept confidential with respect to all but the parents of the students.

In sum, based upon the statutes to which reference is made in the preceding paragraphs, first, it appears that the District cannot require parents to submit the information in question; and second, if the information is submitted, it could be withheld if requested by persons other than the parents of the students to whom the information pertains.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2779

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

February 8, 1983

Mr. Charles J. Jessen
President
Select Investigation Service, Inc.
67 North Broadway
Hicksville, NY 11801

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jessen:

I have received your letter of January 31 in which you requested a copy of the amended Freedom of Information Law as well as an advisory opinion.

Enclosed are copies of the Freedom of Information Law as amended and an explanatory pamphlet on the subject that may be useful to you.

With regard to your inquiry, you wrote that you were recently advised by educational institutions that a student must sign a release in order that the institution may inform you that the student has graduated or been granted a degree. Since your only interest is in verification of graduation and the granting of a degree, you asked whether such information may be made available without violating the Freedom of Information Law.

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

First, although the Freedom of Information Law deals with records in possession of government in New York, rights of access to student records are governed by a provision of federal law, the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment".

In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record", a term that is broadly defined, that identifies a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over, an "eligible student", similarly waives his or her right to confidentiality.

An exception to the rule of confidentiality in the Buckley Amendment involves "directory information". Directory information is defined in the regulations of the Department of Education to include:

> "... the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information."

Prior to disclosing directory information, educational agencies must provide notice to parents of students under the age of eighteen or to eligible students in order that the parents or the eligible students may essentially prohibit any or all of the items from being disclosed. Therefore, if an educational agency or institution has adopted a policy on directory information, those items designated as directory information would be available to any person. If, however, an educational agency or institution has not designated a policy on directory information, it would in my view be prohibited from disclosing records pertaining to students or eligible students without the written consent of the parents or eligible students, as the case may be.

With regard to persons who have graduated, somewhat different provisions would be applicable. Specifically, §99.37(b) states that:

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

Based upon the language quoted above, I do not believe that an educational institution must obtain a signed waiver from parents or eligible students in order to disclose whether a student has graduated or been awarded a degree. Therefore, I believe that if a policy on directory information has been established, an agency may disclose the information that you seek without obtaining a waiver from parents or eligible students.

It is noted that I have discussed the matter with the Administrator of the Buckley Amendment at the Department of Education in Washington, who concurs with this opinion.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2780

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

February 8, 1983

Mr. Gregg C. McAllister
City Editor
The Daily News
2 Apollo Drive
Box 360
Batavia, NY 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. McAllister:

As you are aware, I have received your letter of January 26 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry focuses upon a request for records directed to the Genesee County Sheriff's Department and the response to the request by the Sheriff, both of which were attached to your letter. Specifically, in a letter dated January 13, you requested that representatives of the Batavia Daily News "be allowed to see daily arrest records, the blotter and complaint forms filed by the Genesee County Sheriff's Department". The Sheriff offered specific comments with respect to each of the types of records sought, and I would like to offer the following comments regarding his remarks.

It is noted at the outset that, in his letter to you, Sheriff Call cited four grounds for denial appearing in the Freedom of Information Law that might be cited to withhold the records in question, in whole or in part.

In brief, Sheriff Call cited §87(2)(b) pertaining to unwarranted invasions of personal privacy, §87(2)(e) concerning records compiled for law enforcement purposes, §87(2)(f) which pertains to the disclosure of records that would endanger the life or safety of any person, and §87(2)(g) concerning inter-agency and intra-agency materials.

While I agree that one or more of those bases for withholding might be applicable, I do not believe that they may be cited to withhold in as broad a fashion as the Sheriff has suggested.

First, with respect to arrest records, the Sheriff indicated that there is no single list of all arrests made by the Department. He added that:

> "Officers either issue Uniform Traffic Tickets as the result of a violation of the V&T Law or complete Arrest Reports following an arrest of an accusatory instrument. Those documents are kept by the officer or within the adminstrative section of the Department. If either of those documents were released in full, the information thereon (the Arrest Report is an intra-agency form) could constitute an unwarranted invasion of personal privacy, deprive the individual of a fair trial, identify confidential sources and/or reveal criminal investigative techniques."

In this regard, it is noted that the Freedom of Information Law in its current form represents the second version of the Law. The Freedom of Information Law was initially enacted in 1974. In brief, the Law granted access to particular categories of records to the exclusion of all others. The current Freedom of Information Law is based upon the opposite presumption, for it states in §87(2) that all records of an agency are available, except those records or portions thereof that fall within one or more among eight grounds for denial.

Although arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. From my perspective, even though

reference to those records is not made in the current Freedom of Information Law, I believe that such records generally continue to be available, for the new Freedom of Information Law was clearly intended to broaden rather than restrict rights of access.

In terms of the Sheriff's specific comments, I believe that traffic tickets, accident reports and similar arrest reports have long been available, as indicated in the original Freedom of Information Law by granting access to "booking records", the records of arrest made by an arresting agency.

I agree with Sheriff Call's statement that an arrest report is "an intra-agency form". Nevertheless, §87(2)(g)(i) indicates that statistical or factual information found within inter-agency or intra-agency materials must be made available. I would conjecture that much of the information contained within an arrest report is "factual".

Another basis for withholding cited by the Sheriff deals with "unwarranted invasions of personal privacy". While I would agree that disclosure would result in an invasion of privacy, based upon the prior Freedom of Information Law, as well as the fact that the judicial process relative to arrests, arraignments and various related proceedings is open, I do not believe that disclosure would necessarily result in an "unwarranted" invasion of personal privacy. Often, even though persons are identified in records, disclosure might result in a permissible invasion of privacy.

The Sheriff also contended that disclosure would "deprive the individual of a fair trial". In my view, such a blanket assertion could not be proven, particularly since indictments and related information are generally made available before a trial.

If indeed arrest reports "identify confidential sources", I would agree that such portions of an arrest report could be deleted under §87(2)(iii). Nevertheless, it is emphasized that if a portion of a record might justifiably be denied, it does not follow that the entire record must be withheld. As you may be aware, the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within one or more of the grounds for denial.

The Sheriff also indicated that disclosure of arrest records might "reveal criminal investigative techniques". Here I would like to point out that the Freedom of Information Law permits an agency to withhold records compiled for law enforcement purposes when disclosure would:

> "reveal criminal investigative techniques or procedures, except routine techniques and procedures" [§87(2)(iv)].

Consequently, I believe that the Law requires that records reflective of routine investigative techniques be made available; the quoted ground for denial in my view applies only to "non-routine" criminal investigative techniques and procedures.

The second area of commentary by the Sheriff concerns "The Blotter". In this regard, the Sheriff wrote that:

> "Our Blotter contains information useful to the furtherance of police services given by members of the public either to an officer or by telephone to the Department. The information is somewhat detailed for future reference, as well as contains confidential and personal information about the particular individuals, organizations or businesses within the Genesee community. As a consequence, we strongly contend that unscreened access to the Blotter would not only interfere with law enforcement responsibilities, but could constitute unwarranted invasion of personal privacy, reveal criminal investigations and disclose confidential information relating to those investigations. Further, the Blotter is strictly an intra-agency document maintained for the purpose of advancing police service in protection of the public (recall the entry about the runaway steer which information was given to this Department so that we might protect the steer and the public)."

While it is possible that some aspects of the blotter as the Sheriff described it might justifiably be deleted, I disagree with many of his assertions.

Again, the blotter could be characterized as an "intra-agency document". Nevertheless, the information found within the blotter would in my view consist largely of factual information. If that is so, §87(2)(g) could not be cited to deny access to the blotter.

While I am not suggesting that the Sheriff's Department makes such determinations, in the past it has been reported that law enforcement agencies have deleted or withheld information from a blotter that identifies prestigious or wealthy members of a community, while granting access to the remainder. In my view, such a practice would be discriminatory and would create a shield for some that does not exist for others. The same might be true regarding the Sheriff's assertion regarding the entries that identify "particular individuals, organizations or businesses within the Genesee community". In my opinion, the degree to which one's privacy is invaded would not differ whether an entry in a blotter refers to the robbery of the wealthiest or the poorest person in a community.

The Sheriff indicated that disclosure might "reveal criminal investigations". Very simply, the language of the Law does not extend as far as the Sheriff has suggested in terms of the capacity to deny access. Specifically, §87(2)(e)(i) permits an agency to withhold records compiled for law enforcement purposes when disclosure would "interfere" with an investigation; it does not permit an agency to deny when disclosure would "reveal" an investigation.

Further, it is in my view questionable whether a police blotter may be characterized as a record compiled for law enforcement purposes. Under the Sheehan decision cited by the Sheriff [59 AD 2d 808 (1977)], it was found that a police blotter, as traditionally defined, is merely a summary of events or occurrences that contains no investigative information. Under those circumstances, I would conjecture that a police blotter might be considered a record compiled in the ordinary course of business and not for law enforcement purposes. If the blotter is created in the ordinary course of business, I do not believe that §87(2)(e) could be cited as a basis for denial. Whether the blotter maintained by the Sheriff's Department is consistent with the definition offered in Sheehan is unknown to me.

The last subject of your request involves "complaint forms". On the subject of complaint forms, the Sheriff wrote that:

> "If there is any document that is unequivocally protected from public inspection, it is the Complaint Form. The form is compiled for law enforcement purposes and its disclosure would surely interfere with the investigation, as well as very likely deprive the defendant of the right to a fair trial, or identify confidential source and investigative techniques."

Once again, while certain aspects of a complaint form might justifiably be withheld, I disagree with the Sheriff's assertion that it is "unequivocally protected from public inspection". Although the form is compiled for law enforcement purposes and disclosure might interfere with an investigation, I would doubt that disclosure would always interfere with every investigation. Similarly, it is in my view questionable whether disclosure would always deprive a defendant of the right to a fair trial for reasons to which reference was made earlier. It is possible that there may be confidential sources identified in a complaint form, but that might not be so in every instance. In addition, as noted earlier, while investigative techniques might be described, if the techniques are routine in nature, no ground for denial would apply to those aspects of the forms.

In sum, it is suggested that the broad assertions made by the Sheriff would not be applicable in every instance and that, as a general rule, the Freedom of Information Law requires that records sought be reviewed in their entirety to determine the extent, if any, to which one or more grounds for denial might apply.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff Call

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2281

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

February 9, 1983

David Greenberg, Esq.
Greenberg & Wanderman
35 North Madison Avenue
P.O. Box 327
Spring Valley, NY 10977

The staff of the Committee on Public Access to 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 January 27 and appreciate your interest in complying with the Freedom of Information Law.

According to your letter, your client, the East Ramapo Central School District, on occasion receives inquiries from the Internal Revenue Service on forms similar to one that you enclosed. You asked whether the School District must provide the information sought and, if it is not, whether the School District is nonetheless permitted to provide the information.

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

First, with respect to the form that you enclosed, several of the items requested on the form could in my view be withheld under the Freedom of Information Law on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)]. For instance, questions pertaining to the home addresses of a present or former employee, that person's home telephone number, social

security number, the name, address and telephone number of a new employer and related information in my view could justifiably be withheld. Although the courts have found in a variety of contexts that records pertaining to public employees that are relevant to their official duties are available [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), 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], it has also been found that information that is not relevant to the performance of their official duties may be withheld [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, I do not believe that the items to which specific reference was made above would be relevant to the performance of the duties of either a current or former employee. As such, based upon case law, those items in my view could be denied.

Second, it is emphasized that the Freedom of Information Law is permissive. Stated differently, while an agency may withhold certain records or portions of records [see §87 (2)], the Law does not require that such records or information must be withheld. The only instances in which records must be withheld involve statutory exceptions that prohibit disclosure [i.e., the Family Educational Rights and Privacy Act]. Therefore, although the items in question could in my opinion justifiably be withheld, there would be no prohibition against making them available.

Lastly, there are often questions similar to yours that deal with situations in which one agency of government requests information from another. In those situations it has been suggested that, in the spirit of cooperation, information sought might be made available. However, it has also been suggested that, when making the information available, a cover letter be transmitted indicating that the information provided is generally denied under the Freedom of Information Law, but that since the request was made in order to carry out an agency's official duties, the information would be provided. By preparing such a cover letter, the agency in receipt of the information is aware that there may be no right to the information and further, the agency supplying the information might avoid creating a precedent in terms of supplying 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

FOIL-AO-2782

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Patrick Cea

February 10, 1983

FROM : Bob Freeman

SUBJECT : Identity of Complainant

I have received your memo of February 7 and the materials attached to it.

In a letter dated December 20, Mr. Mathias Wagner requested the name of the person who registered a complaint against him. Your question is whether you may withhold the name of the complainant.

In my view, the name and other identifying details pertaining to the complainant could likely be withheld or otherwise deleted from records submitted to the Department.

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

Relevant under the circumstances is §87(2)(b), which states that an agency may withold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." Further, §89(2)(b) permits an agency to delete identifying details when disclosure would result in an unwarranted invasion of personal privacy, and the cited provision also lists several examples of such invasions.

With respect to complaints, it has consistently been advised that, although the substance of a complaint is available, the identifying details pertaining to the complainant found within such a record could justifiably be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Several of the examples of unwarranted invasions of personal privacy listed in §89(2)(b), as well as various judicial decisions, refer to whether or not an item is "relevant", i.e., to the work of an agency. From my perspective, the identity of a person who made a complaint is generally irrelevant to the work of an agency; what is relevant from the agency's point of view is whether or not the complaint has merit. Further, situations have been brought to the attention of this office in which the disclosure of a complainant's identity could result in vindictive action taken by the person who is the subject of the complaint.

In sum, it is my view that those portions of the complaint that identify the complainant could 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.

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2783

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

February 9, 1983

John F. Woog, Esq.
666 Old Country Road
Garden City, NY 11530

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Woog:

I have received your letters of February 3 and 4. In conjunction with your request, enclosed are copies of the Committee's annual reports on both the Freedom of Information and Open Meetings Laws.

Your question involves the procedure that should be followed "to apply for permission to erase and reuse tapes" that are used as an aid in transcribing minutes of meetings of a board of trustees, a planning board and a zoning board of appeals.

While your inquiry does not specifically fall within the provisions of the Freedom of Information and Open Meetings Laws, as a service, I would like to offer the following comments.

First, the applicable provision is in my view §65-b of the Public Officers Law, which states in brief that a public corporation, such as a village, cannot "destroy, sell or otherwise dispose of" records without receiving consent from the Commissioner of Education. In this regard, the Commissioner has developed schedules concerning the minimum periods of time for which records must be retained prior to their destruction or disposal.

Second, I have contacted the Education Department on your behalf to determine whether a schedule exists relative to tape recordings of meetings. I was informed that the retention period, following any necessary transcriptions, such as the preparation and approval of minutes, is zero. As such, if, for example, minutes prepared on the basis of the tape recordings have been approved or if the necessary transcripts have been created, I believe that the tapes may then be erased and reused.

I hope that I 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- 2784

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

February 10, 1983

Mr. Donald R. Moy
General Counsel
Medical Society of the State of New York
420 Lakeville Road
Lake Success, New York 11042

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Moy:

I have received your letter of February 2 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter "[A] newspaper recently published a list of physicians identified as 'top' Medicaid billers and the amount such physicians received in Medicaid billings in the past fiscal year". In this regard, it is your contention that the "publication of a provider's income constitutes an invasion of the provider's privacy" and that as a consequence, you believe that identifying details should have been deleted to protect providers' privacy.

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

First, as you indicated, §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". While the standard in the Law regarding privacy is flexible and often requires subjective judgments to be made, it is clear that

disclosure of personal information would in some cases result in a permissible rather than an unwarranted invasion of privacy. Under the circumstances that you described, I believe that disclosure would result in an invasion of privacy, but not in an "unwarranted" invasion. Further, while §89(2) provides guidance by listing five examples of unwarranted invasions of personal privacy, none of those examples in my view could clearly be cited as a basis for deleting identifying details or otherwise withholding the records.

Second, from my perspective, as a general rule, records of payment by agencies of government in New York are available, unless there is some statutory basis for withholding. For example, as you are aware, records that identify recipients of public assistance are generally confidential under §136 of the Social Services Law. In the situation that you have described, however, I do not believe that the records in question would include reference to the identities of those in receipt of social services, but rather to the physicians who provided services for the recipients and who are paid by government.

Third, you referred to the amounts received by physicians in Medicaid billings as their "income". Unless I am mistaken, the amounts received from Medicaid billings represent a portion of a physician's total income rather than his or her entire income. If the figures disclosed represented a physician's total income, I might agree that the information could justifiably be withheld.

Lastly, it is emphasized that the Freedom of Information Law is permissive. Stated differently, while an agency may withhold certain records or portions thereof, there is no obligation to do so, except in those cases in which a statute requires confidentiality. In those situations, §87(2)(a) pertaining to records that are "specifically exempted from disclosure" by statute would apply. Therefore, even though a ground for denial might be applicable, there would be no requirement that an agency must withhold records falling within that ground. In this instance, as indicated previously, it is my view that the records in question are accessible and that §87(2)(b) could not justifiably 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2785

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

February 11, 1983

Ms. Cheryl Frank
[redacted]

Dear Ms. Frank:

I have received your recent letter in which you appealed a denial of access to several requests for records sent to Brooklyn College.

I would like to offer the following comments regarding your "appeal".

First, under the Freedom of Information Law, §89(4)(a), a person may appeal to the head or governing body of the agency in receipt of a request, or whomever is designated to render determinations on appeal. Although the cited provision requires that copies of appeals and the determinations that follow be forwarded to the Committee on Public Access to Records, this office does not make determinations on appeal in response to denials of access to records. It is suggested that you attempt to identify the person at Brooklyn College to whom an appeal should be made, for that person, rather than this office, would be the appropriate officer for making such a determination.

Second, since you indicated that various requests have been "disregarded", I would like to point out that the Freedom of Information Law and the regulations of the Committee, which govern the procedural aspects of the Law, 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 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, the records that you are seeking involve "student government financial ledgers". Assuming that the records in question do not identify particular students, it would appear that they are 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 grounds for denial appearing in §87(2)(a) through (h) of the Law. Under the circumstances, if students are not identified in the ledgers, I do not believe that any ground for denial would apply. If students' names or other identifying details appear, I believe that those details should be deleted to comply with federal law (20 U.S.C. §1232g) and to protect their privacy prior to making the remaining materials available.

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee 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: Ms. Felicia Weinberg

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-855
FOIL-AO-2786

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

February 14, 1983

Ms. Pat Posner
New York Public Interest
Research Group, Inc.
5 Beekman 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 Ms. Posner:

I have received your letter of February 3 and the materials attached to it.

The materials pertain to portions of the New York State Radiological Emergency Preparedness Plan concerning public information and education. You have asked that I review the materials and provide an opinion regarding "how the State and local governmentals and the utilities plan to relate to the public via the news media and how the working press will be handled".

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 and Open Meetings Laws. As such, I believe that I am obliged to restrict my remarks to the application of those statutes to the materials. From my perspective, the Open Meetings Law has minimal application to the content of the plan, and the Freedom of Information Law has but tangential relevance.

It is noted that the title of the Freedom of Information Law may be somewhat misleading, for it is not a statute that grants access to information per se; rather it is a statute under which a person may request records. Therefore, the Freedom of Information Law is not a vehicle by which a person is entitled to raise questions or otherwise request information from government that does not exist in the form of a record or records.

The only deficiency in the plan that I can envision relative to the Freedom of Information Law involves the intent to funnel information into and disclose information from a single source. While that alone would not conflict with the Freedom of Information Law, it is possible that records regarding a particular situation might be in the possession of a variety of agencies, both state and municipal.

In this regard, if, for example, a request for records is directed to one or more agencies other than the official spokesperson or agency, I believe that those agencies would nonetheless be required to respond in accordance with the Freedom of Information Law.

I would conjecture, however, that this deficiency would be minor, for records would likely be developed following an incident. Further, the Freedom of Information Law does not require that a response to a request for records be given immediately, but rather within five business days of its receipt [see attached, Freedom of Information Law, §89(3)].

With respect to the Open Meetings Law, it is conceivable that in the event of an incident, a public body, such as a municipal board, might convene an emergency meeting. So long as notice requirements are met (see attached, Open Meetings Law, §99), such a meeting could legally be convened, even on short notice.

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-2787

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

February 14, 1983

Peter A. Walker, Esq.
Kaye, Scholer, Fierman, Hays
& Handler
425 Park Avenue
New York, New York 10022

The staff of the Committee on Public Access to 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 February 4 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, your client, the City School District of the City of New Rochelle, "requested sealed proposals for the purchase of a surplus school". Since the District must "seek and accept the best possible price", which includes consideration of "future tax revenues", financial information was sought from prospective purchasers "to determine that they are responsible bidders and capable of developing the property to generate future tax revenues in the manner stated in their proposals".

In this regard, at a meeting of the Board of Education during which two sealed proposals were opened, one of the proposals contained "a second sealed envelope labelled 'private and confidential'". The second envelope "contained the personal financial statements of the principal submitting the proposal". You indicated, however, that the District "made no pledge that any part of any proposal would be kept confidential".

Based upon the facts described above, you have raised a series of three questions.

The first is whether there is a procedure "for an individual to request that records submitted to the School District be excepted from disclosure because disclosure would be an invasion of personal privacy pursuant to Public Officer's Law §§87(2)(b) and 89(2)(b)".

In short, there is no such procedure. When a request for records is made, agency officials determine the extent, if any, to which one or more of the grounds for denial listed in §87(2)(a) through (h) of the Freedom of Information Law might apply. The only instance in the Freedom of Information Law in which a submitter of records may request that records be "excepted from disclosure" involves records characterized as trade secrets submitted to a state agency pursuant to §89(5). Since the School District is not a state agency, but rather an entitly of local government, the provisions of §89(5) would not be applicable.

The second question is whether the School District may "except from disclosure" the financial statements on the ground that they were designated "private and confidential" and because "disclosure would be an invasion of personal privacy". In a related vein, you asked whether if the District may withhold the financial statements, it is required to do so.

In my opinion, as assertion or promise of confidentiality may be all but meaningless. From an historical perspective, long before the enactment of the Freedom of Information Law in 1974, the courts held that a request for or a seal of confidentiality or privilege regarding records submitted to government by third parties is largely irrelevant. "[T]he concern...is with the privilege of the public officer, the recipient of the communication" [Langert v. Tenney, 5 AD 2d 586, 589 (1958); see also People v. Keating, 288 App. Div. 150 (1955); Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1974)], and the passage of the Freedom of Information Law confirmed this principle by placing the burden of defending secrecy on the government, the custodian of records, rather than a third party that may have submitted records to the government.

Further, it is noted that the ground for denial concerning personal privacy [§87(2)(b)] permits an agency to withhold records or portions thereof when disclosure would result in an "unwarranted" invasion of personal privacy. As such, even though disclosure might constitute an invasion of privacy, there are many instances in which disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

With respect to any requirement that the District is "required to except those records from disclosure", it is emphasized that the Freedom of Information Law is permissive. Stated differently, §87(2) of the Law indicates that an agency "may" withhold records to the extent that one or more of the grounds for denial might appropriately be cited. Therefore, in my view, there is no requirement that records must be withheld, even if a ground for denial applies. The only situations in which records must be withheld would involve statutory prohibitions that preclude an agency from disclosing certain records. In such cases, §87(2)(a) concerning records that are "specifically exempted from disclosure by state or federal statute" would apply. Based upon the facts presented, I do not believe that any statute prohibiting disclosure would be applicable to the records in question.

Lastly, you asked whether the records in question could or must be withheld "on the grounds that disclosure would injure the competitive position of the principal who submitted them". Here I direct your attention to §87(2)(d) of the Feedom 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..."

The extent to which the language quoted above might be applicable would in my view be dependent on the nature and content of the records, as well as various factors regarding the degree of competition within an industroy.

I would like to point out, however, that case law would appear to diminish the capacity to assert §87(2)(d) in the context of the situation that you described. In Contracting Plumbers Cooperative Restoration Corp. v. Ameruso [430 NYS 2d 196 (1980)], the petitioner, an unsuccessful bidder, sought to obtain "all bid proposals submitted for the award of a contract for certain work...all reports, findings and determinations made pursuant to the bid proposal and to the award of any contract or recommendation for the award of any contract" (id. at 197). The successful bidder moved to intervene to prevent disclosure.

The court held in relevant part that:

> "...it would appear that disclosure of the contents of the successful bid proposal and the basis of the determination to accept the successful bid proposal by the agency together with its findings, reports, and memoranda would be expressive of the legislative purposes set forth in section 84 POL...
>
> "The argument that the successful bid submitted to respondents contained confidential information is not a persuasive one. Said argument was not made by respondent. Furthermore, in view of the P.O.L., the successful bidder had no reasonable expectation of not having its bid open to the public" (id. at 198).

Further, the court rejected the motion to intervene.

Although the issue in Contracting Plumbers, supra, involved records concerning a successful bid, it would appear that rights of access would be equally broad relative to records of unsuccessful bidders in situations in which bids are publicly opened.

Therefore, it is in my view questionable whether the records in question could be withheld. Moreover, as indicated earlier, even though records may be withheld, there is generally no requirement that they must be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2788

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

February 14, 1983

Mr. Raul Rodriguez
74-A-2804 D6/16
Green Haven 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. Rodriguez:

I have received your letter of February 5 in which you requested advice regarding the means by which you might obtain and attempt to correct your pre-sentence report.

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 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 rehabilitiation, 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 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.

In view of the foregoing, it is suggested that you contact the sentencing judge for the purpose of seeking review of the report.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2789

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

February 14, 1983

Ms. Marilyn Adriance
Executive Assistant
Professional Insurance Agents of
New York State, Inc.
P.O. Box 98
Glenmont, New York 12077-0098

The staff of the Committee on Public Access 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. Adriance:

As you are aware, I have received your letter of February 7.

You have referred to an opinion prepared at your request in 1980 concerning the status of the New York Automobile Insurance Plan under the Freedom of Information Law. Since the Plan is in your view "an oddity among Plans because it was established originally by statute and gets all its authority from the Law and not from the industry" (Insurance Law, §63), you have asked whether my opinion might now be different.

As in 1980, the focal point of your inquiry is §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."

Even though the Plan may have been created by statute, I do not believe that it is an "agency" subject to the Freedom of Information Law, for it is not in my view a "governmental entity" nor does it perform a "governmental function".

To bolster this contention, it is noted that a judicial determination found that the Plan is not a state agency, despite the relationship with government [see Down v. New York Automobile Insurance Plan, 407 NYS 2d 421 (1978)]. Specifically, it was found in Down that:

> "[A]lthough the Superintendent of Insurance has certain supervisory control over the Plan (Insurance Law, sec. 63 subds. 1 and 5) the over-all operation thereof is self-executing and independent of direct governmental control. Moreover, the regulatory powers of the Superintendent of Insurance over the Plan appear to differ little from his powers with respect to all other aspects of the insurance business. It appears, then, that the Plan is an organization voluntarily effectuated by the insurance companies...and that its rules and regulations are promulgated by them...
>
> "Accordingly the court finds that defendant is not a state agency and is not engaged in the performance of a governmental function or in the furtherance of the official business of the State" (id. at 423).

In view of the foregoing, I would like to reiterate my opinion that the Plan is not an "agency" required to comply 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2790

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

February 14, 1983

Mr. Louis Milburn
71-A-0356
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. Milburn:

I have received your letter of February 9 in which you requested advice under the Freedom of Information Law.

In brief, you wrote that you were the defendant in two indictments. One indictment was dismissed; you are, however, now incarcerated after having been convicted under the other. In a series of correspondence addressed to the Bronx County District Attorney's Office, you have asked whether the same police officer arrested you in conjunction with both indictments. Although Mr. Peter Grishman of the District Attorney's Office responded to your inquiries, you indicated that his responses were "vague". It is your view that the Freedom of Information Law requires Mr. Grishman to provide you with "a physical record 'clearly revealing the officer's role in both cases'; or certify in writing the position of the Bronx County District Attorney as to the officer's role in both cases, with respect to [your] arrest".

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

First, it is unclear whether records containing the information sought exist. In this regard, §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. Therefore, if no record containing the information sought exists, the District Attorney's Office would not be required to prepare a record on your behalf in response to a request made under the Freedom of Information Law.

Second, the certification to which you made reference appears to be different from that envisioned in the Freedom of Information Law. The certification that you are seeking relative to the opinion of the District Attorney regarding the "role" of a particular police officer apparently involves the interpretation of a record, as Mr. Grishman indicated.

The provisions of the Freedom of Information Law insofar as they relate to certification are also found in §89(3), which refers to certification as to the "correctness" of a copy of a record or to the effect that an agency "does not have possession of such record". There is in my view nothing in the Freedom of Information Law that would require the District Attorney to certify with respect to its view of an officer's role in your arrest.

Third, it is suggested that there might be a different source of records that could be useful to you. Specifically, although the Freedom of Information Law does not apply to the courts and court records [see Freedom of Information Law, definitions of "agency", §86(3) and "judiciary", §86(1)], many court records are available under various provisions of law. Perhaps the information sought might be found in records in possession of the court in which your proceeding was conducted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2791

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

February 14, 1983

Paul J. Campito, Esq.
230 Washington Avenue Ext.
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. Campito:

As you are aware, your letter of February 3 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.

According to your letter, in response to a request for a copy of an accident report sent to the New York City Police Department, the Department assessed a fee of ten dollars for "search and service". You have requested an opinion regarding the propriety of the fee, which in your view should be limited to twenty-five cents per photocopy pursuant to §87(1)(b)(iii) of the Freedom of Information Law.

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

It is noted at the outset that §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 cents 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.

With respect to the fee assessed by the New York City Police Department, 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, it would in my opinion be valid, for it would be "prescribed by statute". Since I am unfamiliar with the means by which the fee in question was established, it is suggested that you might want to raise the question with the Division of Legal Affairs at the New York City Police Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rosemary Carroll, Division of Legal Affairs

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2792

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

February 14, 1983

Mr. Marvin Datz
[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. Datz:

I have received your letter of February 7, in which you complained about the procedural implementation of the Freedom of Information Law by the Public Employment Relations Board (PERB).

Specifically, according to your letter:

> "[P]ERB has refused to mail any documents and records and has indicated that they will only be made available at the Albany PERB office. This despite the fact that PERB maintains a New York City office at 250 Broadway..."

From my perspective, so long as an applicant for records is willing to pay the appropriate fees for photocopies and postage, an agency is required to mail copies of accessible records to him or her [see Freedom of Information Law, §89(3)]. However, there is not in my view any requirement that an agency transfer or forward its records from a central to a regional office to accommodate an applicant. Therefore, while PERB is not required to forward its records to its New York City office for your inspection, it is in my view required to mail requested records to you upon payment of the fees described above.

You wrote that a "related matter is the discrimination by PERB in the processing of informational requests". Apparently, your requests are handled by Jerome Lefkowitz rather than the records access officer, Ralph Vatalaro.

In this regard, there is no provision that requires the designated records access officer to respond personally to every request directed to an agency. As indicated in the regulations promulgated by the Committee, the records access officer "shall have the duty of coordinating agency response to public requests for access to records" [21 NYCRR §1401.2(a)]. While Mr. Vatalaro might not respond directly to your requests, by designating Mr. Lefkowitz to do so, it appears that Mr. Vatalaro has "coordinated" PERB's response to your requests.

Your remaining contention concerns PERB's alleged failure to respond to certain requests based upon your "motivation" for making requests. While the status or interest of an applicant in my view has no bearing upon rights of access, a failure to respond to a request within the prescribed time limits may be considered a denial. In such cases, an appeal may be initiated under §89(4)(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: Ralph Vatalaro
Jerome Lefkowitz

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2793

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

February 14, 1983

Mr. James Caroline
82-A-3323 I-1358
Box 500
Elmira, NY 14902

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Caroline:

I have received your letter of February 6 in which you requested information regarding the means by which you could obtain a copy of your "rap sheet", as well as "transcripts from old court cases".

I believe that your criminal history record or "rap sheet" 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 and 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.

With respect to court records, it is noted that the Freedom of Information Law does not apply to the courts or court records [see attached, Freedom of Information Law, definitions of "agency", §86(3) and "judiciary", §86(1)]. Nevertheless, there are various provisions of law that provide rights of access to court records. It is suggested that requests for such records be directed to the clerks of the courts that maintain possession of the records sought. It is also recommended that, in making such requests, as much detail as possible should be provided, such as names, dates, index and docket numbers and similar information that would enable 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

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2794

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

February 16, 1983

Mr. Theodore W. Roth
President
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:

I have received your letter of February 7, which, once again, pertains to records of the New York City Employees' Retirement System and the capacity to locate "missing heirs".

In terms of background, on December 20, 1982 an opinion was prepared on your behalf regarding rights of access to applications originally submitted by deceased members that would be used to determine the identities of possible beneficiaries. While it was earlier advised that a list of deceased members should be and since has been made available, I suggested that, due to considerations of privacy, rights of access to the applications remain questionable. It was also suggested under the circumstances that you discuss the matter with officials of the Retirement System in an effort to reach some sort of accommodation.

Your most recent correspondence indicates that you have been "stalemated" and that no progress has been made since December.

In this regard, it appears that there may be but one method of determining rights of access. That method would involve exhausting your administrative remedies under the Freedom of Information Law, and in the event of a final denied by the agency, initiating a lawsuit under Article 78 of the Civil Practice Law and Rules.

More specifically, when an applicant for records is denied access, he or she has the right to appeal under §89 (4)(a) of the Freedom of Information Law. The cited provision 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."

It is emphasized that if a final determination affirming an initial denial is rendered, the reasons for the denial must be "fully" explained in writing.

It is noted, too, that unlike most proceedings initiated under Article 78, §89(4)(b) of the Freedom of Information Law requires that the agency "shall have the burden of proving that" records withheld fall within one or more of the grounds for denial listed in §87(2) of the Law.

Lastly, a new provision, §89(4)(c), states that a court may under certain conditions award "reasonable attorney's fees and other litigation costs reasonably incurred" when an applicant has "substantially prevailed" in a judicial proceeding brought 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

Robert J. Freeman
Executive Director

RJF:jm
cc: Harold Herkommer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2795

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(51 2791

AMITTEE MEMBERS

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GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 16, 1983

Mr. Umar Majeer
81-A-1100 E-49-3
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. Majeer:

I have received your letter of February 8 in which you requested assistance in obtaining transcripts of judicial proceedings pertaining to you.

Please be advised that the Freedom of Information Law does not include within its scope the courts or court records. Section 86(3) of the Freedom of Information 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."

As such, although the Freedom of Information Law is applicable to governmental entities in New York, it does not apply to the courts or the records that you are seeking.

Even though the courts fall outside the requirements of the Freedom of Information Law, many court records are available under various provisions of law. Therefore, it is suggested that you might want to submit a request to the clerk of the court in which the proceedings were conducted. It might also be worthwhile to contact a representative of a legal aid group or Prisoners' Legal Services.

I hope that I have been of some assistance. 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-2796

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

February 17, 1983

Mr. Robert DeGregorio
Assistant Town Attorney
Town of Huntington
Town Hall
100 Main Street
Huntington, NY 11743

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DeGregorio:

I have received your letter of February 8 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, various individuals, "believing their dogs to have been placed in the Huntington Dog Pound", have requested the names of those who adopted dogs after the expiration of the "statutory waiting period". You also wrote that the people who adopted dogs were "informed at the time of adoption that the information as to their names and addresses would be kept confidential".

The question is whether the "names of the adopters" are confidential and may be withheld under the Freedom of Information Law.

While I do not believe that, in a technical sense, the names of those who adopt dogs pursuant to §118 of the Agriculture and Markets Law are "confidential" or that a promise of confidentiality can be made, I believe that the names may nonetheless be withheld under the Freedom of Information Law.

With respect to an assertion or promise of confidentiality, records may in my view be considered "confidential" only if a statute permits or requires confidentiality. In such instances, records would be deniable under §87(2)(a) of the Freedom of Information Law pertaining to records that are "specifically exempted from disclosure by state or federal statute". I am unwarae of any statute that would confer confidentiality relative to the names and addresses of those who adopt dogs.

However, one of the other grounds for denial in the Freedom of Information Law would in my view permit the Town to withhold the records in question. Specifically, §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".

Under the circumstances, if, as you stressed in your letter, adoptions occur only after the statutory time limit within which previous owners may claim dogs, it would appear that disclosure to those who adopted the dogs following the expiration of the time limits could result in unnecessary or unwarranted intrustions, harassment or personal hardship [see §89(2)(b)(iv)]. Therefore, it appears that the records in question may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2797

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

February 17, 1983

Mr. Delbert Wm. Ode
76-C-521
Attica Correctional Facility
P.O. 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. Ode:

I have received your letter of February 11 in which you requested from this office various materials pertaining to you and other individuals.

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, nor does it have the authority to require an agency to grant or deny access to records. However, I would like to offer various remarks regarding your request.

First, under the Freedom of Information Law, requests should be directed to the agencies that maintain records in which you are interested. Therefore, if, for example, the records that you seek are in possession of a variety of agencies, requests should be directed to each of those agencies separately.

Second, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". In some instances, you provided substantial detail in your requests. In others, it is likely that there is insufficient detail to permit an agency to locate records sought. It is suggested that, when making a request, as much detail as possible should be given, including names, dates, file designations, descriptions of events, identification, index, indictment and docket numbers and similar information that would enable agency officials to locate records sought.

Third, you contended in your letter that the Office of the District Attorney in Monroe County falls within the scope of the federal Freedom of Information and Privacy Acts. I disagree, for those acts apply to records of federal agencies. However, I believe that the Office of the District Attorney and other governmental entities in New York fall within the scope of the Freedom of Information Law.

Fourth, in another aspect of your request, you asked for a "Vaughn" index. Although a Vaughn index itemizing records withheld may be required to be prepared in some circumstances under the federal Freedom of Information Act, I am unaware of any judicial interpretation of the New York Freedom of Information Law that would require as detailed a record regarding a denial as the Vaughn index.

Fifth, it is noted that the Freedom of Information Law contains eight grounds for denial, several of which would likely be applicable to various aspects of the records that you are seeking. To give you an indication of the types of records that may be withheld, I have enclosed a copy of the Freedom of Information Law for your consideration.

Lastly, based upon the determination rendered in People v. Billups [Sup. Ct., Queens Cty., Criminal Term, NYLJ, July 13, 1981], it is possible that your rights may be limited. In Billups, it was found, in brief, that a convicted defendant could not employ the Freedom of Information Law as a method of circumventing the proper times and procedures for criminal discovery set forth in Article 240 of the Criminal Procedure 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-2798

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

February 17, 1983

Mr. Kenneth Wilson
82-A-2391 B-24-30
Attica Correctional Facility
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. Wilson:

I have received your recent letter in which you requested assistance from this office.

Apparently, you are trying to obtain copies of various trial records pertaining to you.

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

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.

Questions concerning copies of trial transcripts should also be addressed to the clerk of the appropriate court. Since it is likely that there may be a fee imposed for these documents, it is suggested that you contact a representative of Prisoners' Legal Services at your facility.

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

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-2799

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

February 18, 1983

Stephen M. Fromson, Esq.
Greenberg & Wanderman
35 North Madison Avenue
P.O. Box 327
Spring Valley, NY 10977

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fromson:

I have received your letter of February 9 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, on January 7, you wrote to the Village Clerk of the Village of Spring Valley to request information pertaining to the number of Uniform Traffic Tickets issued by the Spring Valley Police Department for the calendar years 1980, 1981 and 1982. The Clerk suggested that you direct your request to the Chief of Police. In response to that request, the Village Attorney apparently indicated that although the information requestion would be provided, requests to review individual tickets would be denied. Further, on February 1, the Police Chief advised you by letter that materials sought would be made available but that, in anticipation of a request to inspect tickets, he indicated that you would first have to inform him of the reason for a request. On February 3, the Police Chief informed you that although the statistical totals requested were found "on a year-end memorandum", that memorandum would not be made available to you. Rather, the Chief informed you that he had extracted from the memorandum the information sought and provided it to you by means of a separate letter.

In conjunction with the facts described in the preceding paragraph, you have asked whether under the Freedom of Information Law the Chief of Police may extract information from a memorandum prepared in the regular course of business for the Village and provide you instead with a separate memorandum containing the information sought. A second question is whether the Uniform Traffic Tickets are available under the Freedom of Information Law, or whether a person must first explain the reasons for making a request to inspect the tickets.

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

With respect to the issuance of a separate letter containing the information sought rather than the original memorandum transmitted by the Chief of Police to the Mayor and the Village Board, I believe that the original memorandum, to the extent that it is accessible under the Freedom of Information Law, should have been made available to you.

In this regard, I direct your attention initially to §86(4) of the Freedom of Information Law, which 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 definition, a memorandum transmitted from the Chief of Police to the Mayor and the Board of Trustees would in my view clearly constitute a "record" subject to rights of access granted by the Freedom of Information Law.

In terms of rights of access, as you are 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.

It would appear that the original memorandum transmitted by the Chief to Village officials would fall within the scope of §87(2)(g) concerning inter-agency and 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 determinations must be made available.

Under the circumstances, while the original memorandum might be characterized as "intra-agency" material, I believe that the information sought would constitute "statistical or factual tabulations or data" that must be made available.

In sum, since the request was made for the original memorandum, I believe that the memorandum itself should have been made available in whole or in part, depending upon its content, and that a separate letter containing extracts from the original memorandum did not constitute an appropriate response to your request.

With regard to Uniform Traffic Tickets, I believe that they are available.

Viewing the matter from an historical perspective, it is noted that the original Freedom of Information Law granted access to specified records to the exclusion of all others. Perhaps the key deficiency in the original Law was that unless an applicant could request records falling within one or more categories of available records, that person had no rights under the Law.

It is important to point out, however, that one of the categories of available records involved "police blotters and booking records". Presumably reference to the issuance of traffic tickets would be found within either a police blotter, which in my view is available [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1988)], or booking records, the records of arrest made by an arresting agency.

In my opinion, since the Legislature in 1974 determined that police blotters and booking records should be available to the public, any alterations in the Law that became effective in 1978 should not be used as the basis for withholding records that had long been considered accessible. Moreover, I believe that the direction provided by the Legislature to the effect that police blotters and booking records should be made available represented an inference that disclosure of such documents would result in a permissible rather than "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

Further, I view the amendments to the Freedom of Information Law that became effective in 1978 as an attempt to remediate deficiencies that arose under the original Law and to broaden rather than restrict rights of access.

In terms of the grounds for denial listed in the current Law, I do not believe that any could justifiably be cited to withhold the records in question. Although it might be contended that the records were compiled for law enforcement purposes, it is in my opinion unlikely that the harmful effects of disclosure described in the provision pertaining to such records would arise. Section 87(2)(e) of the Law states that an agency may withhold records or portions thereof that:

> "...are compiled for law enforcement purpose 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 techines and procedures..."

In the case of traffic tickets, it is difficult to envision how disclosure of such records would interfere with an investigation, deprive a person of a right to a fair trial or impartial adjudication, identify a confidential source or disclose criminal investigative techniques or procedures other than routine techniques or procedures. If my contention is accurate, §87(2)(e) could not be cited as a basis for withholding.

The only other ground for denial that I can envision as being at all applicable is §87(2)(b), which provides that an agency may withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". As stated previously, in view of the legislative history of the Freedom of Information Law, I do not feel that the cited provision would constitute a basis for withholding. Moreover, case law and other statutory provisions in my view tend to confirm such a contention.

Considering the issue from a somewhat different vantage point, records other than the tickets themselves but nonetheless related to them would in my view be available and therefore indicate that the information in which you are interested should be accessible under the Freedom of Information Law. For instance, if an individual is arrested for a traffic violation, I believe that the individual arrested generally may have two choices in terms of response. The individual can essentially plead guilty and send a check to pay for whatever the fine might be to the appropriate agency. In this regard, a record indicating the payment of such a fine would in my opinion be accessible under various provisions of laws [see e.g., §§107, 2091-a, 2020 and 2021 of the Uniform Justice Court Act].

On the other hand, if a fine is not paid by mail, an individual may appear in court. In this regard, it has long been held that the dockets are accessible under various provisions of law, such as §2019-a of the Uniform Justice Court Act and §255 of the Judiciary Law. Even prior to the passage of the Freedom of Information Law, it was found in Werfel v. Fitzgerald [23 AD 2d 306 (1965)] that dockets were available under §255 of the Judiciary Law as well as other statutory provisions and common law. Section 255 of the Judiciary Law states that:

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

Since records identifying a person arrested for traffic violations would be available pursuant to statute from various sources, again, I believe that such statutes indicate that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

Based upon the Freedom of Information Law, its judicial interpretation, and provisions of other statutes, it is my view that the Uniform Traffic Tickets that are the subject of your inquiry should be available.

Lastly, the Freedom of Information Law does not distinguish among applicants for records. In one of the first judicial decisions 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, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Consequently, as a general rule, when requesting records, an applicant need not in my opinion indicate the reason or purpose for making a request. Therefore, I do not believe that you are required to provide the Chief of Police with a reason for requesting records as a condition precedent to the making of a determination regarding 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
cc: Julia Jacaruso
Paul Toth

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO - 858
FOIL-AO - 2800

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

February 18, 1983

Mr. Fredric Steven Harri
[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. Harri:

I have received your letter of February 14, in which you raised a series of questions that relate to the Freedom of Information and Open Meetings Laws. An attempt will be made to respond to each.

Your first question involves a situation in which "a resident of a school district petitions the Board of Education to overrule the Superintendent's ruling on a matter of transportation", and whether the Board may consider the issue during an executive session.

In this regard, it is noted that the Open Meetings Law (see attached) does not permit a public body, such as a board of education, to enter into an executive session to discuss the subject of its choice. On the contrary, §100(1) in paragraphs (a) through (h) specifies and limits the topics that may appropriately be considered during an executive session.

From my perspective, it is unlikely that a discussion regarding transportation, if it involves policy matters, routes or other matters unrelated to particular individuals, could be conducted during an executive session. Under those circumstances, no ground for executive session could in my

view be appropriately cited. If, on the other hand, the issue pertains to the performance of a school bus driver or a particular student, for example, an executive session might properly have been convened [see e.g., §100(1)(f)]. Without greater specificity regarding the nature of the discussion, it is difficult to provide a specific response.

It is noted that, prior to entry into an executive session, a public body must accomplish a procedure during an open meeting. Specifically, §100(1) of the Open Meetings Law states in relevant part that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

As such, before entering into an executive session, a motion should indicate the subject to be considered. Further, I believe that the subject described should be consistent with one or more of the bases for entry into executive session.

Your second question is based upon the assumption that the Board could properly enter into an executive session. Under those circumstances, you asked whether the Board could "bar the petitioner from its discussion of the petition, after hearing from the petitioner".

If there is a proper basis for entry into an executive session, the Board in my view could exclude any person, including the petitioner from an executive session. Section 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."

Therefore, a public body may exclude from an executive session all but its own members, including a person who may have initiated a discussion or who may be the subject of a discussion.

The third question is whether a board of education may vote during an executive session, or whether it must return to an open session for the purpose of voting.

While public bodies may generally vote during executive sessions, the courts have on several occasions interpreted the Education Law, §1708(3), to prohibit a school board from taking action during an executive session [see e.g., Sanna v. Lindenhurst Board of Education, 85 AD 2d 157, aff'd ___ NY 2d, November 16, 1982], except in specified situations (i.e., tenure proceedings). As such, in most instances, a school board must vote during an open meeting.

The fourth question pertains to requirements "for reporting the result of the Board of Education to the petitioner". In this regard, §101 of the Open Meetings Law contains requirements regarding the preparation of minutes.

With respect to minutes of 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."

When action is taken during an executive session, which, as indicated earlier, should not generally be so in relation to school boards, §101(2) states in part 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..."

Further, §101(3) states that minutes of open meetings must be prepared and made available within two weeks of such meetings, and that minutes of action taken during executive sessions must be prepared and made available within one week of the executive sessions.

Your last area of inquiry concerns a situation in which the Board requests a document from the Superintendent, who in turn seeks the document from staff. The document later apparently is used in an "oral discussion" at an open meeting. The question is whether the document is available to the public.

Here I direct your attention to the Freedom of Information Law (see attached). 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 categories of denial appearing in §87 (2)(a) through (h) of the Law.

Without greater specificity regarding the nature of a document, specific direction regarding rights of access cannot be offered. However, it is noted that the bases for entry into an executive session in the Open Meetings Law are not necessarily consistent with grounds for denial of access to records in the Freedom of Information Law. Therefore, in some instances, even though a discussion might be required to be discussed in public, it is possible that records involved in the discussion might justifiably be withheld.

By means of example, if staff sent to the Board a memorandum containing an opinion or recommendation regarding transportation policy, that record might be deniable under the Freedom of Information Law [see §87(2)(g)]. Nevertheless, discussion of the topic by the Board would not likely fall within any ground for executive session. Once again, however, without more information regarding the nature of a record, specific advice cannot be given.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2801

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
ALFRED DEL BELLO
JOHN C. EGAN
MIC[illegible]TY
STEPHEN PAWLING
BARBARA SHACK
GAIL S. SHAFFER
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 23, 1983

Mr. Alfred Toomer
81-A-4116 F5-266
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. Toomer:

I have received your recent letter in which you requested a copy of your arrest record.

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. Consequently, this office does not have possession of records generally, such as those in which you are interested, nor does it have the authority to compel an agency to grant or deny access to records. However, I would like to offer the following comments regarding your inquiry.

I believe that your criminal history record or "rap sheet" 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

[illegible] concerning the "DCJS Report", which is [illegible] 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 and 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 hope that I 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-2802

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

[redacted]MITTEE MEMBERS

[redacted]OMAS H. COLLINS
ALFRED DEL BELLO
JOHN C. EGAN
[redacted]TY

[redacted]
BARBA[redacted]
GAIL S. SHAFFER
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 23, 1983

Mr. Frank G. Adee
79-C-0152
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. Adee:

I have received your letter of February 8 in which you requested from this office copies of either a "death certificate and/or medical examiners report" regarding the death of a particular individual.

It is noted that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. Consequently, this office does not have possession of the records that you are seeking, 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 comments regarding your inquiry.

First, with respect to death certificates, the Public Health Law, §4174, governs access to such records. In brief, that provision states that death certificates and similar materials are available upon a showing of judicial or other proper purposes. Whether your request would be reflective of a "proper purpose" is unknown to me.

I would also like to point out that death certificates are kept in two locations. Original death certificates are maintained by the Bureau of Vital Records at the State Health Department in Albany. Duplicate copies are kept by local registrars of vital records, either city or town clerks, in the city or town in which a death occurred.

Second, with respect to reports of a medical examiner, such records are generally confidential under §677 of the County Law. A copy of a medical examiner's report is available under the cited provision to the next of kin of a deceased or their representatives and the district attorney. Others may gain access to such reports only after having obtained a court order.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2803

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

February 23, 1983

Mr. Ernest Schender
81-A-0963 A-8
Arthur Kill Correctional Facility
2911 Arthurkill Road
Staten Island, New York 10309

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schender:

I have received your letter of February 10 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry pertains to a request for a certification sought under §89(3) of the Freedom of Information Law regarding the existence of records of the Division of Parole. In response to the request, Herman Graber, Counsel to the Division, wrote that:

> "[P]lease be advised that certification is not required in this matter, in that the material you initially requested did not represent material to which you have any statutory entitlement, pursuant to Sections 87(2)(b) and (3)(b), and Section 89(2)(b) Public Officers Law. Therefore, as you have no entitlement to the material in question, there is no necessity that this agency certify as to whether such records are in our possession or whether or not they could be found after diligent search."

If I understand the situation accurately, I agree with Mr. Graber, but for a reason other than that expressed in his response to you.

From my perspective, when an applicant submits a request for records, if the records sought do not exist or are not in possession of the agency in receipt of the request, the agency in its response would so state. Further, in such a situation, a response that records sought are not in possession of the agency would not constitute a denial, for no records would be withheld. Under those circumstances, I believe that a request for a certification under §89(3) of the Freedom of Information Law would be appropriate.

When a request is made and the response involves a denial, I believe that it may be inferred that, in order to deny, records must exist.

In the context of Mr. Graber's response to you, your rights of access to the records sought are in my view irrelevant to a request for a certification regarding maintenance of the records. Nevertheless, once again, I concur with the result of Mr. Graber's response, for the denial in my opinion represents an indication that the records sought exist and are maintained by 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:jm

cc: Herman Graber

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2804

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

February 24, 1983

Mr. Marvin Datz
[redacted]

Dear Mr. Datz:

I have received your letter of February 11 in which you registered a complaint regarding the implementation of the Freedom of Information Law by the New York City Department of Employment.

You indicated in your letter that Commissioner Ronald T. Gault of the Department of Employment has not received a copy of an advisory opinion prepared on your behalf on December 29. I would like to point out that Mr. Gault would not have received that opinion because your inquiry of December 16 involved requests directed under the Freedom of Information Law to the New York City Board of Education. Nevertheless, in conjunction with your request, a copy of that opinion will be sent to Commissioner Gault.

As indicated in the December advisory opinion, if an applicant for records has completed the appropriate procedural steps and has exhausted his or her administrative remedies, that person has the capacity to initiate a suit under Article 78 of the Civil Practice Law and Rules [see Freedom of Information Law, §89(4)(b)]. Perhaps a review of the enclosed opinion by Commissioner Gault will obviate the necessity of initiating a suit and enhance compliance 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: Commissioner Gault

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2805

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

February 24, 1983

Mr. Richard R. Behrens
[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. Behrens:

I have received your letter of February 13 in which you registered a complaint regarding the procedural implementation of the Freedom of Information Law by the New York City Board of Education.

Specifically, according to your letter, the Board of Education generally responds to requests in a manner inconsistent with the requirements of the Freedom of Information Law and the regulations promulgated by the Committee. As an indication of the Board's failure to comply with the prescribed time limits, you included a letter sent to you by a member of the Board, Ms. Irene Impellizzeri, concerning an appeal that you forwarded to the Board on February 1. In this regard, Ms. Impellizzeri wrote that "[S]ince you have been advised by the Records Access Office that you will be given a response to your request by May 2, 1983, we find that there has been no denial of access."

I disagree with Ms. Impellizzeri's comment. As you are aware, §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of its receipt. Although an agency may extend the time for responding by acknowledging the receipt

of the request, §1401.5(d) of the regulations promulgated [illegible] and effect of law, [illegible] circumstances, that no determination would have been made until a substantially greater prior of time has elapsed. As such, I agree with your contention that the request has been constructively denied and that your appeal was proper.

Moreover, in the event of a denial, an applicant has the right to appeal under §89(4)(a) of the Freedom of Information Law. The person designated to render determinations on appeal has seven business days from the receipt of the appeal to grant access to the records sought or to fully explain in writing the reasons for further denial.

In addition, 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.

Lastly, the lengthy period taken by the Board of Education to respond to requests has in the past been brought to the attention of this office. In this regard, I have on many occasions discussed the matter with various officials of the Board of Education. While I believe that the Board is required to comply with the Freedom of Information Law and the regulations, I also believe that Board employees make good faith efforts to respond appropriately as quickly as possible. In terms of the Committee's authority to compel compliance, this office has the authority only to advise. As such, the Committee cannot compel an agency to grant or deny access to records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lillian DelSeni
John Nolan
Ruth Bernstein
Irene Impellizzeri

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2806

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

February 24, 1983

Mr. Robert J. Emmick
[redacted]

Dear Mr. Emmick:

I have received your letter of February 23 in which you requested forms to be completed for the purpose of requesting records pertaining to you under the Freedom of Information Law.

Please be advised that there are no specific forms prescribed for making requests for records under the Freedom of Information Law. In my view, any request made in writing that reasonably describes the records sought should be sufficient [see attached, Freedom of Information Law, §89(3)]. Therefore, when making a request to an agency that maintains records pertaining to you, it is suggested that you provide as much information as possible, such as identification numbers, dates, file designations, descriptions of events and similar details that might enable agency officials to locate records.

To provide additional guidance, enclosed is an explanatory pamphlet that describes the Freedom of Information Law and its use. The pamphlet also contains a sample letter of request 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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2807

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

March 1, 1983

Ms. Hazel Shader
[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. Shader:

I have received your letter of February 14 in which you raised a series of questions. Although you requested a response by February 22, it is noted that your letter reached this office too late to respond by that date. It is noted, too, that requests for advisory opinions are handled in chronological order.

Your first area of inquiry pertains to unpaid taxes in Schuyler County. Apparently, you have unsuccessfully attempted to obtain information regarding the amount owed to the County.

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

Further, although much of the information sought likely falls within one of the grounds for denial, due to its structure, I believe that records relative to monies owed to the County are available to the extent that such records exist.

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. 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 information sought likely consists of "statistical or factual tabulations or data" that are available under §87(2)(g)(i) of the Freedom of Information Law.

It is also noted 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 right of access at law or in equity of any party to records."

As such, if records are available under some other provision of law, they remain available, notwithstanding the provisions of the Freedom of Information Law.

One provision of law that has long granted broad rights of access to records of municipalities, including counties, is §51 of the General Municipal Law. Section 51 provides access to "[A]ll books of minutes, entry or account and the books, bills, vouchers, checks, contracts..." and other papers in possession of a municipality. Therefore, the information that you are seeking from the County would appear to be available both under the Freedom of Information Law and the General Municipal Law.

The second area of inquiry concerns County employees who, according to your letter, "resent the time and effort to get copies" of records. You indicated that the records in question involve salary information relative to County employees, an audit report prepared by the Department of Audit and Control and the report of the County Treasurer.

With respect to the "time and effort" that may be involved in locating records, it is noted that the Freedom of Information Law requires that agency officials must make records available under the Law within prescribed time limits [see attached, Freedom of Information Law, §89(3); regulations, §1401.5(a)].

I would also like to point out that the Freedom of Information Law makes specific reference to salary information. Section 87(3)(b) requires that each agency shall maintain:

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

Therefore, in my opinion, the records indicating the salaries of all public employees must be maintained and made available.

With regard to the audit and Treasurer's reports, I believe that they, too, are likely accessible. Completed audits of municipalities have long been available, and a treasurer's report likely consists of factual information accessible under §87(2)(g)(i) of the Freedom of Information Law as well as §51 of the General Municipal Law.

The next area of inquiry concerns fees for copies of records. Although agendas of meetings have been made available to you, you indicated the a fee of six dollars was charged for a twenty-four page agenda. You wrote further that "the Press gets the agenda free".

In this regard, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge up to twenty-five cents per photocopy. Therefore, a fee of six dollars for twenty-four pages was legal and consistent with the Freedom of Information Law. It is noted, however, that the Freedom of Information Law does not distinguish among applicants for records, and members of the news media

enjoy no greater rights under the Law than members of the public generally. Therefore, it is my view that if one group obtains records for free, others should also receive the records for free. Conversely, if you are assessed a fee, others should in my opinion be required to pay the same fee.

The next issue raised in your letter involves a contention by a Board of Education that it need not vote to raise salaries of the superintendent and three principals.

As a general rule, I believe that a board must vote in order to take action. However, it is possible that contractual provisions govern the manner in which pay raises are made regarding the individuals in question. It is suggested that you review the employment contracts between the school district and the four employees. Perhaps their contents are relevant to the procedure described in your letter.

Your last question involves bidding practices. In all honesty, I have no expertise on the subject. Consequently, it is suggested that you raise the issue with either the State Education Department or the Department of Audit and Control.

I hope that I 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: Schuyler County Legislature

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-860
FOIL-AO-2808

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

March 1, 1983

Mr. Joseph Jaffe
Levine, Silverman & Jaffe
33 Chestnut Street
P.O. Box 390
Liberty, NY 12754

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jaffe:

I have received your letter of February 18, which reached this office on February 25.

You have requested an advisory opinion regarding the following question:

> "[A]fter a Board of Education has voted to discuss a personnel matter in executive session, what information is required to be put into the public record at the conclusion of the executive session, and what information may not be put into the public record concerning the ongoings of the executive session?"

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

As a general rule, a public body must prepare minutes of meetings, and §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 by 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 must be taken behind closed doors (i.e., see §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)].

Most recently, the Appellate Division, Second Department also found that a school board may act only by means of a vote taken during an open meeting. Although the Court of Appeals affirmed, it did not deal specifically with the so-called "open vote" provision of the Education Law [see Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd ___ NY 2d ___ (1982)]. Nevertheless, since §1708(3) of the Education Law is apparently "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can generally act only during an open meeting.

Therefore, in conjunction with your question regarding the information that must be "put into the record" after an executive session, since no action can be taken during an executive session, presumably no record is required to be compiled.

The second aspect of your question involves what "may not be put into the public record concerning the ongoing of an executive session."

Here I direct your attention to the Freedom of Information Law (see attached). Assuming that a record is prepared regarding discussions that occurred during an executive session, it would in my view be subject to the Freedom of Information Law.

Section 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."

Therefore, in my view, the mere creation of a record by a school board would bring the record within the scope of the Freedom of Information Law. Moreover, it has been held that notes taken at a meeting fall within the definition of record and, consequently, fall within the scope of the Freedom of Information Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

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, it is emphasized that the Law is permissive; while an agency may withhold records in accordance with the grounds for denial, there is generally no obligation to do so, even if records may be withheld.

In my view, the only instances in which records must be withheld involve situations in which a statute prohibits disclosure. In those cases, §87(2)(a) of the Freedom of Information Law, which pertains to records that are "specifically exempted from disclosure by state or federal statute", would apply.

By means of example, if a school board convenes an executive session to discuss the medical history of a particular student, records identifiable to the student created regarding the discussion could not in my view be disclosed, for federal law prohibits disclosure of such records (see Family Educational Rights and Privacy Act, 20 U.S.C. §1232g).

As a general rule, however, if a record exists, unless the record falls within the scope of a statute prohibiting disclosure, I believe that the record may be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 2809

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

March 1, 1983

Mr. Samuel A. Weissmandl
Administrative Assistant
Office of the Mayor
Village of New Square
New Square, NY 10977

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Weissmandl:

I have received your letter of February 21 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns the implementation of the Freedom of Information Law by the Town of Ramapo. The Town's rules and regulations adopted under the Freedom of Information Law indicate that records may be inspected "from 10 A.M. to 4 P.M. Monday through Thursday, except holidays". In this regard, you asked whether, since:

> "...the Town of Ramapo offices are open from 9 A.M. to 5 P.M., Monday through Friday, is it legal for public inspection hours to be limited from 10 A.M. till 4 P.M. thereby eliminating two hours each day? Also, is it legal for them to disfranchise the public from being able to inspect public records on Fridays?"

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

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations regarding the procedural implementation of the Law. In turn, §87(1) requires each agency to adopt its own regulations in conformity with those promulgated by the Committee.

Second, §1401.4(a) of the Committee's regulations (see attached) 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."

Based upon the language quoted above, if the Town maintains regular business on Monday through Friday, it is my view that requests should be accepted and records produced during regular business hours, including Fridays.

Lastly, it is emphasized that an agency is not required to respond to a request immediately. Section 89(3) of the Freedom of Information Law and §1401.5(d) of the regulations indicate that a respond to a request must be given within five business days of its receipt. Therefore, while I believe that the Town must accept requests on Fridays, it does not necessarily follow that responses to all requests must be given or that records must be made available on the day in which a request is made.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2810

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

March 1, 1983

Mr. Robert A. Ferrette
[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. Ferrett:

I have received your letter of February 20 in which you raised questions regarding the Freedom of Information Law as it affects the Office of Court Administration.

According to your letter, "[T]he Office of Court Administration for sometime now has evaded complying with the requirements of the Freedom of Information Law...under the guise of being part of the 'courts' or 'judiciary'".

In this regard, I am aware of the stance taken by the Office of Court Administration. Further, it has consistently been advised that the Office of Court Administration is an "agency" subject to the Freedom of Information Law in all respects, rather than a "court" that falls outside the requirements of the Freedom of Information Law. In addition, the only judicial decisions of which I am aware specifically dealing with the relationship between the Freedom of Information Law and the Office of Court Adminstration indicate that the Office of Court Administration is indeed an agency [see attached, Babigian v. Evans, 427 NYS 2d 688 (1980); In Quirk, Sup. Ct., New York County, NYLJ, June 4, 1982].

You also asked whether the Committee has requested an opinion from the Attorney General regarding the status of the Office of Court Administration under the Freedom of Information Law. No request for an opinion has been made. As a rule, inquiries sent to the Attorney Generaly regarding rights of access to records are forwarded to this office for response. Moreover, at this juncture, it is questionable in my view whether the Office of Court Administration would place greater weight on an opinion of the Attorney General than the judicial decisions 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:jm

Encs.

cc: John Eiseman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2811

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

March 1, 1983

Lieutenant James J. Gallagher
Executive Officer
Central Records Section
Command 420
Suffolk County Police Department
Yaphank Avenue
Yaphank, NY 11980

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Lieutenant Gallagher:

I have received your letter of February 15 in which you requested a "decision as to the availability of mugshots, to the arrestee or his attorney only when requested via the Freedom of Information Law."

In this regard, I would like to offer the following comments.

First, since you requested a "decision", it is noted that the Committee on Public Access to Records has the authority to advise; this office has no authority to render a binding determinations or to compel an agency to grant or deny access to records.

Second, due to the definition of "record" appearing in §86(4) of the Freedom of Information Law, I believe that mugshots are subject to rights of access. "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."

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 but one ground for denial of relevance regarding mugshots. Specifically, §87(2)(b) states that an agency may withhold records the disclosure of which would result in "an unwarranted invasion of personal privacy". However, §89(2)(c) states that, unless some other ground for denial applies:

> "...disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
>
> ii. when the person to whom a record pertains consents in writing to the disclosure;
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Therefore, I believe that an "arrestee" has the right to obtain copies of mugshots pertaining to him upon presenting reasonable proof of identity. Similarly, an attorney representing such an individual may in my opinion obtain a mugshot with the written consent of the person to whom the record pertains.

I hope that I 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-2812

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

March 3, 1983

Mr. Peter Carucci
Director, Bureau of Vital Records
NYS Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Mr. Carucci:

I recently received a copy of Vital Records Review, which in its column entitled "Answers Please" a question was raised regarding access to the names of marriage license applicants when such records are requested by the news media.

In the response to the inquiry, the following answer was published:

> "[T]he names of marriage license applicants SHOULD NOT be provided to the news media. Release of marriage records has been determined by the Department of Health to fall into the category of unwarranted invasion of personal privacy as provided in subdivision three of Public Officers Law Section 88. Publication by the news media of the names of marriage applicants is without legitimate and proper purpose and may only serve to satisfy idle curiosity. On the other hand, a news media request for a specific marriage record should be evaluated to determine if the request is for a proper purpose. It is recommended that such requests be referred to the New York State Department of Health."

Since the answer made reference to the Freedom of Information Law, I would like to offer the following comments for your consideration.

First, the section of the Public Officers Law cited in the response, subdivision three of §88, pertains only to records of the State Legislature. Although the cited provision dealt with unwarranted invasion of personal privacy in the Freedom of Information Law as originally enacted, the "new" Freedom of Information Law has been in effect since January 1, 1978. As such, more than five years have passed since the provision cited concerning privacy has existed. For future reference, §87(2)(b) of the current 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) provides additional guidance regarding the protection of privacy.

Second, I do not believe that the Freedom of Information Law could be used as a basis for withholding the records in question, for I do not believe that the Freedom of Information Law is applicable to such records. As you are aware, Article 3 of the Domestic Relations Law, §§10 through 25, deals with the "Solemnization, Proof and Effect of Marriage". In this regard, it is my view that a general law dealing with access to records, such as the Freedom of Information Law, is superseded by a statute that provides direction concerning access to particular records. In this instance, I believe that §19 of the Domestic Relations Law is applicable, for it deals specifically with records pertaining to marriages.

Third, as I understand §19 of the Domestic Relations Law, the names of persons receiving marriage licenses are available to members of the news media, as well as any member of the public. This is not to suggest that all records concerning marriage in possession of town and city clerks are readily available, for often other records may in my view justifiably be withheld.

More specifically, the first sentence of §19(1) of the Domestic Relations Law states that:

> "[E]ach town and city clerk hereby empowered to issue marriage licenses shall keep a book supplied by the state department of health in which such clerk shall record and index such information as is required therein, which book shall be kept and preserved as a part of the public records of his office."

The fifth sentence, which pertains to related records, states that:

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

In view of the foregoing, the information to which reference is made in the first sentence of §19(1) is in my opinion available to any person, notwithstanding the purpose for which a request is made. The related materials to which reference is made in the fifth sentence are, however, available only "when necessary or required for judicial or other proper purposes".

Consequently, I believe that §19(1) of the Domestic Relations Law provides a distinction in terms of rights of access between the book kept by a clerk, which is accessible, and the other records, which are available only on a limited basis.

Considering the issue from a different vantage point, licenses or permits are in my opinion and have long been generally available to the public, for they enable the public to know whether a person is qualified to engage in a particular activity, i.e., drive an automobile, sell real estate, engage in the profession of cosmetology, medicine, teaching, law or even to own a firearm [see Penal Law, §400.00(5) and its interpretation by the Court of Appeals in Kwitny v. McGuire, 422 NYS 2d 867, aff'd 77 AD 2d 839, aff'd 53 NY 2d 968 (1981)]. Further, while licenses and similar records are generally available, often related materials may justifiably be withheld due to considerations of privacy [see e.g., Penal Law, §400.00]. Even in the case of a divorce, while §235 of the Domestic Relations Law requires that records indicating the particulars of a matrimonial proceeding be kept confidential, a certificate of dissolution indicating merely that one person was divorced from another is available.

It is strongly suggested that you review your position regarding access to marriage records, for I believe that it is misleading, if not erroneous.

If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Millock, General Counsel
Peter Slocum, Director of Public Affairs

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2813

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

March 4, 1983

Mr. Kevin G. Schenk
Department of Law
Office of the Town Attorney
Town of Cheektowaga
Town Hall
Broadway & Union Road
Cheektowaga, NY 14227

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schenk:

I have received your thoughtful letter of February 23 and appreciate your interest in complying with the Freedom of Information Law.

Your inquiry concerns an opinion rendered by this office on January 13 regarding search fees established by means of a resolution of the Town Board of the Town of Cheektowaga. In that opinion, it was advised that the Freedom of Information Law and the regulations promulgated by the Committee generally prohibit the assessment of search fees.

The problem according to your letter is that many Town records more than two years old are kept in a building different from those less than two years old. Consequently, when a request for records kept in storage in a separate building is made, you wrote that "some Town employee must travel to the building where the record is kept and retrieve the same; also, if insufficient information is given to the Records Access Officer from the private citizen, the Records Access Officer must spend inordinate amounts of time trying to locate the document".

While I appreciate the problem that you have described, I do not believe that the Freedom of Information Law permits the assessment of the search fees required by the Town Board's resolution. In this regard, I would like to offer the following comments and suggestions.

First, it is my view that the provision regarding fees in the Freedom of Information Law, §87(1)(b)(iii), coupled with the regulations promulgated by the Committee, prohibit the assessment of a fee other than a maximum of twenty-five cents per photocopy.

In terms of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Public Access to Records to promulgate regulations concerning the procedural implementation of the Law. In turn, §87 (1) requires all agencies, including a town as a public corporation, to promulgate regulations consistent with those of the Committee regarding access to their records. As you are aware, §87(1)(b)(iii) makes reference only to fees for photocopies and fees based upon the actual cost of reproduction for records that cannot be photocopied (i.e., tape recordings, computer discs, etc.).

Second, it is noted that the language regarding fees represents a change from the language as it had existed from January 1, 1978 to October 15, 1982. The proposal and rationale for the change were stated in the Committee's 1981 annual report to the Governor and the Legislature as follows:

> "[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."

It is the Committee's view that the capacity to charge more than twenty-five cents per photocopy or to assess search fees often resulted or could result in constructive denials of access.

Third, with respect to your suggestion that the Committee consider the issue of search fees, it is emphasized that the topic has been considered by the Committee on many occasions since its creation in 1974. I believe that the Committee feels that the imposition of a search fee would detract from the utility and intent of the Freedom of Information Law and that, in most instances, agency officials have the capacity to locate records without unnecessary burden of expenditure of time.

In the situation that you described regarding the Town of Cheektowaga, while I recognize the problem, a question should in my view be raised as to whether members of the public should be required to pay an extra fee due merely to the placement of Town records. I would question further whether it is reasonable to keep records more than two years old in a separate building. In this office, often there is a need to locate records more than two years old. I would conjecture that Town officials and members of the public also often have a need to obtain or inspect records more than two years old. In short, I would question whether the system adopted by the Town is as effective as it could be.

Lastly, as you are likely aware, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described." Further, §1401.2(b)(2) of the regulations states that the records access officer is responsible for assuring that agency personnel "assist the requester in identifying requested records, if necessary". In situations in which there is insufficient information to enable a records access officer to locate the records sought, it is suggested that he or she confer with an applicant in order to obtain greater detail regarding the records sought. Perhaps such a method would permit the process to become more efficient.

In addition, although §89(3) of the Freedom of Information Law requires that a response be given within five business days of its receipt, a request may be acknowledged in writing within the five business period, thereby extending the time for response up to ten business days from the date of the acknowledgment [see attached regulations, §1401.5(d)]. If occasions arise in which a number of requests for records kept in storage are made within a short period, a Town official might be able to make a single trip for the purpose of obtaining various records sought in separate 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.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2814

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

March 4, 1983

Mr. John Sapp
81-A-4856
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. Sapp:

I have received your letter of February 24, which involves a request that officials of the New York City Police Department or this office "decode" a "computer generated Sprint Print-Out" that was provided to you under the Freedom of Information Law.

In this regard, while the Freedom of Information Law grants broad rights of access to records, it does not in my view require an agency to "decode" or interpret the contents of accessible records. Stated differently, the Freedom of Information Law is not a law that requires agency officials to respond to questions, it is a law that requires agencies to make available existing records, unless a ground for denial may appropriately be cited [see Freedom of Information Law, §87(2)].

Under the circumstances, by sending the record requested to you, it appears that the Police Department has complied with the Freedom of Information Law. Once again, I do not believe that the Freedom of Information Law requires that accessible records be interpreted.

It is suggested that you consult with or transmit a copy of the record in question to your attorney or a representative of Prisoners' Legal Services. Perhaps those individuals could help you to decode or interpret the printout.

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-2815

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

March 4, 1983

Mr. Fredric Steven Harri
[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. Harri:

I have received your letter of February 24, in which you raised a series of questions regarding the Freedom of Information Law.

Your inquiry concerns a situation in which:

> "a) The Board of Education requests a written report on a specific subject from the school administration,
>
> b) The superintendent of school then requests that report from one of his administrators,
>
> c) The written document is then given to the Board of Education,
>
> d) The Board of Education then uses that document in a discussion it had at one of its open session..."

The questions raised in conjunction with the previous set of facts are whether the record is an "intra-agency document", and if so, the extent to which it is accessible or deniable.

First, I believe that the record in question could be characterized as an "intra-agency document", for it would be prepared by and communicated among officials of a single agency, in this instance, a school district.

Second, §87(2)(g) of the Freedom of Information Law pertains specifically to inter-agency and intra-agency materials. The cited provision states that an agency, such as a school district, 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.

The remaining portions of inter-agency or intra-agency materials generally involve opinions, advice or recommendations that may be withheld.

In sum, assuming that no other basis for withholding listed in §87(2) of the Freedom of Information Law may be asserted, the record in question would be accessible or deniable, depending upon its contents, under §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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2816

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

March 4, 1983

Mr. William G. Iannaccone
[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. Iannaccone:

I have received your letters of February 9, 17 and 25, 1983 concerning a request for records under the Freedom of Information Law.

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

First, in your letter of February 9 you had indicated that you were expecting a written response from this office offering to represent you with regard to your request. Please be advised that the Committee on Public Access to Records is authorized to render advisory opinions under the Freedom of Information Law. The Committee does not "represent" individuals, nor does it have the authority to require an agency to grant or deny access to records under the Freedom of Information Law.

Second, in your letter of February 25, you enclosed a copy of a determination on appeal by Donald Dunn, Deputy County Executive of Erie County. In general, I concur with the contentions made by Mr. Dunn in his determination of your appeal. The definition of "agency" in §86 (3) of the Law excludes the judiciary. Therefore, a request for records regarding a Family Court proceeding would be governed by the Family Court Act, §166 rather than the Freedom of Information Law.

Additionally, in your letters to the Committee you requested probation records. 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..." Section 390.50 of the Criminal Procedure Law may be relevant to the records you are seeking. Subdivision (1) and (2) of §390.50 state that:

> "1. 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, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency, except when specifically required or permitted by statute or upon specific authorization of the court.
>
> 2. Not less than one court day prior to sentencing, unless such time required 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."

Therefore, pre-sentence reports are available only after having obtained permission by a judge. It is unclear, however, whether the records sought are those envisioned by §390.50 of the Criminal Procedure Law.

Third, Mr. Dunn is in my opinion correct in his contention that requests for records should be directed to the agency in possession of the records sought. The Freedom of Information Law applies to all units of government in New York State. Records in possession of federal agencies should be requested under the federal Freedom of Information or Privacy Acts. It is suggested that if you wish to renew your requests to the state and federal agencies that you believe maintain the records you are seeking, you should review the enclosed pamphlets entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" and "Your Right to Federal Records", for they contain sample letters of request.

Fourth, Mr. Dunn advised you in his appeal determination that personnel records of County employees "are clearly not public documents available for disclosure." Mr. Dunn may be referring to §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, Oct. 30, 1980]. Conversely, it has been held that records that are irrelevant to the performance of a public employee's official duties may justifiably be withheld 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].

Lastly, you were advised by Mr. Dunn that you could appeal his denial of your appeal to "a committee composed of a county official designated by the County Executive, a county official designated by the Chairman of the County Legislature, and a third person selected by the two designees." While you may pursue this additional appeal, in my view, it is unnecessary. The only appeal procedure in the Freedom of Information Law is set forth in §89(4)(a), which 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."

Therefore, by appealing to Mr. Dunn within the thirty day time period, you have compiled with the Law. The additional appeal step set forth in the Erie County Freedom of Information Law cannot in my opinion supersede provisions of the New York Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm
Encs.
cc: Mr. Dunn

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2817

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

March 4, 1983

Mr. Merrill E. Trefzer
[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. Trefzer:

I have received your letter of February 26 in which you raised a question under the Freedom of Information Law.

Specifically, you wrote that it is your understanding that a "teacher has a right to review the content of his personnel file maintained in the School District's Central Office". Your question is whether "a principal who has a separate file on each of his teachers [can] be required to show the content of that particular file to the said teacher as well".

From my perspective, rights of access by a teacher to a file pertaining to him or her by a principal are dependent upon the contents of the file. In this regard, I would like to offer the following comments.

First, even if the files in question are not shared with third parties by a principal, they are in my view subject to rights of access. As you may be aware, the Freedom of Information Law contains an expansive definition of "record". 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, mamoranda, 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 the contents of the files in question clearly constitute "records" that fall within the scope of the Freedom of Information Law.

Second, although others might be applicable, there would appear to be three grounds for denial of potential significance regarding the files.

One such ground for denial is §87(2)(g), which states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. 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. Other portions of such materials consisting of advice, recommendation, suggestion and the like would in my view be deniable. As such, if, for example, a department head transmits a memorandum concerning a teacher containing advice regarding an aspect of the teacher's duties, such a record might justifiably be withheld.

Another ground for denial of possible significance 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, if a parent or other third party transmits a letter or memorandum to a principal regarding a teacher, it is possible that disclosure of the name or other identifying details of such a person could result in an unwarranted invasion of personal privacy.

The remaining ground for denial that might be relevant is §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute". As you may be aware, the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) requires that education records identifiable to a particular student or students be kept confidential under most circumstances. If, for instance, a record pertaining to a teacher also identifies a particular student or students, it is possible that the federal Act would apply and exempt such a record from disclosure.

Lastly, in many cases, the terms of a collective bargaining agreement between a school district and a teachers' association provide rights of access to records in excess of rights granted by the Freedom of Information Law. At the beginning of your letter, you expressed the contention that teachers generally have a right to review the contents of personnel files pertaining to them. Under the Freedom of Information Law, rights of access might be somewhat limited, depending upon the contents of files. Often, however, a collective bargaining agreement specifies that such records are accessible in their entirety. Perhaps the terms of a collective bargaining agreement would also apply to the files of a principal pertaining to teachers.

I hope that I 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-2818

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

March 7, 1983

Captain Anthony Passaretti
Village of Catskill
Police Department
422 Main Street
Catskill, NY 12412

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Captain Passaretti:

As you are aware, your letter of February 25 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.

According to your letter, it has been the policy of the Police Department of the Village of Catskill to charge a fee of five dollars for copies of accident and incident reports. Based upon the contentions of various individuals that the fee is excessive, you have asked for a clarification regarding the fees that may appropriately be assessed.

In my opinion, the Department is permitted to charge up to twenty-five cents per photocopy, notwithstanding the terms of a policy, local law, ordinance or resolution, for example. As you may be aware, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982 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 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 Legislautre, a statute, so specifies."

As such, prior to October 15, a local law or ordinance establishing a fee in excess of twenty-five cents per photocopy was valid. The fee that you described based upon policy alone would not have been proper under the earlier provision. Moreover, due to the amendment, only an act of the State Legislature 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 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2819

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

March 7, 1983

Mr. Seymour Katz
[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. Katz:

I have received your letter of February 27 in which you described problems in relation to the implementation of the Freedom of Information Law regarding responses to requests by the New York City Board of Education.

Please note that this office has communicated on several occasions with officials of the Board regarding an apparent failure to adhere to the time limits for responses to requests envisioned by §89(3) of the Freedom of Information Law and §1401.5(d) of the regulations promulgated by the Committee.

Under the circumstances, you wrote that it is your assumption that "the Board's failure to conform to the law would be turned over to the Attorney General's office for enforcement". You also indicated that you could not afford the expense of bringing the matter to court.

In this regard, I would like to offer two comments.

First, I do not believe that the Attorney General will seek to enforce the provisions of the Freedom of Information Law, for §89(4)(b) of the Law indicates that a person denied access to records has standing to initiate a lawsuit.

Second, on October 15, 1982, a new provision was added to the Freedom of Information Law concerning the possibility of an award of attorney's fees to a petitioner who substantially prevails in a judicial proceeding commenced under the Law. Specifically, §89(4)(c) states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the records."

Whether the standards required to be met for an award of attorney's fees would be present with respect to the records you are seeking is unknown to me.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2820

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

March 7, 1983

[redacted] T. Ross
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 [redacted]:

I have received your letter of February 27 in which you requested advice regarding access to "medical records on mental health" pertaining to you.

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 Correctiona 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 or psychiatric 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, based upon the enclosed regulations, if records are maintained at your facility, it appears that a request may be transmitted to the facility superintendent (see §5.20). A request for other medical records kept by the Department in Albany may be submitted to the Assistant Commissioner of Health Services, Department of Correctional Services, Building 2, State Campus, Albany, New York 12226 [see §5.24(b)].

And fourth, if, for example, records pertaining to you are maintained by a facility of the State Office of Mental Health, I believe that §33.13 of the Mental Hygiene Law would be applicable. The cited provision requires that patient records be kept confidential, except under specified circumstances.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2821

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

March 7, 1983

Mr. Kenneth C. Brady
[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. Brady:

I have received your letter of February 26 in which you requested an opinion under the Freedom of Information Law.

According to your letter, you are conducting research regarding public school attendance in Suffolk County and you are planning to request from various school districts attendance registers from 1870 to 1925. Your question is whether the records would be considered "statistical or factual tabulations or data" that would be available, or whether disclosure would result in "an unwarranted invasion of personal privacy".

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

First, it is likely that the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) applies to the records in question, rather than the New York Freedom of Information Law. The Act, which is commonly known as the "Buckley Amendment", pertains to education records identifiable to students which are in possession of educational agencies or institutions that participate in funding programs administered by the United States Depart-

ment of Education. As such, the Buckley Amendment applies to virtually all public school districts, as well as many private institutions of higher education that receive funding through programs administered by the Department of Education.

In brief, the Buckley Amendment requires that an "education record", a phrase broadly defined in the Department's regulations, must be kept confidential unless the parent of a student under the age of eighteen or a student eighteen years of age or older consents to disclosure.

It is noted that your question has been discussed with the administrator of the Buckley Amendment at the Department of Education, who informed me that it is the Department's view that the Buckley Amendment is retroactive and applies to records created before its enactment in 1974. I was further advised that it is the position of the Department of Education that records identifiable to students, such as those in which you are interested, are deniable, unless living students consent to disclosure, or unless the students to whom reference is made have died.

Second, under the circumstances, based upon statistical or actuarial tables, for example, it would appear that many of the students identified in attendance registers may be presumed to be deceased. To that extent, I believe that the records would be available under the Freedom of Information Law, for the Buckley Amendment would no longer apply. If such records exist, I would agree that they would consist of "statistical or factual tabulations or data" accessible under §87(2)(g)(i). Moreover, if the subjects of the records are no longer alive, I do not believe that disclosure could constitute "an unwarranted invasion of personal privacy".

Third, it is emphasized that the Freedom of Information Law applies to existing records. Section 89(3) of the Freedom of Information Law states that, as a general rule, an agency, such as a school district, is not required to create a record in response to a request. Therefore, if the records in which you are interested no longer exist, a school district would not in my view be obligated to create records on your behalf in response to a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2822

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

March 8, 1983

William R. Ashburn
Chief of Police
Beacon Police Department
463 Main Street
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 Chief Ashburn:

I have received your letter of March 1, in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a request for records made by Mr. John P. O'Connor. As I understand the situation, on January 10 you received a request for records regarding the breathalyzer test procedures of the Police Department of the City of Beacon. In conjunction with the request, you conferred with a county special prosecutor who suggested that the request could be more appropriately handled by his office. On January 21 you informed Mr. O'Connor of the appropriate procedures to follow, as well as the address and phone number of the special prosecutor in order to facilitate Mr. O'Connor's efforts. Nevertheless, Mr. O'Connor apparently interpreted your response to him on January 21 as a denial of access to records. In this regard, Mr. O'Connor sought to review "denial" of January 21 by submitting an appeal to Mayor Tomlinson. The letter of appeal was dated February 21 but was contained within a letter postmarked February 25. Since §89(4)(a) requires that an appeal be submitted within thirty days of a denial, you have asked whether Mr. O'Connor submitted an appeal within the time specified in the Freedom of Information Law.

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

First, based upon the facts as you have described them, I do not believe that your response to Mr. O'Connor could be considered a denial. According to your letter, you did not withhold records but rather directed Mr. O'Connor to a more appropriate source of the records in an effort to assist him. If there was no denial, the provisions regarding the capacity to appeal would not in my opinion have been applicalbe.

Second, even if an appeal could have been made, it appears that more than thirty days transpired from the date of the alleged denial to the date of the appeal and its receipt by your office. If that is so, Mr. O'Connor would not have met the requirement imposed upon him of appealing within the statutory time limit.

Lastly, although the time for submission of an appeal might have passed, there is nothing in the Freedom of Information Law that would preclude Mr. O'Connor from submitting a new request and beginning the process of seeking records again.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John P. O'Connor

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-862
FOIL-AO-2823

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

March 8, 1983

Mrs. Martha Weale
[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 Mrs. Weale:

I have received your correspondence of March 7, which concerns the Addison Central School District.

Your initial question is whether this office will "check the legality of the regularity with which executive sessions of the Board of Education are held".

Please be advised that the Committee on Public Access to Records does not have the resources or the authority to "investigate" with respect to either of the statutes it oversees, the Freedom of Information and the Open Meetings Laws. Nevertheless, I would like to offer general comments regarding executive sessions.

First, §97(3) of the Open Meetings Law (see attached) defines "executive session" to mean a portion of an open meeting during which the public may be excluded.

Second, the Open Meetings Law contains a procedure that must be followed by a public body during an open meeting before it enters into an executive session. Specifically, §100(1) states in relevant part that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, it is clear in my view that an executive session is not separate and distinct from a meeting, and that a public body must indicate in general terms in a motion made and carried during an open meeting the subject or subjects to be considered during an executive session.

Third, a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, §100(1) of the Law specifies and limits the areas of discussion that may be appropriately considered during an executive session. It is suggested that you review the eight grounds for executive sessions.

Fourth, it appears that many of the executive sessions deal with personnel matters. In this regard, §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..."

From my perspective, if personnel matters are discussed generally or in terms of policy, it is unlikely that an executive session could be held. Section 100(1)(f) would in my opinion apply only to matters specified in its language when those matters involve a "particular" person.

Your second question is general, for you have requested suggestions regarding the means by which an interested citizen can "effect professional conduct and fiscal responsibility by administrative personnel employed by Addison Central School District". In this regard, I direct your attention to the Freedom of Information Law (see attached).

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 fiscal responsibility, I believe that books of account, ledgers, checks, contracts and similar records regarding the expenditure of public monies are open to the public [see §87(2)(g)(i)]. Perhaps a review of those materials would enable you or any other interested person to learn of the financial condition and transactions of the District.

Several of the notations contained within the attachment to your letter appear to deal with salaries and other expenditures concerning District employees. Here I would like to point out that §87(3)(b) of the Freedom of Information Law requires that each agency maintain a payroll record which identifies each officer or employee of the District by name, public office address, title and salary. By reviewing the payroll record required to be prepared under the Freedom of Information Law, you could determine the salaries of District employees.

Further, as indicated earlier, records of payments made to individuals as well as contracts between individuals and the District are in my view available. Even though such records might identify particular persons, based upon judicial interpretations of the Freedom of Information Law, such records are in my opinion likely available. One of the grounds for denial in the Freedom of Information Law pertains to records which if disclosed would result in "an unwarranted invasion of personal privacy". Nevertheless, the courts on several occasions have found, in brief, that records relevant to the performance to the official duties of public employees are available

[see e.g., Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1979); 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]. As such, it would appear that many of the events that you described would be referenced in records, which, in turn, would in most instances be available under the Freedom of Information Law.

Enclosed for your consideration is a copy of an explanatory pamphlet dealing with both the Freedom of Information Law and the Open Meetings Law. If you would like additional copies, they are available on request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2824

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

March 9, 1983

Mr. Cecil Johnson
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. Johnson:

I have received your letter of March 1 in which you requested assistance in obtaining "pre parole release hearing files" pertaining to you prepared by a parole officer at the Downstate Correctional Facility.

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

First, it is unclear whether the records that you are seeking are within the custody of the Department of Correctional Services or the Division of Parole. It is noted that the regulations promulgated by the Department of Correctional Services regarding its records contain provisions that might be of particular interest to you (see attached). For instance, since you referred to "false statements and other inaccuracies" contained within your records, I would like to point out that §5.50 of the enclosed regulations permits an individual to challenge the accuracy of items of information within the personal history or correctional supervision history portions of records. As such, it is suggested that you attempt to determine whether the records that you are seeking are in custody of the Department of Correctional Services or the Division of Parole.

Second, in the event of a denial of access under the Freedom of Information Law, an applicant has the right to appeal. Specifically, §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."

I believe that an appeal regarding records of the Division of Parole should be directed to Counsel to the Division.

Lastly, one of the areas of inquiry concerns recommendations made by a parole officer. In this regard, unless there is some other provision of law that requires such records to be made available, it would appear that a parole officer's recommendations could be withheld under §87(2)(g) of the Freedom of Information Law (see attached). The cited provision pertains to inter-agency and intra-agency materials. Although some aspects of such materials are accessible, those portions consisting of advice, suggestion, or recommendation, for example, may in my view justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2825

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

March 9, 1983

Mr. Richard A. Krusell
Claims Supervisor
General Accident Insurance
731 James Street
P.O. Box 4860
Syracuse, NY 13221

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Krusell:

I have received your letter of March 4 in which you requested assistance under the Freedom of Information Law.

Specifically, you wrote that you have experienced difficulty in obtaining copies of accident reports based upon a fee of twenty-five cents per photocopy from various police departments. Further, you indicated that some police departments are requiring that you "have a representative appear in person" to request 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, 1982, 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.

Some of the confusion regarding the issue might be attributed to §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 authority.

Lastly, I do not believe that an agency can require that a representative appear in person for the purpose of requesting records. In my view, any request made in writing that reasonably describes the records sought [see attached, Freedom of Information Law, §89(3)] should be sufficient, so long as payment of the appropriate fees is included. It has been suggested, too, that when requesting copies of accident reports, requests should include payment as well as stamped, self-addressed envelopes. By so doing, it is possible that some of the burden imposed upon police departments would be removed.

I hope that I 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-2826

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

March 10, 1983

John W. Dax
LeBoeuf, Lamb, Leiby & MacRae
150 State Street
Albany, New York 12207

Dear Mr. Dax:

I have received your letter of March 4 and appreciate your thoughtful comments.

In conjunction with an article that I prepared regarding the Freedom of Information Law appearing in the New York Law Journal on February 25, you indicated that my conclusion relative to the "governmental" or "executive" privilege may have been overstated. Although it was suggested that the Court of Appeals in Doolan v. BOCES [48 NY 2d 341 (1979)] appears to have ended the governmental privilege, it is your contention that the Freedom of Information Law supplants or "subsumes" the privilege.

I am in general agreement with your contention. From my perspective, what had been known as the governmental privilege was based largely upon common sense, for the criterion regarding the propriety of as assertion of the governmental privilege was based upon a test of whether disclosure would, on balance, result in detriment to the public interest.

As you are aware, the Freedom of Information Law is based upon a presumption of access, stating that all records are available, except to the extent that they fall within one or more among eight grounds for denial. In this regard, upon review of the grounds for denial, it is clear

that many are based upon potentially harmful effects of disclosure. In several instances, the grounds for denial contain operative verbs which indicate harmful effects of disclosure. As such, I generally view the Freedom of Information Law as a codification of the governmental privilege based upon principles of common sense, i.e., potentially harmful effects of disclosure.

In other articles, it has been suggested that governmental officials use a "common sense" test as a starting point when a request is received. Under such a test, the question involves what the effects would be if the records sought are disclosed. If disclosure would hamper a governmental process or "hurt" a person, more often than not, one or more grounds for denial would apply. Conversely, if disclosure would not cause substantial damage, the records sought are generally available. Consequently, the thought processes and the "test" used under the Freedom of Information Law are largely the same as that envisioned in the governmental privilege.

Therefore, I tend to agree that the Court of Appeals in Doolan essentially found that the Freedom of Information Law subsumes the privilage by stating that records cannot be withheld unless a ground for withholding listed in the Freedom of Information Law applies.

Further, I agree with several of the points that you offered regarding §87(2)(g), which pertains to inter-agency and intra-agency materials, in relation to the privilege. I believe that the language of the cited provision represents a clarification of what might be characterized as the "deliberative" privilege.

With regard to your comment that you could not "conceive of final determinations being embodied in inter- or intra-agency communications", I disagree. Having written numerous advisory opinions based upon an array of factual circumstances, I believe that there are many instances in which "final determinations" are found within inter-agency or intra-agency materials.

Once again, I thank you for your interest and your comments. If you would like to discuss the matter further, 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-2827

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

March 10, 1983

[redacted]
Mid-Hudson Psychiatric Center
P.O. Box 158
New Hampton, NY 10958

Dear [redacted]:

I have received your letter of March 7 in which you requested that this office inquire on your behalf with respect to an unanswered request for records sent to the Office of Mental Health on February 21.

Having contacted Robert Spoor, records access officer for the Office of Mental Health in conjunction with your request, Mr. Spoor informed me that your letter of February 21 has not been received by his office. He indicated further that the most recent request that he received from you was answered in January.

I have forwarded the request to Mr. Spoor on your behalf.

In addition, I would like to offer a comment regarding a statement made in your letter.

Specifically, in the event of a denial of access to records, you wrote that it is your understanding that you could initiate a proceeding under Article 78 of the Civil Practice Law and Rules or appeal pursuant to §89(4)(a) of the Freedom of Information Law. Please be advised in this regard that your administrative remedies must be exhausted under the Freedom of Information Law before an

Article 78 proceeding may be commenced. Stated differently, you do not have the option of appealing under §89(4)(a) or initiating a judicial proceeding; on the contrary, an appeal must be made and a determination rendered thereon prior to the commencement of an Article 78 proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Spoor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2828

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

March 10, 1983

Mr. Steven M. Martin
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, New York 10022

The staff of the Committee on Public Access to 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 4 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, as Counsel to the City School District of New Rochelle, you inquired with respect to "the disclosure of nominating petitions filed by candidates seeking election to the board of education pursuant to Article 53 of the Education Law." Your questions are whether the petitions are accessible in their entirety, or whether the names, addresses, or both that identify those who sign the petitions may be withheld or deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. You also asked whether the Committee has developed guidelines under §89(2)(a) of the Freedom of Information Law that might be applicable to the situation and the records that you described.

In my opinion, the petitions are likely available to the public in their entirety for the following reasons.

First, although the petitions would identify individuals by means of names and addresses relative to a particular candidate, as you are aware, names and addresses of registered qualified voters are accessible generally under §2606(6) of the Education Law. As such, the identifying details found within a petition are the same as those required to be made available by means of a different record.

Second, while the Education Law does not make specific reference to the capacity to disclose or withhold nominating petitions, I believe that the petitions have routinely been available. Having discussed the matter with a representative of the Office of Counsel at the State Education Department, it was indicated that appeals to the Commissioner have been made on several occasions regarding challenges to petitions. Therefore, by implication, to initiate a challenge based upon a petition, it would appear that the petition must first be made available. Further, the attorney at the Education Department with whom I spoke did not express any reason based upon the Education Law that might be cited for the purpose of justifying a denial of access to a nominating petition.

Lastly, the Committee has not developed guidelines regarding the deletion of identifying details to protect against unwarranted invasions of personal privacy. In brief, it is the Committee's view that in many instances it would be inappropriate to impose its subjective judgments regarding privacy upon others. The resolution of questions regarding personal privacy is dependent upon personal points of view. Stated differently, while one reasonable person might view a record and contend that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy, an equally reasonable person might view the same record and feel that disclosure would be innocuous, thereby resulting in a permissible invasion of personal privacy. Moreover, there are virtually thousands of records in possession of state and local agencies containing personally identifiable details. As such, the task of developing guidelines regarding such a broad variety of records would be extremely burdensome.

I hope that I 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-2829

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

March 10, 1983

Daniel T. Manning, Jr.
Town Attorney
Manning & Manning
South Main Street
Au Sable Forks, NY 12912

Dear Mr. Manning:

This is to acknowledge receipt of your letter of March 7 and the materials attached to it.

I am in general agreement with your response to a request for records directed to the Town of Black Brook by the Adirondack Council.

It appears that the only points of disagreement between the Town and the applicant involve the degree of specificity relative to various aspects of the request. By means of example, one aspect of the request by the Council involved:

> "all correspondence from any municipality, state or local government agency, private person or business enterprise of any nature concerning pesticiding".

As you indicated in your response, the request is open ended and contains no limitation relative to the time of creation or maintenance of the records sought.

In this regard, as you are aware, §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". From my perspective, due to the breadth of the request, it is likely that some aspects of the request did not meet the standard of reasonably describing the records sought.

It is suggested that perhaps the applicant and the Town's records access officer might meet or confer in order to assist the applicant in identifying the records sought [see attached regulations, §1401.2(b)(2)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Carl J. Rubino, Jr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2830

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

March 11, 1983

Mr. Arthur Collins
81-A-5140 C5-6
Clinton Correctional Facility
P.O. Box B
Dannemora, NY 12929

Dear Mr. Collins:

I have received your recent letter in which you requested records from this office regarding the existence of any outstanding warrant or investigation pertaining to you.

Please be advised that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. As such, this office does not maintain 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. 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 sought. For example, if you are interested in obtaining records kept at the Clinton Correctional Facility, a request should be directed to the facility superintendent pursuant to regulations adopted by the Department of Correctional Services.

Second, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". Therefore, when making a request, it is suggested that as much detail as possible be included, such as identification numbers, descriptions of events, dates, and similar details that would permit agency officials to locate records sought.

Third, while the Freedom of Information Law grants broad rights of access to records, there are eight grounds for denial. In the case of an ongoing investigation, it is likely that some records pertaining to an investigation could be withheld under §87(2)(e) of the Freedom of Information Law. That 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 adjudiciation;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Other grounds for denial might also be applicable, depending upon the nature and content of records.

Lastly, since you raised an issue regarding the treatment of mail, it is suggested that you request any rules, regulations or policies on that subject from the facility superintendent.

Enclosed 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-2831

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

March 11, 1983

Mr. Patrick J. King, Jr.
[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. King:

I have received your letter of March 8, as well as the materials attached to it.

You have requested an advisory opinion under the Freedom of Information Law regarding a denial of your request by the City of Long Beach for copies of "all checks from July 1, 1978 to June 30, 1981 that were countersigned by the City Manager. Also the warrants and claim form". According to your letter, the records sought were denied on the ground that "there are too many checks...to look through". You also indicated that you were willing to pay for a search for the records in question in conjunction with a resolution permitting the assessment of a search fee.

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

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, the records sought are in my view accessible, for I do not believe that any of the grounds for denial could appropriately be asserted to withhold the records. Moreover, as you intimated, §51 of the General Municipal Law has for decades required that the records sought be made available. That provision makes specific reference to the capacity to gain access to "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers...used or filed in the office of ..." a municipal corporation, such as a city. Consequently, it appears that the records sought would be accessible under the Freedom of Information Law or §51 of the General Municipal Law.

Second, §89(3) of the Freedom of Informaton Law requires that an applicant request records "reasonably described". Although your request is broad, the denial given in response did not indicate that the request was so vague that the records sought could not be located. It is also noted that it has been held judicially, in brief, that if an agency can determine and locate which records have been requested, an applicant has submitted a proper request [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)]. In addition, in a case in which some fifteen-hundred grievances were requested, and in which a denial was based upon a shortage of manpower, it was held that a denial on that basis would "thwart the very purpose of the Freedom of Information Law" [see United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)].

The form that you completed to make the request indicates that the request was denied, but there is nothing on the form that could be used to state a reason for a denial. Here I direct your attention to the regulations promulgated by the Committee.

In terms of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Commiteee to promulgate regulations concerning the procedural implementation of the Law. In turn, §87(1)(a) states that:

> "[W]ithin sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on public access to records in

> conformity with the provisions of this article, pertaining to the administration of this article."

As such, the governing body of the City of Long Beach was required to promulgate its own regulations "in conformity" with those of the Committee within sixty days of the effective date of the current Freedom of Information Law, which was January 1, 1978. The resolution attached to your letter was apparently adopted on October 15, 1974.

With respect to a denial, §1401.7(b) of the regulations promulgated by the Committee states that:

> "Denial of access shall be in writing stating the reason therefor and advising the person denied access to his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

Based upon the language quoted above, a reason for a denial must be given in writing. In addition, the person to whom an appeal may be directed must be "identified" in accordance with §1401.7(b). Neither of those requirements is met by the form used by the City.

Lastly, with regard to fees, the resolution adopted by the City in 1974 established various fees for searching for records. However, §1401.8(a) of the regulations promulgated by the Committee states that:

> "[T]here 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 addition, §87(1)(b)(iii) of the Freedom of Information Law pertains to regulations adopted by agencies, which are required to make 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 statute."

Therefore, unless a search fee is established by a statute, an act of the State Legislature, a search fee cannot in my opinion be assessed. Further, the only fee that may be assessed in my opinion would be a maximum of twenty-five cents per photocopy for records up to nine by fourteen inches.

Enclosed for your review and for the consideration of City officials identified in your letter are copies of the Freedom of Information Law, the regulations adopted by the Committee, model regulations designed to assist agencies in the development of their regulations and an explanatory pamphlet.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Roy Tepper
S. Lombardi
L. Eaton

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2832

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

March 14, 1983

Mr. Thomas Dimitri
80-A-777
Ind. No. 1924/79
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. Dimitri:

I have received your letter of March 4 in which you requested assistance under the Freedom of Information Law.

According to your letter, you submitted a request "for pretrial documents" to the Office of the New York County District Attorney on January 3. Since you received no response, an appeal was submitted on February 15. On March 3, you received a letter indicating that your initial request had never reached the District Attorney's office.

In this regard, I would like to offer the following comments concerning your inquiry.

First, it is possible that the District Attorney never received your request. For future reference, however, 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)].

Second, although the Freedom of Information Law provides broad rights of access, there are several grounds for denial that might be applicable to the records that you are seeking. For instance, §87(2)(e) permits an agency to withhold records compiled for law enforcement purposes under certain circumstances; §87(2)(b) enables an agency to withhold records or portions thereof when disclosure would result in an unwarranted invasion of personal privacy; and §87(2)(g) permits an agency to withhold inter-agency or intra-agency materials, depending upon their contents. The extent to which those grounds for denial, or others, might apply is unknown to me.

Lastly, I would like to point out that a judicial decision indicated that the appropriate vehicle for obtaining records involved in a criminal proceeding is Article 240 of the Criminal Procedure Law pertaining to criminal discovery. The court found that the Freedom of Information Law cannot be employed in lieu of the untimely use of Article 240 [see People & C., v. Billy Billups, Sup. Ct., Queens Cty., Criminal Term, NYLJ, July 13, 1981]. Whether the holding in that decision bears upon your case cannot be determined on the basis of the information that you have provided.

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 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.

cc: Records Access Officer, Office of the District Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2833

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

March 14, 1983

Ms. Mary Vines
Office of the County Clerk
Albany County Hall of Records
27 Western Avenue
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 Ms. Vines:

I have received your letter of February 28 in which you requested an advisory opinion.

As you indicated during our conversation, the Albany County Hall of Records is preparing to receive marriage records in the near future. Consequently, you have raised questions regarding rights of access to such records by the public once they are in your possession. You also expressed interest in learning of any restrictions that might apply to marriage records sought for the purpose of a genealogical search.

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

First, as we discussed, the Freedom of Information Law, in my opinion, does not apply to marriage records. Article 3 of the Domestic Relations Law, §§10 through 25, deals with the "Solemnization, Proof and Effect of Marriage". In this regard, it is my view that a general law dealing with access to records, such as the Freedom of Information Law, is superseded by a statute that provides direction concerning access to particular records. In this instance, §19 of the Domestic Relations Law is applicable, for it deals specifically with records pertaining to marriages.

Under §19 of the Domestic Relations Law, I believe that the names of persons receiving marriage licenses are available to members of the news media, as well as any member of the public. This is not to suggest that all records concerning marriage in possession of town and city clerks are readily available, for often other records may in my view justifiably be withheld.

More specifically, the first sentence of §19(1) of the Domestic Relations Law states that:

> "[E]ach town and city clerk hereby empowered to issue marriage licenses shall keep a book supplied by the state department of health in which such clerk shall record and index such information as is required therein, which book shall be kept and preserved as a part of the public records of his office."

The fifth sentence, which pertains to related records, states that:

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

In view of the foregoing, the information to which reference is made in the first sentence of §19(1) is in my opinion available to any person, notwithstanding the purpose for which a request is made. The related materials to which reference is made in the fifth sentence are, however, available only "when necessary or required for judicial or other proper purposes".

Consequently, I believe that §19(1) of the Domestic Relations Law provides a distinction in terms of rights of access between the book kept by a clerk, which is accessible, and the other records, which are available only on a limited basis.

Second, my research indicates that the Department of Health over the years has issued various regulations and/or policy statements dealing with genealogical searches of birth, death and marriage records. In particular, 10(a) of the New York Code of Rules and Regulations (NYCRR), §35.5 which was amended in 1979, deals with the release of genealogical records. Section 35.5(b) and (c) state that:

> "(b) Information from records of marriage on file in the State Department of Health or on file with a town or city clerk may be provided for genealogical research in the form of an uncertified copy or abstract upon written application. If application is made to the State Department of Health, the applicant shall pay the fees prescribed in section 20-a of the Domestic Relations Law. If the application is made to a town or city clerk, the applicant shall pay the fees prescribed in section 19 of the Domestic Relations Law. The search of the files may be conducted only by authorized employees of the State Department of Health and locally be the town or city clerk or deputy clerk or by authorized employees of the town or city clerk subject, however, to the limitation that no information shall be issued from a record of marriage unless the record has been on file for at least 50 years and the parties to the marriage named in the record are known to the applicant to be deceased.
>
> "(c) All uncertified copies or abstracts issued for genealogical research shall be clearly marked 'for genealogical research only'."

Therefore, it appears that it would be appropriate to process requests for genealogical searches of marriage records. However, requests for marriage records which are not for the purpose of genealogical research would be governed by Domestic Relations Law, §19 as described above.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2834

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

March 14, 1983

Mr. Jeffery S. Squires
Southern Tier Sign
1262 Woodbine Avenue
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 Mr. Squires:

I have received your letter of March 8 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you are interested in gaining access from the City of Elmira "the number and content of any and all complaints regarding signs and or the proposed sign ordinance." You also specified in your request to the City Manager, to whom you have apparently appealed an initial denial of access, that you are not interested in the names or addresses of complainants.

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

Second, the introductory language of §87(2) states that an agency may withhold "records or portions thereof" that fall within one or more grounds for denial. Consequently, I believe that the Legislature envisioned situations in which a single record might be accessible and deniable in part. Further, the phrase quoted above in my view requires that an agency review records sought in their entirety to determine which portions, if any, may justifiably be withheld in conjunction with the grounds for denial.

Third, 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 in question should in my opinion be made available after deletion of personally identifying details.

Lastly, insofar as your request deals with the number of complaints submitted, §89(3) states that, as a general rule, an agency need not create a record in response to a request. Therefore, if, for instance, there is no record that indicates the total number of complaints, the City would not in my opinion be required to prepare a new record containing a total. However, assuming that you can review the complaints in conjunction with the previous comments, you could essentially create your own total.

Copies of this opinion will be sent to the City officials identified in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Joseph E. Sartori
Mary P. Ciccariello
Jerome Prechtl

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2835

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

March 16, 1983

Ms. Sandie Wilson
The Leader
Bath Bureau
1 E. William Street
Bath, NY 14810

Dear Ms. Wilson:

I have received your letter of March 9 in which you raised questions regarding access to court records.

Specifically, you have asked whether §255 of the Judiciary Law would require access to "motions filed by defense lawyers with a county court clerk in a criminal case, but not yet argued in open court". You also questioned whether such documents should be produced on request or whether they are "considered closed until answered by a district attorney and heard by a judge."

In this regard, as you indicated at the beginning of your letter, the courts and court records are specifically excluded from the scope of the Freedom of Information Law. Nevertheless, as a service to you I have enclosed a copy of Werfel v. Fitzgerald, 23 AD 2d 306, which is the most expansive decision on the subject of which I am aware. The Werfel decision indicates generally that papers filed with a court clerk are available, "unless the papers have been sealed from public scrutiny by the court or by the terms of a statute (id. at 312). Consequently, based upon the language of §255 of the Judiciary Law and its judicial interpretation in Werfel, unless papers filed with a court clerk are sealed by a court or subject to a statutory exemption from disclosure, it would appear that they are available to any person.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2836

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

March 16, 1983

Ms. Alberta James
112-A
247 Harris Road
P.O. Box 1000
Bedford Hills, NY 10507

Dear Ms. James:

I have received your letter of March 10 in which you requested from this office records pertaining to you.

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. Consequently, this office does not maintain possession of records generally, nor does it maintain records specifically identifiable to you. However, I would like to offer the following comments regarding your inquiry.

First, a request made under the Freedom of Information Law should be directed to the agency or agencies that maintain the records in which you are interested. In this regard, the regulations promulgated by the Committee require that each agency designate a "records access officer" who is responsible for coordinating an agency's response to requests made under the Freedom of Information Law [see regulations, §1401.2(a)]. Therefore, a request should be sent to the records access officer of the agency that maintains the records sought.

Second, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". In many instances, I would conjecture that a request for records pertaining to a named individual without greater detail would not "reasonably describe" the records sought. Therefore, it is suggested

that in the future a request provide as much information as possible, such as dates, file designations, identification numbers, descriptions of events and similar details that might enable agency officials to locate the records requested.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee that govern the procedural aspects of the Law, and an explanatory pamphlet 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-864
FOIL-AO-2837

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

March 16, 1983

Mr. John B. Schamel
New York Educators Association
Elmira Service Center
Mark Twain Building - Suite 200
N. Main and W. Gray
Elmira, New York 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. Schamel:

I have received your letter of March 7, as well as the materials attached to it. You have requested assistance regarding a request made under the Freedom of Information Law directed to the Odessa Central School District.

Specifically, in a letter dated February 28, you requested the following records from the District's records access officer:

> "1. A copy of the form filled out by Jim Lewis for his vacation day on June 25, 1982.
>
> 2. A copy of the minutes taken by the Superintendent of any other Board member or administrator at Executive Board sessions on June 24, 1982, as it relates to discussions concerning certain teachers playing golf.

> 3. Copies of all vouchers for mileage, submitted voucher forms or any other means of reimbursement for mileage claimed by any administrator within the Odessa Central School District for a period from July 1, 1981 through February 15, 1983."

In response to your request, on March 3, James E. Lewis, District Clerk, wrote that:

> "[T]he Odessa-Montour Central School District has received your letter requesting information under the Freedom of Information Law, Article 6 of the Public Officers Law. The district has a Board Policy that requires requests for information to be on the prescribed form."

Based upon the facts described above, I would like to offer the following comments.

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 Odessa would be required to write to this office, request the form, have the form sent to Odessa, require the applicant to complete it and return it to Albany. In short, such a procedure would simply involve an unnecessary amount of time.

In terms of rights of access to the records requested, I would like to offer the following remarks.

It is noted initially 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 aspect of the request involves a form completed for use of a vacation day by a named individual. In my view, rights of access are dependent upon the nature and content of the form, for two grounds for denial may be relevant.

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 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 form in question could likely be characterized as "intra-agency material". If it merely contains a request to use vacation time, I believe that it would be deniable, for it would not contain any accessible information as described in subparagraphs (i), (ii) or (iii) of §87(2)(g). If, however, the form contains an indication of approval or disapproval of the request, that aspect of the form would be available, for it would in my opinion represent a final agency determination.

The other ground for denial of possible relevance is §87(2)(b), which permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy". If, for example, the form included a description of the proposed use of vacation time, it is possible that disclosure of that portion of the form might constitute an unwarranted invasion of personal privacy.

The second aspect of the request involves minutes of an executive session pertaining "to discussions concerning certain teachers playing golf". At this juncture, I direct your attention to the Open Meetings Law.

In terms of the nature of the discussion, "teachers playing golf", it is in my view questionable whether an executive session could appropriately have been held. The only ground for executive session that might have been applicable is §100(1)(f). That provision 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..."

From my perspective, §100(1)(f) is applicable only when one or more of the topics described therein is considered with respect to a "particular person". Whether §100(1)(f) could appropriately have been invoked would have been dependent upon the specific nature of the discussion.

With regard to minutes, as a general rule, §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 by 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 must be taken behind closed doors (i.e., see §3020-a of the Education Law concerning tenure).

Section 105(2) of the Open Meetings Laws 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, it has been 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 Educaion, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959)].

Most recently, the Appellate Division, Second Department also found that a school board may act only by means of a vote taken during an open meeting. Although the Court of Appeals affirmed, it did not deal specifically with the so-called "open vote" provision of the Education Law [see Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd ___ NY 2d ___ (1982)]. Nevertheless, since §1708(3) of the Education Law is apparently "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can generally act only during an open meeting.

Consequently, if no action was taken during the executive session, minutes need not have been prepared. If action was taken, it should in my opinion have occurred during an open meeting and recorded in minutes.

The last aspect of your request involves claims for reimbursement, such as vouchers, for mileage submitted by District administrators within a specified period.

In my opinion, vouchers and similar records regarding claims for reimbursement are available. Although such records might constitute intra-agency materials, as indicated earlier, statistical or factual information found within such materials are available under §87(2)(g)(i). Moreover, although the vouchers would identify the administrators who submitted them, based upon judicial interpretations of the Freedom of Information Law concerning the privacy of public employees, disclosure would likely result in a permissible and not an unwarranted invasion of personal privacy

[see e.g., Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1979); 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].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James E. Lewis
School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2838

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

March 16, 1983

Ms. Barbara Bernstein
Executive Director
New York Civil Liberties Union
Nassau County Chapter
210 Old Country Road
Mineola, NY 11501

The staff of the Committee on Public Access 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. Bernstein:

I have received your letter of March 10 in which you requested copies of designated advisory opinions that relate to the status of a volunteer fire company under the Freedom of Information Law.

Having reviewed the two advisory opinions cited in your letter, I do not believe that either deals directly with the issue that you described. Nevertheless, I have enclosed copies of various other opinions as well as the decision rendered by the Court of Appeals in Westchester-Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)].

With regard to the substance of your inquiry, you wrote that "a survey of sex discrimination in Nassau County fire departments" is being conducted and that you "need copies of by-laws or membership qualification requirements". However, you also indicated that among the requests for records sent to some seventy departments, approximately twenty have responded. Further, one of the responses, which was attached to your letter, indicated that a particular fire company was a "private membership corporation" that falls outside the requirements of the Freedom of Information Law.

It is true that a volunteer fire company is a "private" not-for-profit corporation. Nevertheless, the state's highest court in Kimball, supra, found that the records of volunteer fire companies are subject to rights of access granted by the Freedom of Information Law. The decision also indicated that a volunteer fire company is an "agency" as defined by the Freedom of Information Law, §86(3), despite its corporate status under the Not-For-Profit Corporation Law.

In view of the Court of Appeals' determination, I disagree with the view expressed by counsel to Oyster Bay Fire Company No. 1.

Lastly, the records sought from the various fire companies are in my view clearly available, for §87(2)(g)(iii) requires that "final agency policy or determinations" are available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Edward T. Robinson III

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2839

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

March 17, 1983

Ms. Lois Humphrey
Director of Probation
Tompkins County Probation
Department
Court House
320 N. Tioga Street
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. Humphrey:

I have received your letter of March 14 and appreciate your interest in complying with the Freedom of Information Law.

According to your letter, the Tompkins County Probation Department "is in the process of revising subject matter lists of records available and not available under the Freedom of Information Law (Sections 85-89 Public Officers Law)." Since it is your understanding that the Committee "has adopted regulations which apply to all phases of government", you have requested regulations applicable to probation departments, as well as other explanatory materials regarding the Freedom of Information Law.

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

First, the provisions of the Freedom of Information Law that you cited, §§85 through 89 of the Public Officers Law, represent the Law as originally enacted in 1974. A new Freedom of Information Law found in Public Officers Law, §§84-90, became effective on January 1, 1978.

Second, although the orginal provision required that a subject matter list refer to available records, the current provision does not distinguish between available and deniable records. Specifically, §87(3)(c) 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."

Further, often it is inappropriate to attempt to draw a line of demarcation between available and deniable records, for many of the grounds for withholding listed in §87(2) of the Freedom of Information Law are based upon potentially harmful effects of disclosure. Therefore, while records might justifiably be withheld today, it is possible that the same records might become available at some point in the future.

For instance, §87(2)(c) permits an agency to withhold records when disclosure would "impair present or imminent contract awards or collective bargaining negotiations". If an agency is now involved in collective bargaining negotiations, disclosure of some of its records might if disclosed "impair" the negotiations by placing the agency at a disadvantage at the bargaining table. Nevertheless, when an agreement is reached, the "impairment" would essentially disappear, and records that could have been withheld likely become available.

Third, with respect to regulations, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations regarding the procedural aspects of the Law and the subject matter list. There are no regulations that deal specifically with probation departments or their records. The regulations in §1401.6 provide guidance regarding the nature of a subject matter list.

Lastly, as requested, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee, model regulations designed to assist agencies in devising their regulations required to be adopted under §87(1), an explanatory pamphlet on the subject and an article that appeared recently in the New York Law Journal.

I hope that I 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-2840

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

March 17, 1983

Mr. William Scott
[redacted]

Dear Mr. Scott:

I have received your letters and the materials attached to them.

In letters from Mr. Freeman dated February 8 and March 1, he advised you that the policy of the Committee on Public Access to Records prohibits the issuance of advisory opinions when litigation has been commenced. Consequently, he indicated to you that until you could advise him with certainty that litigation has not been commenced, this office would be unable to provide specific advice. However, you wrote in your most recent correspondence "I assure you that I have not started any lawsuit under the Freedom of Information Law".

Based upon that representation, I would like to offer the following comments.

First, you requested that the Committee "monitor" your requests for records, since it appears that various agencies have failed to respond to your inquiries. Please be advised that the jurisdiction of the Committee is limited to the issuance of advisory opinions under the Freedom of Information Law. As such, the Committee cannot require an agency to grant or deny access to records.

Second, you inquired as to whether this office has received documents from the New York City Department of Corrections with respect to an appeal you submitted under the Freedom of Information Law. Having reviewed our files, the only correspondence that we have been able to locate is a copy of an appeal that you submitted to Rosemary Carroll of the New York City Police Department dated February 22, 1983, and was received by this office on March 1.

In this regard, as you are aware, §89(4)(a) of the Freedom of Information Law pertaining to appeals 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". Again, based upon a review of our files regarding appeals, it appears that neither copies of your appeals nor the ensuing determinations were forwarded to the Committee.

I regret that I cannot be of greater assistance. Shoul 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: Robert Daly
Rosemary Carroll

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-866
FOIL-AO-2841

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

March 17, 1983

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 March 8 in which you requested that I comment with respect to a request directed to Richard S. Zummo regarding the Suffolk County Criminal Justice Coordinating Committee.

According to the application attached to your letter, you requested a listing of the members of the Coordinating Committee and their addresses. Further, you asked to be placed on a mailing list to receive notices of meetings as well as agendas or materials to be used at meetings of the Coordinating Committee.

In response, Mr. Zummo wrote that there is no requirement that a mailing list for the purpose of receiving notice be maintained, nor is the public entitled to a "meetings packet". Although Mr. Zummo forwarded a list of the names and addresses of members of the Coordinating Committee, he indicated that there would be a charge of "$.35 per copy".

I would like to offer the following comments regarding the correspondence between you and Mr. Zummo.

First, I agree that there is no requirement that a mailing list be developed for the purpose of sending notices of meetings to members of the public. The requirements concerning notice of meetings are found in §99 of the Open Meetings Law. The cited provision generally requires that notice be given to the news media and to the public by means of posting in one or more designated, conspicuous public locations. Mr. Zummo identified the locations where notices will be posted.

I would like to point out, too, that the provisions concerning notice require only an indication of the time and place of a meeting. There is nothing in the Open Meetings Law that requires that the subject matter to be discussed at a meeting be included in a notice. Further, there is no requirement of which I am aware concerning the creation of agendas prior to a meeting, even though such materials are generally prepared and made available.

Second, with respect to Mr. Zummo's comment that the public is not entitled to a "meetings packet", I disagree with his contention due to its breadth.

From my perspective, the records contained within a meetings packet would be subject to whatever rights of access might exist under the Freedom of Information Law. While it is possible that some aspects of the materials might justifiably be denied, it is equally possible that various aspects of the contents of such materials might be accessible to any person.

It is suggested that, prior to a meeting of the Coordinating Committee, you request the packet for the purpose of obtaining those aspects of its contents that are available under the Freedom of Information Law.

Third, Mr. Zummo wrote that the fees for copying would be thirty-five cents per copy. In this regard, as you are aware, §87(1)(b)(iii) of the Freedom of Information Law states that the maximum fee that may be assessed is twenty-five cents per photocopy, unless a different fee is prescribed by statute. In my view, it is unlikely that any statute under the circumstances is applicable that would permit an assessment of a fee of thirty-five cents per photocopy.

Lastly, your request was made on February 11, but Mr. Zummo responded on March 3. In this regard, the Freedom of Information Law and the regulations prescribed 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 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard S. Zummo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2842

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

March 17, 1983

Ms. Rebecca Negri
[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. Negri:

I have received your letter of March 8 in which you requested an advisory opinion under the Freedom of Information Law.

Your question concerns the propriety of a "search and service fee" assessed by the New York City Transit Police Department when requests for records are directed to the Department. According to the correspondence attached to your letter from Walter D. Mickulas of the Department, the fee of fifteen dollars "is for search and service, not for the report itself. This is an agency policy and does not apply to Section 87-(1)-B-III".

In my view, the fee for search and service is invalid, for the terms of an "agency policy" cannot be inconsistent with the language of a statute, such as the Freedom of Information Law.

It is noted that §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, 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 situation 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.

Further, nowhere in the Freedom of Information Law is there a provision that permits the assessment of a fee for "search" or "service". In addition, the regulations promulgated by the Committee pursuant to §89(1)(b)(iii) and with which an agency's rules and regulations must conform [see §87(1)(b)], state in §1401.8 that:

> "[E]xcept when a different fee is otherwise prescribed by statute:
>
> (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 sum, based upon the specific direction provided in the Freedom of Information Law as amended and the regulations promulgated by the Committee, the Department cannot in my opinion by means of policy establish a fee for photocopying in excess of twenty-five cents per photocopy, or a fee for "search and service".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Walter D. Mickulas

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2843

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

March 18, 1983

Mr. John Stone
82-A-1575 A-4-26
Box 51
Comstock, NY 12821

Dear Mr. Stone:

I have received your letter of March 15 in which you requested "the procedures by which" you can request the "folder" pertaining to you. You also raised questions regarding the nature of "directive #4422."

In conjunction with your request, enclosed are copies of the Freedom of Information Law, an explanatory pamphlet on the subject, and the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services.

Under the Department's regulations, requests for records maintained by the facility should be directed to the facility superintendent (see §5.15). Requests for records maintained by the Department at its Albany offices should be sent to the records access officer pursuant to §5.11.

With respect to directive #4422, in all honesty, I am not familiar with its substance. Assuming that it is a directive issued by the Department of Correctional Services, it is suggested that you submit a request based upon the procedures described in the enclosed regulations.

Lastly, in conjunction with a determination on appeal rendered on February 7 by Ramon J. Rodriguez, Counsel to the Department of Correctional Services, it is emphasized that an applicant must submit a request for records "reasonably described" [see Freedom of Information Law, §89(3)]. Consequently, when making a request, it is suggested that as much detail as possible be provided, including dates, file designations, identification numbers, descriptions of events and similar information that will 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-2844

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

March 18, 1983

Joseph Wm. Ward
82-A-4732
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. Ward:

I have received your letter of March 12 in which you requested assistance regarding the use of the Freedom of Information Law.

Specifically, you wrote that you were denied access to records pertaining to a decision concerning the facility in which you have been placed. According to your letter, the denial was based on "security reasons".

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

First, under §89(4)(a) of the Freedom of Information Law, a person denied access to a record may appeal the denial within thirty days to the head of the agency or whomever has been designated to render determinations on appeal following a denial. In this regard, under §5.45 of the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law appeals should be directed to Counsel, Department of Correctional Services, Building 2, State Campus, Albany, NY 12226. It is suggested that you carefully review the Department's regulations, a copy of which is enclosed.

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, several of the grounds for denial might be applicable, depending upon the nature and content of the record sought. For instance, if the identities of others are referenced in the materials, §87(2)(b) pertaining to unwarranted invasion of personal privacy might apply; §87(2)(f) permits an agency to withhold records or portions of records when disclosure would "endanger the life or safety of any person"; §87(2)(g) permits the withholding of advice, recommendation, suggestions and the like found within "inter-agency or intra-agency materials".

The extent to which the grounds for denial described above or others might be applicable is unknown to me. Further, as intimated earlier, it is suggested that you appeal the denial.

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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2845

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

March 18, 1983

E. Marta Sachey, Esq.
NYS Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

The staff of the Committee on Public Access 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. Sachey:

I have received your letter of March 14 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you have questioned the propriety of a denial of access pursuant to §87(2)(g) of the Freedom of Information Law. According to your letter, the records in question involve "Department of Health communications to a City's Engineer, which consist of entirely non-final recommendations, comments, suggestions and questions concerning the City's submitted plans and specifications for modifying its public water system..."

In my view, based upon your description of the records in question, it would appear that a denial under §87(2)(g) would be appropriate.

The cited provision pertains to "inter-agency and intra-agency materials". 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 the definition includes any state or municipal entity, such as the State Department of Health, or a city, which is a public corporation, communications between the Department and a city could in my view be characterized as "inter-agency" materials.

In terms of rights of access, §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 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 that you presented, the materials would not contain accessible information as described in subparagraphs (i), (ii) or (iii) of §87(2)(g).

It is suggested, however, that the materials be closely reviewed, for in a determination concerning the Department of Health, it was found by the Appellate Division that §87(2)(g) does not apply as a basis for withholding with respect to an entire record "if both factual data

and opinion are intertwined in it" [see Ingram v. Axelrod, App. Div. 456 NYS 2d 146, 148 (1982)]. Based upon the determination cited above, if portions of inter-agency or intra-agency materials contain statistical or factual information, those aspects of the records must be made available.

Therefore, once again, if the records do not contain statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations, they may in my view be justifiably withheld in their entirety.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-868
FOIL-AO-2846

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

March 21, 1983

Mr. Joseph Jaffe
Levine, Silverman & Jaffe
33 Chestnut Street
P.O. Box 390
Liberty, NY 12754

The staff of the Committee on Public Access 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. Jaffe:

I have received your letter of March 4 in which you requested assistance from this office.

Specifically, you have requested a response to the following question:

> "[I]f a Board of Education has properly voted to discuss a particular person in a particular personnel area and does so at an Executive Session at which no action is taken, are there any statutory or other proscriptions on individual members making public that which was discussed at the Executive Session?"

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

First, from my perspective, neither the Freedom of Information nor the Open Meetings Laws generally prohibits a member of a board of education from disclosing information obtained by that individual during a discussion held

during an executive session. Further, while the Freedom of Information Law permits certain records to be withheld, it does not generally require that records must be withheld, even when a ground for denial may appropriately be asserted. Similarly, under the Open Meetings Law, while a topic might fall within a ground for discussion during an executive session, there is no requirement that the topic must be discussed during an executive session.

The only instances in which the permissive aspects of those statutes would not apply, in my opinion, would involve situations in which disclosure is prohibited by state or federal statute. For example, with respect to discussions concerning a particular student, the Family Educational Rights and Privacy Act, commonly known as the Buckley Amendment, would often preclude a board member from publicly discussing information identifiable to an individual student.

Second, the only provision that may be relevant to your inquiry of which I am aware is §805-a(1)(b) of the General Municipal Law which states that:

> "[N]o municipal officer or employee shall:
>
> b. disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests..."

Since the jurisdiction of the Committee on Public Access to Records is limited to advising under the Freedom of Information and Open Meetings Laws, I am unable to offer advice with respect to the application of the General Municipal Law to your inquiry. However, it is suggested that you contact Ken Pirro, an attorney for the Department of Audit and Control who is responsible for providing advice in this area. He can be reached at (518) 474-3517.

I hope 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: Ken Pirro

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2847

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

March 21, 1983

David A. Schlissel, Esq.
[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. Schlissel:

I have received your letter of March 14 in which you requested an advisory opinion under the Freedom of Information Law regarding a denial of a request for records directed to the Public Service Commission (PSC).

The records denied include a number of memoranda transmitted to the PSC by various members of the staff of the Department of Public Service. The letter denying the first five categories of your request is grounded upon §87(2)(g) of the Freedom of Information Law. Further, Mr. William Barnes, Deputy Secretary to the PSC, wrote that "as intra-office memoranda, none of the documents are public documents within the meaning of Section 16(1) of the Public Service Law."

In this regard, based upon the correspondence attached to your letter, it is your view that the denial was improper under both the Freedom of Information Law and §16(1) of the Public Service Law, for you believe "that these documents contain factual or statistical information or data regarding the construction or the comparative economics of the Nine Mile 2 Nuclear Project".

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 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 [see e.g., Ingram v. Axelrod, Sup. Ct., Albany Cty., May 13, 1982, App. Div., 450 NYS 2d 146 (1982)].

Under the circumstances, memoranda furnished by staff of the Department of Public Service could in my opinion be characterized as inter-agency or intra-agency materials. Nevertheless, to the extent that they 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. The extent to which the memoranda in question 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 artice 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, as you intimated, 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."

Whether the language quoted above grants rights of access in excess of the Freedom of Information Law has not, to the best of my knowledge, been determined judicially. As such, I do not believe that it would be appropriate at this juncture to conjecture with respect to the existence of rights of access under §16(1) 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

Robert J. Freeman
Executive Director

RJF:jm
cc: John J. Kelleher, Secretary
William Barnes, Deputy Secretary

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2848

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

March 22, 1983

Ms. Jeanne Casatelli
[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. Casatelli:

I have received your letter of March 14 and the correspondence attached to it, which describes your unsuccessful efforts to gain access to records under the Freedom of Information Law.

The records sought involve the title pages of applications submitted to the Albany County Industrial Development Agency since 1977. Although your requests were submittee in December of 1982, no response was given. Due to the absence of a response, you appealed on January 27 to Joseph Dolan, Albany County's appeals officer. To date, no determination on appeal has been rendered.

Due to the circumstances described, you asked for assistance in order to "secure compliance"with the Freedom of Information Law.

It is noted at this juncture that the Committee on Public Access to Records has the authority to advise under the Freedom of Information Law; it does not have the authority to compel an agency to grant or deny access to records. Nevertheless, perhaps the ensuing remarks will encourage County officials to respond appropriately to your request.

First, since the records are in possession of the County, they are subject to the Freedom of Information Law. 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Further, the records of an industrial development agency fall within the scope of the Freedom of Information Law, for an industrial development agency is a public corporation (see General Municipal Law, §856) and, therefore, an "agency" [see Freedom of Information Law, §86(3)].

Second, the Freedom of Information Law and the regulations promulgated by the Committee (see attached), 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 appealed to the head of the agency or whomever is designated to determine appeals. With regard to an appeal, §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 re-

> ceipt 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."

Third, it has been held by the state's highest court that a failure by an agency to respond to an appeal in a timely manner constitutes an exhaustion of the applicant's administrative remedies [see Floyd v. McGuire, 108 Misc. 2d 536, 87 AD 2d 388, ___ NY 2d ___ (1982)].

Therefore, I believe that you have the capacity to initiate a judicial proceeding due to the County's constructive denial of access. It is emphasized that the County would have the burden of proof in such a proceeding [see Freedom of Information Law, §89(4)(b)], and that an amendment to the Freedom of Information Law permits a court under certain circumstances to award reasonable attorney's fees and other litigation costs to a petitioner who has substantially prevailed [see Freedom of Information Law, §89(4)(c)].

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to Mr. Pacquin, County Clerk, and Mr. Dolan, appeals officer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Guy Pacquin
Joseph Dolan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2849

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

March 22, 1983

Mr. Warren Jay Grossman
[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. Grossman:

I have received your letter of February 28 and the materials attached to it.

Your first question is whether tax field books maintained by the Village of Scarsdale are open to full public inspection. In conjunction with that question, you asked whether you can "scan" through each book "without asking for or identifying specific information".

As indicated to you in an opinion dated January 21, I believe that tax field books are generally available. In that opinion, the case of Sears, Roebuck and Co. v. Hoyt [107 NYS 2d 759 (1951)] was cited, and the contents of a so-called "Kardex" system was described. It was advised then that if the contents of the books in question are analogous to the contents of the system described in Sears, Roebuck, the books would in my view be available. Nevertheless, I am not familiar with the specific books that are the subject of your inquiry. As such, it is possible that their contents may be somewhat different from that described in Sears, Roebuck, and that, consequently, certain aspects of the books might be deniable under the Freedom of Information Law.

Further, with respect to "scanning" the books, §89 (3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Therefore, while an applicant need not in my opinion identify a specific document, or perhaps a specific page within a field book, a request to scan through all twenty-four books might not reasonably describe the records sought.

It is also noted that an agency official in receipt of a request is not required to respond immediately to the request. Section 89(3) of the Freedom of Information Law requires that a response be given within five business days of receipt of a request. Often a request cannot be answered immediately due to other responsibilities or the time needed to locate or review the contents of records in order to determine the extent, if any, to which portions of the records might justifiably be withheld.

As such, in conjunction with your second question, whether a taxpayer must obtain approval of the Assessor before tax field books are made available, I do not believe that records sought must be made available instantly. Further, based upon §89(3), agency officials generally may in my opinion evaluate the contents of the records sought prior to making them available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lowell Tooley

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2850

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

March 23, 1983

Ms. Ann Booth
Journal Newspapers
72 West High Street
P.O. Box 461
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 March 18 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, the Ballston Spa Central School District denied your request for a record indicating the names of those appointed to serve on a curriculum development committee created by means of a collective bargaining agreement. The record identifying the members of the committee in question was denied on the basis of §87 (2)(g) of the Freedom of Information Law.

You have asked whether "the names of appointees to a school committee" are "exempt from the Freedom of Information Law".

In my view, a record indicating the names of those appointed to the Curriculum Development Committee is accessible under the Freedom of Information Law.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

Further, although §87(2)(g) might be applicable to the record in which you are interested, due to its structure, I believe that the cited provision requires that the names of the appointees must be disclosed.

Specifically, §87(2)(g) of the Freedom of Information Law states that an agency may deny access to 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, a record identifying the appointees that is prepared by a district official or the Board of Education might properly be characterized as an "intra-agency" document. Nevertheless, the names of the appointees would in my opinion clearly constitute "factual" information that must be made available.

As requested, copies of this opinion will be sent to Paul Giacobbe, Superintendent, and Robert Rhubin, President of the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Paul Giacobbe
Robert Rhubin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2851

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

March 24, 1983

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

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sweet:

I have received your letter of March 15 in which you requested assistance regarding the Freedom of Information Law.

In terms of background, the Office of Consumer Affairs receives complaints concerning vendors and requests by members of the public pertaining to vendors. Further, the Office maintains "a computer listing of these vendors showing both complaint and inquiry activity over a three year period". Your question is whether "the names of the persons who have inquired about a firm [should] be omitted from disclosure to the public".

I would like to offer the following comments regarding 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 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.

Under the circumstances, I believe that a name or other identifying details concerning those who have requested information pertaining to vendors could likely be deleted or withheld 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 or 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, aff'd 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 the 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 may 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 name or 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 or persons who made requests. 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 names or other identifying details regarding persons who request information under the circumstances that you described could likely be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2852

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

March 25, 1983

Ms. Alberta James
114-B-16
P.O. Box 1000
Bedford Hills, NY 10507

Dear Ms. James:

I have received your letter of March 22 in which you requested from this office records pertaining to a particular criminal case.

As I informed you by letter on March 16, the Committee on Public Access to Records is responsible for providing advice under the Freedom of Information Law; this office does not maintain possession of records generally, nor does it maintain records involving the case pertaining to you. Further, it is reiterated that a request for records should be directed to the agency or agencies which maintain the records in which you are interested. Therefore, it is suggested that you review the materials sent to you with the letter of March 16.

Under the circumstances, it is recommended that your requests be directed to the arresting agency, the police department that made the arrest, and the Office of the District Attorney that prosecuted the case. In addition, many records of relevance to you would likely be in possession of the court clerk of the court in which the case was tried. In this regard, although the courts and court records fall outside the scope of the Freedom of Information Law, many court records are available under various provisions of law, such as §255 of the Judiciary Law.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2853

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

March 29, 1983

Mr. Carl Stevenson
73-A-550
Box 300
Marcy, N.Y. 13403-0300

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Stevenson:

I have received your letter of March 23 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,

Pamela Petrie Baldasaro
Assistant to the Executive
Director

Enclosures
PPB:ss

FOIL-AO-2854

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Jack Przekop

March 28, 1983

FROM : Bob Freeman

SUBJECT : Hazardous Materials

I have received your memo of March 22 and the materials attached to it. You requested advice relative to rights of access to records submitted to fire departments under §209-u of the General Municipal Law regaridng hazardous materials.

In my opinion, it is possible that the information in question might justifiably be withheld. In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law.

Second, there may be two grounds for denial of potential significance. One is §87(2)(d), which states that an agency, such as a fire department, 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..."

It is noted that there are few cases dealing with the trade secret exception quoted above. However, it is conceivable that an indication of the type of materials kept at a particular site might be of value to a competitor. Therefore, it is possible that the information might be considered a trade secret which if disclosed would cause substantial injury to the competitive position of a particular corporation.

The other exception of possible relevance is §87(2)(f), which states that an agency may withhold records or portions thereof when disclosure would "endanger the life or safety of any person". Again, there are few cases dealing with §87(2)(f), and most have involved materials concerning confidential informants and records relative to criminal activity. However, it might be argued that disclosure of the nature of hazardous materials and the sites where they are located could endanger the life or safety of members of the public by posing a security risk.

Lastly, it is emphasized that unlike most Article 78 proceedings, the burden of proof in such a proceeding brought under the Freedom of Information Law is on the agency. Specifically, §89(4)(b) of the Law requires that in a proceeding in which a denial of access is challenged, the agency has the burden of proving that the records in fact fall within one or more of the grounds for denial.

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

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2855

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

March 28, 1983

Mr. William Scott
[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. Scott:

I have received your letter of March 21 in which you commented on an advisory opinion of March 17 written at your request.

In your most recent correspondence, you expressed concern that the Committee did not "monitor" the fact that a particular agency failed to transmit copies of your appeal and its determination to the Committee as required by §89(4)(a) of the Freedom of Information Law. Additionally, you appear to be uncertain as to the next procedural step that may be available to you following the denial of your appeal.

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

First, since the advisory opinion of March 17, the Department of Correction has transmitted to the Committee copies of your appeal and its determination. I have enclosed a copy of their letter for your review.

Second, you indicated your intention to commence an Article 78 proceeding. In this regard, §89(4)(b) of the Freedom of Information Law states that:

> "...a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two."

Lastly, as you are aware, once litigation has been commenced with respect to issues involving the Freedom of Information Law, it is the policy of the Committee based upon considerations of ethics and fairness, to refrain from issuing advisory opinions.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-2856

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

March 29, 1983

Mr. Joseph Copeland
79-A-4208-0300
Box 300
Marcy, N.Y. 13403

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Copeland:

I have received your letter of March 23 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,

Pamela Petrie Baldasaro
Assistant to the Executive
Director

Enclosures
PPB:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2857

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

March 30, 1983

Mr. Rondelle Harris
82-A-0447
Ward 401
Box 300
Marcy, NY 13403-0300

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Harris:

I have received your letter of March 23 in which you requested medical and inmate 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, 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 of 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 available to:

> "attorneys representing inmates in proceedings in which the inmates' 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, as a general rule, it is my belief based upon discussion with Department of Correctional Services officials, 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 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

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-2858

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

April 1, 1983

Ms. Patricia Sheridan
Town Clerk
Town of Clarkstown
Town Hall
10 Maple Avenue
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 Ms. Sheridan:

I have received your letter of March 18 and the materials attached to it. Your inquiry concerns the "proper use of dog owner lists".

Specifically, there is apparently some confusion relative to statements made by myself and Mr. Stuart Preece, records access officer for the Department of Agriculture and Markets. Mr. Preece concurred with my opinion that a list of holders of dog licenses need not be made available, but you questioned his response to the extent that he indicated that a person may, in your words, "come in and see one (1) individual license".

I do not believe that Mr. Preece's comments were as narrowly stated as you suggested, for he merely wrote that "the request for information should be for a specific dog license..." In my view, the statement quoted in the preceding sentence does not restrict a person from requesting more than one license. In this regard, perhaps the following review of the Freedom of Information Law may be useful.

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, it has consistently been advised that licenses generally are available. From my perspective, the purpose of a license is to enable the public to know that certain requirements imposed by government have been met or that an individual is qualified to engage in a particular endeavor (i.e., selling real estate, driving an automobile, practicing medicine, etc.).

Third, however, there may be a distinction in terms of rights of access between a situation in which an applicant seeks to inspect particular licenses and a situation in which a person seeks to review a list of licensees.

In this regard, §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) lists five examples of unwarranted invasions of personal privacy. Relevant under the circumstances is §89(2)(b)(iii), which states that an unwarrnated 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..."

As such, there may be a distinction between the capacity to request and review individual licenses, which should in my view be available, and the capacity to review a list identifying licensees, which could, under §89(2)(b)(iii) of the Freedom of Information Law, likely be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stuart Preece

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2859

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

April 1, 1983

Mr. Emmanuel Patterson
79-B-1572
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. Patterson:

I have received your letter of March 29 in which you requested assistance under the Freedom of Information Law.

Specifically, you wrote that you would like to obtain medical, psychiatric and related records pertaining to you, regarding a specific time period, from the Erie County Holding Center.

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 the authority to grant or deny access to records, such as those in which you are interested.

Second, it is suggested that you submit a request under the Freedom of Information Law to the agency that maintains the records in question. You need not identify the Head Nurse at the Holding Center for the purpose of making a request. To provide you with explanatory material concerning the Freedom of Information Law and the means by which a request may be made, I have enclosed a pamphlet that may be useful to you.

And third, I have engaged in several discussions regarding access to medical records by inmates with officials of the State 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)]. From my perspective, the provisions applicable to the State Department of Correctional Services would also be applicable to a county facility.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-869
FOIL-AO-2860

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

April 1, 1983

Ms. Carol Mailloux
[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. Mailloux:

I have received your letter of March 18 regarding a response to an appeal following a denial of a request for minutes and tape recordings of a meeting held by the Lindenhurst Board of Education on March 2.

Specifically, Dr. Harry Burggraf, appeals officer for the District, indicated that your request would be granted "within a reasonable time after the April 13, 1983 Board meeting". As such, he wrote that he affirmed the earlier action taken by the records access officer. Further, according to your letter, Dr. Burggraf failed to follow the requirements of the Freedom of Information Law relative to appeals.

In this regard, you have requested an opinion regarding Dr. Burggraf's "attitude of disregard", the sufficiency of his determination on appeal, and the duties of an appeals officer.

First, it is emphasized that the issues raised are virtually the same as those discussed in an advisory opinion that was sent to you on December 22, 1982. Since no copy of that opinion was sent directly to Dr. Burggraf, I will forward a copy to him.

Second, the Freedom of Information Law and the Open Meetings Law in my opinion clearly delineate the responsibilities of the District and the Board regarding both tape recordings and minutes of meetings.

With respect to minutes, as indicated on December 22, §101(3) of the Open Meetings Laws 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, minutes of open meetings must be prepared and made available within two weeks of meetings, whether or not the minutes have been approved.

In recognition of the possibility that some public bodies might not meet within two weeks and therefore might not have the capacity to approve minutes within that time, it has been suggested 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 body who receive the minutes are aware that the contents may be changed.

With respect to access to tape recordings of a meeting, 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.

Third, I believe that the responsibilities prescribed by the Freedom of Information Law regarding appeals are also clear. The applicable provision is §89(4)(a), which provides 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."

Having reviewed our files of appeals from March, I do not believe that the District or Dr. Burggraf complied with the requirement that copies of appeals and the ensuing determinations be sent to this office.

Further, with regard to Dr. Burggraf's determination, I believe that it was deficient.

The language of §89(4)(a) indicates that an appeals officer has two choices when rendering a determination on appeal. One choice involves "fully" explaining the reasons for further denial. From my perspective, no such explanation was given. It is also noted that a denial can in my view be based only upon one or more grounds for denial listed in §87(2)(a) through (h) of the Freedom of Information Law. No mention was made of any ground for denial. The other choice is to "provide access to the record sought", which has not occurred.

Lastly, in terms of the "disregard" for the law, I can only state that, in terms of your request, both the Open Meetings Law and the Freedom of Information Law provide clear direction that could easily be carried out. In addition, the recalcitrance on the part of the District in view of the fact that the meeting to which the records sought relate was open to the public is particularly difficult to understand.

I hope that I 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. Harry Burggraf
School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2861

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

April 1, 1983

Mr. Louis M. Pinto
Claims Manager
General Accident Insurance
71 State Street
P.O. Box 369
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. Pinto:

I have received your letter of March 16, 1983 in which you requested assistance from this office.

Specifically, you have experienced difficulty in obtaining copies of police reports from the City of Corning, even though fees for copies and a self-addressed, stamped envelope were included with your request. In this regard, you attached a copy of a response from the City of Corning Police Department advising that "You may make your own hand written copy of the report on forms that will be provided or you may bring your own photocopy machine and make a copy."

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

First, it is noted 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..."

As a general matter, the Committee has consistently advised that an individual who is willing to pay the appropriate fees for copying and posting should be able to receive copies of records by mail.

From my perspective, rights of access under the Freedom of Information Law cannot justifiably be diminished by requiring an individual to travel great distances to inspect records or to provide one's own copying equipment. Since the above referenced sections of the Law clearly require an agency to produce copies of accessible records upon payment of or offer to pay the appropriate fees, a refusal to provide copies could in my view be construed as a constructive denial of access.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

cc: Arthur R. Webster, Chief of Police

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2862

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

April 4, 1983

Mr. Willie Welch
82-A-4622
Building 9 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. Welch:

I have received your letter of March 24 in which you requested that this office "grant" you the right to have copies of your criminal records, warrants for your arrest and indictments.

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. As such, the requested records 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.

With respect to warrants, assuming that you are referring to warrants related to your arrest, §120.80(2) of the Criminal Procedure Law states in part that:

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

As such, it would appear that copies of warrants would be available to you from either the police department that made the arrest or the court in which the warrant was introduced in a proceeding.

To submit a request to a police department, for example, §89(3) of the Freedom of Information Law requires that an applicant submit a request for a record "reasonably described". Therefore, it is suggested that, when making a request, you include as much detail as possible, including names, descriptions of events, dates, docket or index numbers and similar information that might enable agency officials to locate the record.

Lastly, it is suggested that you attempt to contact your attorney or a legal aid group, such as Prisoners' Legal Services. Perhaps they could help you in your efforts.

I hope that I 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-2863

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

April 4, 1983

Mr. Vincent L. Morello
80-C-443
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. Morello:

I have received your letter of March 18 in which you requested assistance regarding the use of the Freedom of Information Law.

Based upon the statements made in your letter, you are interested in carrying that portion of a "Visitors/ Lawyers log book" of a police department that indicates that you were visited by your attorney. You also seek to obtain a copy of "the monitored phone conversation" between your attorney and a police official concerning your arrest. It appears that the records in question, to the extent that they exist, would be in possession of the Niagara Falls Police Department.

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

First, §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. Therefore, if, for example, the tape recording to which you referred no longer exists, the Police Department would not be required to create or reconstruct a new record in response to a request.

Second, another aspect of the same provision requires that an applicant submit a request for records "reasonably described". As such, when submitting a request to the Niagara Falls Police Department, it is suggested that you include as much detail as possible, including names, dates, identification, index or docket numbers, descriptions of events and similar information that might enable officials of the Police Department to locate the records sought.

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.

With respect to the "Visitors/Lawyers log book", those portions that do not relate to your attorney's visit to you could in my view 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)]. However, that portion of the log book indicating your attorney's visit to you would in my opinion be available to you after other aspects of the page or pages of the book are deleted.

It would appear that a tape recording of a conversation pertaining to you between you attorney and the Police Department, if it continues to exist, would be available to you on the same basis as that described in the preceding paragraph. However, without knowledge of the nature of the dialogue, it is impossible to determine the extent to which one or more of the grounds for denial might apply. For instance, the identities of others might have been referenced, and it is possible that any number of the grounds for denial might be applicable to the tape [e.g., see Freedom of Information Law, §§87(2)(b), (e) and (f)].

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-2864

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

April 4, 1983

William J. Rold
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. Rold:

As you are aware, I have received your letter of March 16 in which you requested that this office review the "master index maintained by the Department of Correctional Services" pursuant to §87(3)(c) of the Freedom of Information Law to determine whether the Department has complied with the cited provision as well as the applicable provisions of the regulations promulgated by the Committee.

I would like to offer the following comments regarding your request for an opinion.

First, the "master index" is the equivalent of what is generally known as the "subject matter list". In this regard, §87(3)(c) 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."

Additional direction regarding §87(3)(c) is provided by §1401.6 of the Committee's regulations, which states in 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."

Having reviewed the "master index" appended to your letter, it appears that the index fulfills the requirements of §87(3)(c) of the Freedom of Information Law and the regulations. It is noted, however, that it is impossible from this vantage point to ascertain whether the index refers to the subject matter of all records in possession of the Department of Correctional Services, for I am unfamiliar with all such records. Nevertheless, having reviewed a number of subject matter lists during the past several years, the master index is in my opinion as detailed as any that I have seen.

If you could provide additional information that would lead to a contrary opinion, I would appreciate hearing from you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2865

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

April 4, 1983

Mr. Louis A. Martinez
83-A-871
B-Block - V356
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. Martinez:

I have received your recent letter 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 the 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:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2866

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

April 4, 1983

Mr. Bruce Markens
[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. Markens:

I have received your letter of March 21 in which you requested information regarding your "rights under Article 78 of the Civil Practice Law and Rules". Apparently you are interested in the information in question due to the possibility of being denied access to records by the New York City Board of Education.

In this regard, this office does not maintain specific records regarding the manner in which proceedings under Article 78 may be commenced. Further, it is suggested that you contact an attorney should you opt to initiate such a proceeding.

To provide you with general information, however, I would like to offer the following comments.

First, the Article 78 proceeding is the vehicle under which action taken by a public officer may generally be challenged in court.

Second, before initiating an Article 78 proceeding, a person must have exhausted his or her administrative remedies. In terms of the Freedom of Information Law, a final determination to deny a request following an appeal would constitute the exhaustion of one's administrative remedies.

Third, the burden of proof in an Article 78 proceeding is generally on the petitioner, the member of the public, who must demonstrate that the agency acted unreasonably or failed to perform a duty required to be performed. Under the Freedom of Information Law, while the vehicle for seeking review of an agency's action is the Article 78 proceeding, §89(4)(b) of the Law specifies that the agency has the burden of proving that records withheld in fact fall within one or more of the grounds for denial appearing in §87(2).

Lastly, it is suggested that you visit a law library for the purposes of reading about Article 78 and reviewing "form books" [i.e., McKinney's or Bender's Forms]. In the interim, enclosed are copies of §§7803 and 7804 of the Civil Practice Law and Rules. Once again, it is recommended that you consult with 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

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2867

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

April 4, 1983

Michael J. Spinella
President
Bethpage Congress of Teachers
J.F.K. Jr. High School
Broadway
Bethpage, NY 11714

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Spinella:

I have received your letter of March 21 in which you described a situation involving rights of access to records.

Specifically, according to your letter, you wrote that the Supervisor of Pupil Personnel Services in the Bethpage School District apparently prepared a report comparing various services offered in the Bethpage District with other nearby districts. You indicated further that a request for the report made to the Supervisor was denied on the ground that it is "confidential"; in a second request to the Assistant Superintendent, he indicated that the "alleged" report is not confidential, but he questioned the union's right to obtain a copy. Further, having discussed the subject with the Superintendent, "his only comment is 'What report?'"

Based upon those facts, you have asked whether the report is available, and if so, to whom. You also raised questions regarding "the proper forum for obtaining this information" and the manner in which the Union might "have the State Education Department investigate this matter".

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

First, the Freedom of Information Law is applicable to every "agency" of state and local government in New York [see attached, Freedom of Information Law, definition of "agency", §86(3)], including school districts.

Second, the Freedom of Information Law is applicable to all records of an agency. In this regard, §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."

As such, if the District maintains the report in question, it is a "record" that falls within the scope of the 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, in view of the nature of the report as you described it, only one of the grounds for denial is relevant. Due to its structure, however, it is likely that the report is accessible in part, if not in toto.

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, the report could in my opinion be characterized as an "intra-agency" document. To the extent that it consists of statistical or factual information, I believe that it is available under §87(2)(g)(i) [see Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979); and Ingram v. Axelrod, App. Div., 456 NYS 2d 146 (1982)]. Conversely, to the extent that the report is reflective of advice or opinion, for example, those portions could likely be withheld.

Fourth, in terms of who may assert rights granted under the Freedom of Information Law, case law indicates that records accessible under the 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; and Duncan v. Bradford Central School District, 394 NYS 2d 362]. Therefore, those portions of the report that are accessible under the Freedom of Information Law are available to "any person".

Fifth, with respect to procedure, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations governing the procedural aspects of the Law. In turn, §87(1) requires each agency to adopt regulations "in conformity" with those adopted by the Committee.

Enclosed is a copy of the Committee's regulations, which in §1401.2 pertains to the designation of a "records access officer" who is responsible for answering requests made under the Freedom of Information Law. It is suggested that you obtain a copy of the regulations adopted by the District under the Freedom of Information Law in order to review its procedures generally and to learn the identity of the designated records access officer.

Lastly, since the existence of the report appears to be questionable, it is noted that §89(3) of the Freedom of Information Law states in part that if an agency asserts that it does not maintain a record requested, the agency, on request, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

Enclosed for your consideration is an explanatory pamphlet that may be useful to you, for it contains direction regarding both the substantive and procedural aspects of the Freedom of Information Law.

With respect to the capacity of the union to request that the State Education Department investigate the matter, it is suggested that you contact the Department directly.

I hope that I 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: Paul Cooper
George Mann
Dr. John Sommi
Michael Verderosa
Louis Orphan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2868

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

April 5, 1983

Mr. James Spear
Spear Refrigeration, Inc.
345 Church Street
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 Mr. Spear:

I have received your letter of March 25 in which you requested assistance from this office.

You have written with respect to difficulties encountered in gaining access to certain records under the Freedom of Information Law. In particular, you are seeking copies of inspection reports and violation notices for multiple family residences in the City of Poughkeepsie. To date, the City of Poughkeepsie in response to your request has advised you that either the records you are seeking "are maintained on an address-specific basis and not by category or type of resident", or that much of the material you are seeking "would be intra-agency materials and thus exempt from disclosure".

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

First, as you may be aware, the Freedom of Information Law provides that all records or portions of records are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law. Therefore, when a

request for records is made, it is the responsibility of the agency to review its records in their entirety to determine when portions, if any, fall within one or more of the grounds for denial. Further, one of the responsibilities of a records access officer appointed to process requests, involves assisting the requester "in identifying requested records, if necessary" [see enclosed regulations, §1401.2(b)(2)]. Consequently, if the Office of the Building Inspector has records reflective of multiple residence inspections and/or reports, the records access officer would in my view be required to assist you in locating those records even though the records may not necessarily be maintained by category or type of residence.

Second, the denial that you received from the City Chamberlain indicated that, since much of the material you requested would likely be "intra-agency", such records are exempt from disclosure. However, as noted earlier, the agency is responsible for reviewing the records sought in order to determine the extent, if any, to which records or portions of records can be withheld. Therefore, an agency cannot in my opinion deny access to an entire category of records merely because some information might fall within one of the categories for withholding. Section 87(2)(g) of the Law which is cited by the City of Poughkeepsie as a basis for denial 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. 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.

To the extent that the information contained in the inspection reports and notices of violation reflect "factual data", it would in my opinion be available. However, if a building inspector recorded comments reflective of advice, opinion or recommendation, they could in my view be denied.

Third, it is also noted that decisions rendered under both the original and the amended Freedom of Information Law have held that the "law enforcement purposes" exception [formerly §88(7)(d), now §87(2)(e)] may be appropriately raised only by a criminal law enforcement agency [see Young v. Town of Huntington, 388 NYS 2d 978 (1976) and Broughton v. Lewis, Sup. Ct., Albany Cty., (1978)]. Further, the Young decision, supra, specifically held that records compiled by a town building department fell outside the "law enforcement purposes" exception to rights of access. Even in a situation in which records might have fallen within §87(2)(e), it was determined that complaints such as those received by a building inspector's office, are available after having deleted identifying details regarding the complainants [see Church of Scientology v. State, 61 AD 2d 942 (1978); aff'd 46 NY 2d 906 (1978)].

Lastly, but perhaps most important under the circumstances, the Freedom of Information Law preserves rights of access granted by other provisions of law. Section 89(6) 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."

One such provision of potential relevance is §307 of the Multiple Residence Law which states that:

> "[A]ll records of the department shall be public. Upon request the department shall be required to make a search and issue a certificate of any of its records, including violations, and shall have the power to charge and collect reasonable fees for searches and certificates."

Therefore, if the records in question are available under §307 of the Multiple Residence Law nothing in the Freedom of Information Law could be cited to limit or diminish rights granted by §307.

I hope 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: Patricia H. Havens

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2869

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

April 5, 1983

Mr. Vaul B. Dallas, Jr.
[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. Dallas:

I have received your letter of March 20 and the materials attached to it, which pertain to a denial of a request for records directed to the New York State Thruway Authority.

In terms of background, the materials indicate that you requested various records from the Authority concerning a disciplinary proceeding in which you are involved. On January 31, four days after the receipt of your request, David F. Alexander of the Authority responded by indicating that the information sought, to the extent that it exists in the form of a record or records, had been furnished to your union representative and that it could be made available through him. I do not believe that Mr. Alexander considered his response to have been a denial, for he directed you to the appropriate source of the records. Nevertheless, on March 3 you appealed Mr. Alexander's "denial". In this regard, it is noted that §89(4)(a) of the Freedom of Information Law requires that a person denied access appeal within thrity days of the denial. That time limitation appears to have expired. Notwithstanding the failure to appeal within the prescribed time limit, James A. Martin, Executive Director of the Authority, responded on March 9 by reiterating that the records sought would be available to you from your union representative in accordance with various provisions of a collective bargaining agreement that were cited by Mr. Martin.

You have raised a series of questions concerning the situation. In this regard, I would like to offer the following comments.

First, although the Freedom of Information Law is the vehicle generally applicable for obtaining copies of government records, it would appear that the collective bargaining agreement under the circumstances serves as the primary mechanism by which you may obtain the records sought. As such, it is reiterated that the responses by Mr. Alexander and Mr. Martin might not be characterized as denials of access but rather indications that the records had been made available through your union representative. As they suggested, it is recommended that you contact your union representative for the purpose of obtaining records furnished to him by the Thruway Authority.

Second, in terms of your specific questions, the first is whether the Authority is required to "tell you what part of the Freedom of Information Law [your] request is in violation of". As a general rule, the regulations promulgated by the Committee concerning the duties of a records access officer require that the reasons for an initial denial must be stated in writing [see regulations, §1401.2]. In this instance, the records access officer, Mr. Alexander, did not in my view deny but rather directed you to the source of the records. In the event of an appeal, the appeals officer must under §89(4)(a) fully explain the reasons for further denial in writing or provide access to the records sought. Again, when read in conjunction with the requirements of the collective bargaining agreement, Mr. Martin's response might not be considered a denial but rather an indication that records have been made available indirectly to you via your union representative.

You asked who the freedom of information officers are for the New York State Thruway Authority, including the dates of their positions. In this regard, the Committee does not maintain a listing of the records access and appeals officers designated by agencies. In short, more than 10,000 agencies are subject to the Freedom of Information Law, and the creation of such a list would be unnecessarily burdensome. However, I believe that the designated records access officer for the Authority is David Alexander, and the appeals officer is James Martin.

You also asked for statistical information regarding requests made by personnel of the Authority under the Freedom of Information Law. The Committee maintains no such statistics.

Your final question is whether the Freedom of Information Law is "enforceable". When a final determination is rendered on appeal, the person denied has the capacity to initiate a proceeding under Article 78 of the Civil Practice Law and Rules. It is noted that §89(4)(b) of the Freedom of Information Law specifies that the burden of proof in such a proceeding is on the agency.

In conjunction with your request, enclosed is a copy of the Committee's subject matter list.

Lastly, it is again suggested that you avail yourself of rights granted to you under the terms of the collective bargaining agreement and seek the records in question from your union representative.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: David F. Alexander
James A. Martin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2820

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

COMMITTEE MEMBERS

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GAIL S. SHAFFER
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 5, 1983

Mr. Joseph Wm. Ward
82-A-4732
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. Ward:

I have received your letter in which you raised questions regarding the removal of information pertaining to you from a DCJS report, your "yellow sheet" and from court records.

Your specific concern involves an arrest that was followed by a dismissal.

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. Although your question does not deal directly with the Freedom of Information Law, as a service to you, I would like to offer the following comments.

First, the regulations promulgated by the Department of Correctional Services contain provisions whereby an inmate may challenge the accuracy of the contents of records pertaining to him. Enclosed is a copy of §§5.50 through 5.54 of the regulations.

Second, enclosed is §160.50 of the Criminal Procedure Law which concerns situations in which a criminal action or proceeding has been terminated in favor of the accused. It is suggested that you review §160.50 and contact 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:jm

Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-871
FOIL-AO-2871

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

April 6, 1983

John E. Donovan
[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. Donovan:

I have received your letter of March 22 in which you requested an opinion regarding the obligation of school boards "to keep and make available a record of votes in their meetings".

The correspondence attached to your letter indicates that records of votes of action taken by individual Board members are not generally kept by the Hammondsport Central School Board. Further, you indicated that such records are particularly important since the Board often takes action during executive sessions.

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

First, there are two statutes that are relevant to the situation that you described, the Freedom of Information Law and the Open Meetings Law.

Although the Open Meetings Law provides general direction regarding the conduct of meetings by public bodies, the Freedom of Information Law contains specific direction regarding the preparation of records of votes. Specifically, §87(3)(a) states that each agency shall maintain:

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

As such, in every instance in which the School Board votes, I believe that a record must be prepared which indicates the manner in which each member voted.

Second, the Open Meetings Law in §101 pertains to minutes that must be prepared following meetings. As a general rule, §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 by 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 must be taken behind closed doors (i.e., see §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 specifically state that school boards must vote publicly, it has been 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)].

Most recently, the Appellate Division, Second Department also found that a school board may act only by means of a vote taken during an open meeting. Although the Court of Appeals affirmed, it did not deal specifically with the so-called "open vote" provision of the Education Law [see Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 Ad 2d 157, aff'd ___ NY 2d ___ (1982)]. Nevertheless, since §1708(3) of the Education Law is apparently "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can generally act only during an open meeting.

Consequently, if no action is taken during the executive session, minutes need not be prepared. If action is taken, it should in my opinion occur during an open meeting and recorded in minutes.

Third, enclosed as requested is a copy of the Open Meetings Law. With respect to the capacity to conduct executive sessions, §100(1) of the Law specifies and limits the topics that may appropriately be considred by a public body during an executive session.

Also enclosed are copies of the Freedom of Information Law and an explanatory pamphlet dealing with both subjects that may be useful to you.

Lastly, in conjunction with your request, a copy of this opinion will be sent to the School Board.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2822

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

April 6, 1983

Theodore W. Roth, President
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:

I have received your letters of March 14 and March 22, both of which reached this office on March 25.

Attached to your letter is a series of correspondence with the New York City Employees' Retirement System in which the executive director of the System denied access to a list of names and addresses of beneficiaries of deceased members of the System. The basis for the denial cited by Mr. Herkommer was §89(2)(b)(iii) of the Freedom of Information Law, 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". You have asked for assistance regarding "where to go from here".

Since Mr. Herkommer has rendered a final determination following your appeal, it would appear that the only additional step would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

With respect to lists of names and addresses, I have enclosed two decisions rendered by the Appellate Division. While I could not conjecture as to the determination that might be reached judicially with respect to the records that you are seeking, in the two attached decisions, the scope of "commercial or fund-raising purposes" was found to be somewhat narrow in my view. Perhaps those decisions will be useful to you.

With regard to your letter of March 22, as requested, enclosed is a copy of the New York Freedom of Information Law.

The question raised in that letter is whether the New York statute contains a provision regarding the possible waiver of fees analogous to that found in the federal Freedom of Information Act. In short, the New York Freedom of Information Law contains no similar provision.

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: Mr. Herkommer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2823

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

COMMITTEE MEMBERS

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GAIL S. SHAFFER
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 6, 1983

Mr. Donald Viele
77-D-95
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. Viele:

I have received your letter of March 21 in which you requested assistance regarding the possibility of obtaining "work evaluation records" pertaining to you.

In terms of background, you indicated that you were denied access to the records in question by a senior corrections counselor at your facility on the ground that the records are "intra-departmental" and "evaluative". Following the denial, you appealed to Counsel to the Department of Correctional Services, who affirmed the denial based on §87(2)(g) of the Freedom of Information Law.

You have asked whether there is any way of obtaining the work evaluation records.

In this regard, I would like to offer the following comments.

First, I am in general agreement with the determination made by the corrections counselor and Counsel to the Department.

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..."

Under the circumstances, the records in question may in my view properly be characterized as "intra-agency" materials. Further, while certain aspects of such materials are accessible, those portions consisting of advice, recommendations, or opinion, such as evaluations reflective of personal views, may in my opinion be withheld.

Second, the only remaining step that could be taken under the Freedom of Information Law would involve the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules. In view of the situation described in your letter, even if you were to be successful in such a proceeding, the records would likely be made available too late for your purposes.

And third, I am unaware of any other vehicle that could be cited to obtain the records sought. However, it is suggested that you discuss the matter with your attorney or perhaps with a representative of Prisoners' Legal Services or a similar legal aid group.

I hope that I 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-2824

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

April 6, 1983

Mr. Douglas Ritter
[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. Ritter:

I have received your letter of March 24 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 submitted requests under the Freedom of Information Law to the director of Environmental Health Services of Broome County in December and January. Those requests were apparently ignored because they were not addressed directly to the County's designated records access officer. Moreover, Andrew Mair, assistant county attorney, wrote that "Broome County will not recognize nor respond to any Freedom of Information request not submitted in writing to the County Records Access Officer".

You have asked whether "the County is correct in their position that just because the requests were not sent directly to the Records Access Officer that they do not have to respond in any way to [a] request".

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

First, as a general matter, it is my view that the Freedom of Information Law is intended to broaden rights of access and facilitate the means by which the public may obtain government records. The statement made by Mr. Mair, if carried out without flexibility, could have the opposite effect.

Second, the Committee on Public Access to Records is required under §89(1)(b)(iii) of the Freedom of Information Law to promulgate regulations regarding the procedural aspects of the Law. In turn, §87(1) requires the governing body of a public corporation, in this case, the Broome County Legislature, to promulgate their own regulations pursuant to those adopted by the Committee and in conformity with the Freedom of Information Law.

In this regard, §1401.2 of the regulations promulgated by the Committee concerns the designation of a records access officer. Section 1401.2(a) states in part that the records access officer:

> "shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Based upon the language quoted above, I believe that the records access officer is required to "coordinate" responses to requests directed to Broome County and its component units.

In the context of the situation described, a more appropriate course of action would in my view have involved a transfer of your requests from the Health Department to the records access officer.

By means of analogy, the agency in which the Committee is housed, the Department of State, like Broome County, is composed of numerous and seemingly unrelated units. Often this office receives correspondence or requests for records in possession of another unit. Rather than ignoring or returning a request, it is forwarded to the appropriate unit and/or its records access officer.

From my perspective, the duty of "coordinating" responses to requests involves a responsibility on the part of the records access officer to ensure that requests made to any unit within Broome County government should be forwarded to her.

Lastly, Mr. Mair also wrote that a request "must specify the County Department in which the records would most likely be kept and describe, with reasonable particularity, the documents sought".

In my opinion, since the Freedom of Information Law in §89(3) requires that an applicant request records "reasonably described", the public may but likely need not identify the department in which records are kept. Often without knowledge of the structure of an agency, it may be all but impossible to identify the department that maintains records. Further, §1401.2(b) of the Committee's regulations states that:

> "[T]he records access officer is responsible for assuring that agency personnel...
>
> (2) Assist the requester in identifying requested records, if necessary..."

As such, while an applicant must reasonably describe records sought, the records access officer in my view bears the responsibility of providing assistance when necessary.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Andrew B. Mair
Kay Diekow

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO - 2825

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

April 7, 1983

Mr. Alexander Rogers

[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. Rogers:

I have received your letter of March 22 as well as the correspondence attached to it.

Your inquiry concerns your rights under the Freedom of Information Law relative to requests directed to the Town of Deerfield. In brief, the records sought involve current bills, "payroll data" concerning Town employees, including "elected and appointed Town Officials", and the 1983 Town Budget.

In this regard, I have contacted the Town Clerk, Ms. Gail Stappenbeck, on your behalf in order to learn more of the situation. I was informed that you recently reviewed the bills in question and that since the budget had been incorporated as part of the minutes, you also have reviewed the budget. Ms. Stappenbeck added, however, that your most recent request to inspect the budget may have been delayed, because that document was temporarily in possession of officials of the Department of Audit and Control.

With respect to "payroll data", §87(3)(b) of the Freedom of Information Law (see attached) 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, a list of salaried employees and officers of the Town must in my view be maintained and made available. It is noted, however, that the identities of appointed Town officials might not appear in the payroll record required under Freedom of Information Law, for many of those individuals likely serve without salary or pay of any kind.

I hope that I 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, Clerk
Donald Youlen, Supervisor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2876

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

April 7, 1983

Kenneth J. Franzblau, Esq.
[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. Franzblau:

I have received your letter of March 25 concerning a request directed to the Catskill Region Off-Track Betting Corporation under the Freedom of Information Law.

Specifically, you have apparently unsuccessfully sought to obtain the "names, job titles, job addresses of all" employees of the Corporation. As such, you have requested that this office "send in the form of an advisory opinion a written direction" to the Corporation to make the information in question available.

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

First, the authority of the Committee on Public Access to Records is solely advisory. Therefore, although a copy of this opinion will be sent to the Catskill Region Off-Track Betting Corporation, this office has no authority to compel the Corporation to adhere to the opinion.

Second, in my view, the information sought is clearly available under the Freedom of Information Law.

The Catskill Region Off-Track Betting Corporation is in my opinion subject to the Freedom of Information Law. The definition of "agency" appearing in §86(3) of the Freedom of Information Law includes within its scope public corporations. The term "public corporation" is defined by §66 of the General Construction Law to include public benefit corporations. Further, §8113 of the Unconsolidated Laws states that the regional corporations created pursuant to Article VII-A of the Unconsolidated Laws constitute public benefit corporations. As such, Catskill OTB is an agency subject to rights of access granted by the Freedom of Information Law.

Third, since more than a month has passed without a response to your request, I would like to point out that the Freedom of Information Law and the regulations promulgated by the Committee on Public Access to Records, which govern the procedural aspects of the Law, 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 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 acess 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, although agencies generally need not create a record in response to a request, there are some instances in the Freedom of Information Law in which records must be compiled by agencies. Relevant to your inquiry, §87(3)(b) of the Law states that each agency shall maintain "a record setting forth the name, public office address, title and salary of each officer or employee of the agency..." Consequently, each agency subject to the Law, including Catskill OTB, is required to compile and make available the payroll record envisioned by the cited provision.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Catskill Region Off-Track Betting Corporation

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2872

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

April 7, 1983

Mr. W. Quiles
78-A-90 D4238
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. Quiles:

I have received your letter in which you raised questions regarding the policy of the Department of Correctional Services in a variety of areas. In this regard you have requested from this office any "applications" that should be submitted.

First, there is nothing in the Freedom of Information Law that requires that a particular form or application be submitted. Section 89(3) of the Law merely requires that a written request be submitted that "reasonably describes" the record sought.

Second, with respect to policies adopted by the Department of Correctional Services, I believe that they are generally available, for §87(2)(g)(iii) of the Law states that final agency policies are accessible.

Third, in terms of procedures, I have enclosed a copy of the regulations of the Department of Correctional Services. It is suggested that you closely review the regulations, for they provide guidance regarding the steps to be taken when making a request. It is noted, too, that the regulations indicate that a request for records kept at a facility should be directed to the facility superintendent.

Lastly, also enclosed is an explanatory pamphlet on the Freedom of Information Law that may be helpful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2878

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

April 7, 1983

Mr. Junious Gray
80-A-1640 H7-4
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. Gray:

I have received your letter of March 22 in which you requested assistance from this office.

You have requested a variety of records from various law enforcement agencies without success. Specifically, you are apparently seeking copies of documents, photographs, slides and other records you believe were created during a law enforcement investigation.

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 a district attorney's office or a police department, are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, there may be several grounds for withholding that may be relevant to your inquiry.

For example, §87(2)(e) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

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

The provision quoted above is based largely upon potentially harmful effects of disclosure, and the extent to which it may properly be asserted is unknown to me.

Additionally, §87(2)(f) of the Law represents another ground for denial that may arise in the context of law enforcement investigations. That provision states that an agency may withhold records or portions of records where disclosure "would endanger the life or safety of any person". Since I am not familiar with the contents of the records you are seeking, I could not conjecture as to the extent to which this exception would be applicable. With respect to the "radio runs and sprint tapes" you are seeking, it is possible that those items may no longer exist, for some law enforcement agencies destroy taped materials after a specific period of time has transpired.

Third, please be advised that the Committee is responsible for advising with respect to the Freedom of Information Law. Consequently, the Committee does not have the capacity to compel an agency to make records available or to review records on its own initiative to determine rights of access.

Fourth, although the Freedom of Information Law is not applicable to the courts and court records, most court records are available under the provisions of §255 of the Judiciary Law. I have enclosed a copy of that statute for your consideration. If you believe that a court clerk has possession of records that may be of use to you, it is suggested that you direct a request to the clerk of the court in which you were tried.

Fifth, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

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

Lastly, you have not indicated whether an appeal has been taken or the extent to which you may have employed discovery devices during your trial. I would like to point out that, in a situation in which a petitioner initiated a proceeding under Article 78 of the Civil Practice Law and Rules to obtain records under the Freedom of Information Law, the court held that the Freedom of Information Law could not be invoked since the petitioner had failed to make a timely discovery motion under Article 240 of the Criminal Procedure Law. Article 240 of the Criminal Procedure Law establishes the proper times and procedures for criminal discovery. In this regard, the court stated that "[T]he purpose of the Freedom of Information Law is not to allow a litigant to circumvent normal proceedings for discovery" [see attached, People & C. v. Billy Billups, Sup. Ct., Queens Cty., NYLJ, (July 13, 1981)]. If your situa-

tion is similar to that of the petitioner in Billups, you might encounter difficulty in obtaining some of the records sought.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-2829

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

April 7, 1983

Mr. Gary C. Decker
78-D-5
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. Decker:

I have received your letter of April 2 in which you requested assistance and materials from this office.

Since you have requested information concerning the Freedom of Information Law and the Department of Correctional Services, 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, such as the Department of Correctional Services, 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.

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 requests 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. Additionally, §5.13 refers to the subject matter list in which you are interested. Section 5.11 indicates the address from which the subject matter list or "master index" may be requested. 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-2880

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

April 11, 1983

Mr. Michael John Gabel
#81-D-93
Attica Correctional Facility
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. Gabel:

I have received your letters dated April 4 and May 4 in which your requested various materials from this office and raised questions regarding the Freedom of Information Law.

With respect to your request, enclosed are copies of the booklet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door" and the Committee's most recent annual report on the Freedom of Information Law, which includes as an appendix summaries of judicial determinations rendered under the Law.

You also asked for "directives" on law libraries and legal and other types of mail. In this regard, it is noted that the Committee on Public Access to Records does not maintain possession of records generally, such as the directives in question. It is suggested, however, that you submit a request for the directives to your facility superintendent in accordance with the regulations promulgated by the Department of Correctional Services (see attached). If the directives exist, I believe that they would be available to you under §87(2)(g)(iii) of the Freedom of Information Law.

Your question involves rights of access to a psychiatric evaluation pertaining to you. In this regard, having discussed the issue of inmates' medical records with representatives of the Department of Correctional Services on several occasions, it has consistently been advised that factual information such as laboratory test results are available; it has also been advised that medical records reflective of advice or opinion, such as a psychiatric evaluation, generally may be withheld under §87(2)(g) of the Freedom of Information Law. It is recommended that you closely review §5.24 of the enclosed regulations, for that provision deals specifically with medical records pertaining to inmates.

I hope that I 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-2881

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

April 11, 1983

Joseph D. Mullady
80-A-1179 B-19-21
Box 149
Attica, NY 14011

Dear Mr. Mullady:

I have received your letter of April 3 in which you requested various materials from this office.

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 Law, and an explanatory pamphlet that may be useful to you.

You also requested a list of "all the New York State Records that [you] may be entitled to have or read", as well as an indication of the records available from the Department of Correctional Services.

There is no list of which I am aware that identifies every record available from New York State government in general or the Department of Correctional Services in particular. However, §87(3)(c) of the Freedom of Information Law requires that each agency maintain a "subject matter list" which makes reference by category and in reasonable detail the records of the agency, whether or not the records are available. Therefore, by reviewing a subject matter list, an individual may learn of the types of records maintained by an agency.

With respect to records of the Department of Correctional Services, §5.13 of the regulations promulgated by the Department under the Freedom of Information Law 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."

Section 5.15 of the regulations indicates that the superintendent of a facility is a "custodian" of records. Consequently, if you would like a copy of the subject matter list for the Department of Correctional Services, a request should be 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:jm
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2882

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

April 11, 1983

Mr. Maurice Morris
79-B-1793
Box 51
Comstock, NY 12821-0051

Dear Mr. Morris:

I have received your letter of March 31, which reached this office today. In your letter, you requested "institutional records" pertaining to you.

First, it is noted that the Committee on Public Access to Records is responsible for advising with respect to the Freedom of Information Law. As such, this office does not have possession of records generally, nor does it maintain the records in which you are interested.

Second, under the regulations promulgated by the Department of Correctional Services, requests for records kept at the facility should be directed to the facility superintendent.

And third, it is emphasized that the Freedom of Information Law requires that an applicant request records "reasonably described". As such, in some instances, a request for a person's institutional records, without greater detail, might be so broad that the agency cannot determine which records have been requested. Therefore, in order to reasonably describe the records sought when making a request, it is suggested that you provide as much detail as possible, including names, dates, identification numbers, file designations, descriptions of events and similar information that might 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2883

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

April 11, 1983

Mr. J. Batts
81-A-6050 B-21-14
Box 149
Attica, NY 14011

Dear Mr. Batts:

I have received your letter of April 7 in which you requested from this office a list of agencies to which you could write in order to attempt to find work prior to your release in 1984.

First, it is noted that 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 maintain possession of records generally, nor does it maintain the list in which you are interested.

Second, if there is such a list in existence, I would conjecture that it might be in possession of the Department of Correctional Services. In this regard, for the purpose of requesting records at your facility, the regulations promulgated by the Department of Correctional Services indicate that a request should be directed to the facility superintendent.

Third, it is suggested that you discuss the matter with your counselor at the facility. In addition or perhaps in the alternative, you might want to raise the issue with a representative of Prisoners' Legal Services or a legal aid group.

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-2884

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

April 12, 1983

Ms. Nancy Cestaro
[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. Cestaro:

I have received your letter on April 7.

You have requested that the Committee on Public Access to Records confirm that the format of the response you received from the records access officer of the New York State Department of Social Services is "acceptable" under the Freedom of Information Law. The records access officer, Ms. M. Elizabeth Lyon, advised you that the records you were seeking had been returned to the local social security office and were no longer maintained by the Department of Social Services.

Section 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."

Therefore, the response by the Department of Social Services correctly indicates that it no longer has possession of the records in which you are interested.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2885

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

April 14, 1983

Mr. A. Anthony Miller
[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. Miller:

I have received your letter of March 29 and the materials attached to it. You have requested an advisory opinion under the Freedom of Information Law regarding a denial of a request for records by the Nassau County Police Department.

Specifically, according to your letter, the Nassau County Police Department "is in the process of installing new two-way radio equipment". Since its old frequencies will apparently become obsolete, you requested records indicating the new frequencies. In an initial response to your request, you were informed that the records would not be released based upon Department "policy", since "information of this type could be used by those wishing to avoid police detection". You made a second request which was also denied, not on the basis of policy, but rather on the basis of §87(2)(f) of the Freedom of Information Law.

You have asked whether, in my view, the Department is on "solid ground".

Since the issue has not, to the best of my knowledge, been litigated, I cannot provide an unequivocal response. However, based on the contents of the correspondence, it appears that the Department might have the capacity to withhold the record sought under §87(2)(e) of the Freedom of Information Law, as well as §87(2)(f).

Section 87(2)(e) permits an agency to 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 or procedures..."

It is not completely clear whether records regarding radio frequencies may be compiled for law enforcement purposes or, contrarily, in the ordinary course of business. If the records were indeed compiled for law enforcement purposes, and if disclosure would enable individuals to evade detection by the Department, it might be successfully contended that disclosure would interfere with law enforcement investigations. As indicated by the Court of Appeals, "[T]he Freedom of Information Law was not enacted to furnish the safecracker with the combination of the safe" [Fink v. Lefkowitz, 47 NY 2d 567, 573]. While I am not suggesting that you could be characterized as the "safecracker", if the records sought are available to you, the would be available to any person [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], including those seeking to evade detection by the Police Department.

Further, whether or not records containing the radio frequencies are "compiled for law enforcement purposes", based upon Sgt. Passaretti's contentions, it appears that disclosure might indeed "endanger the life or safety of any person". If that is so, §87(2)(f) could in my view appropriately be cited as a basis for a denial of your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Passaretti

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2886

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

April 14, 1983

Mr. Reynard K. McClusky
JOB PAC
Box 307
Delmar, NY 12054

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McClusky:

I have received your letter of April 6 and the correspondence attached to it.

You are apparently dissatisfied with a response to a request for information by the Executive Chamber. In this regard, I would like to offer the following comments.

First, it appears that there may be something of a misunderstanding on your part regarding the scope of the Freedom of Information Law. In my view, the title of the Freedom of Information Law may be misleading, for it is not an access to information law, but rather an access to records law. Stated differently, the Freedom of Information Law is not a vehicle under which a member of the public may ask questions or under which government officials are required to respond to questions. On the contrary, the Freedom of Information Law is a statute that grants access to certain existing records.

Second, as a general rule, if information requested under the Freedom of Information Law does not exist in the form of a record or records, an agency, such as the Executive Chamber, is not required to create or prepare a new record in response to a request [see attached, Freedom of Information Law, §89(3)].

Third, in the context of your correspondence, if records relative to biographical information more detailed than that sent to you do not exist, there would be no obligation to prepare a more detailed record on your behalf.

Fourth, resumes and other related biographical information simply might not exist with respect to some appointees. Having worked in the Department of State for many years, I know that Alexander Levine and the Governor have known one another for years. Due to their lengthy relationship, it is possible that there was no necessity that Mr. Levine submit or prepare a detailed biography as a precondition to appointment.

Lastly, since you mentioned that you were able to obtain more information from the public library regarding a particular appointee than you could under the Freedom of Information Law, I would like to point out that in my view, that is neither unusual nor reflective of a failure to comply with the Freedom of Information Law. Speaking from personal experience, I have been the subject of various newspaper articles, which invariably contain more personal and biographical information than that found in my personnel file.

In short, it is entirely possible that the response to your inquiry was proper.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2887

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

April 15, 1983

Ms. Barbara Fischkin
Newsday
Long Island, NY 11747

The staff of the Committee on Public Access 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. Fischkin:

I have received your letter of April 6, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you requested police reports from the Suffolk County Police Department regarding specified burglaries, which you identified by case number in your request. You also indicated that the records "all concern cases which have been completed" and that you "would be satisfied at this time to obtain the records without the names of victims but with their addresses."

Having received a copy of Suffolk County's determination on appeal, a copy of which was sent to the Committee as required by §89(4)(a) of the Freedom of Information Law, the records were withheld under three of the grounds listed in §87(2), as well as considerations of "public interest policy".

The first ground for denial cited in the determination by Ms. Joyce Long, Assistant County Attorney, is §87(2)(b), which permits an agency to withheld records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy". With respect to the other two grounds, it was stated in the determination that:

> "...if such records deal with a pending case, the divulgence of such records to the general public under FOIL could interfere with law enforcement investigation or a judicial proceeding, or disclose confidential information and could be withheld pursuant to POL §87(2)(e). Some victims of crimes might feel that wholesale availability of their identities and addresses to anyone requesting same under FOIL could endanger their life or safety and should, therefore, be withheld pursuant to POL §87(2)(f)."

Ms. Long also wrote that:

> "[T]he fact that the information you seek may be a matter of public record in court files or available from other agencies does not affect the public interest policy of confidentiality in this particular instance.
>
> "Therefore, it is the considered opinion of this office that the confidentiality and privacy expectations of victims of burglaries and complainants in regard to these particular records must be honored by the Police Department and, based also on public interest policy, the denial of access to such identifying material is upheld."

I disagree with the determination, particularly due to its breadth. In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, it is emphasized that the introductory language of §87(2) states that records "or portions thereof" may be withheld in accordance with the ensuing grounds for denial. Consequently, I believe that the Legislature envisioned situations in which a single record might be both accessible or deniable in part. Moreover, the quoted language in my view requires the agency to review the records sought in their entirety to determine which portions, if any, might justifiably be withheld under one or more of the bases for withholding.

Third, many of the grounds for denial appearing in the Freedom of Information Law, including those cited in the determination, are based largely upon potentially harmful effects of disclosure. As indicated in the determination, "if such records deal with a pending case" disclosure "could interfere with a law enforcement investigation..." Nevertheless, if, as you wrote, the cases "have been completed", it is possible that the harmful effects of disclosure that once existed may have disappeared.

Further, although I am not familiar with records related to the cases to which the determination alluded, i.e., those that are "a matter of public record in court files or available from other agencies", I believe that access to those records has a bearing upon the capacity to deny the records that you are seeking.

If, for example, the burglaries resulted in the arrest and conviction of a particular individual, presumably the proceedings were conducted in open court and the records regarding the proceedings are accessible from the clerk of the appropriate court. Under that kind of circumstance, if the information sought is indeed available from different sources, I do not believe that a denial of the same information could be justified.

Another possible source of some of the information involves the police blotter or its equivalent. As you may be aware, in Sheehan v. City of Binghamton [59 AD 2d 808 (1977)], it was found that a police blotter, a log or diary of any event reported by or to a police department, is available. In that decision, it was indicated that a police blotter generally does not contain investigative information, but rather that it is merely a summary of events or occurrences.

If at the time of the burglaries, blotter entries or their equivalents were recorded (i.e., tapes or transcripts of 911 emergency calls or "sprint printouts"), I believe that such records would be available. Further, it is possible that the names of victims or complainants, details which you do not seek, would not appear. For instance, if

a blotter entry simply indicated a "burglary at 64 Main Street", that type of item would in my view be accessible, If that information, or perhaps similar information is found in the records sought, I believe it would be available.

Fourth, based upon the foregoing contentions, it is questionable in my view whether the grounds for denial cited in the determination could be justified, or if so, the extent to which they may remain valid bases for withholding.

With regard to "unwarranted invasions of personal privacy", it is reiterated that if information relating to the records sought is accessible from other sources, disclosure might constitute a permissible invasion of personal privacy, particularly if names are deleted.

The second ground for denial cited in the determination 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..."

As intimated earlier, the language quoted above is not open-ended. If records compiled for law enforcement purposes pertain to a pending investigation, §87(2)(e)(i) might appropriately be asserted. However, if as you indicated, the cases are closed and the investigations have ended, it would appear that the harmful effects of disclosure envisioned by §87(2)(e) no longer exist, and that, therefore, records once deniable have become available [see Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty.,

August 11, 1981, aff'd w/no opinion, 85 AD 2d 672, motion for leave to appeal dismissed, 55 NY 2d 1018 (1982); Hawkins v. Kurlander, 458 NYS 2d 872 (1983)].

The third ground for denial cited in the determination is §87(2)(f), which states that an agency may withhold records or portions thereof which if disclosed would "endanger the life or safety of any person". In my view, the sufficiency of a denial grounded upon §87(2)(f) must be based upon the specific factual circumstances surrounding a case. Again, if other records related to those sought are available from different sources, §87(2)(f) might not be applicable.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Captain Johnson
Joyce Long

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2888

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

April 18, 1983

Ms. Sharon Wells
Executive Director
United Cerebral Palsy Association
of Fulton & Montgomery Counties, Inc.
R.D. #5
Truax School
Amsterdam, New York 12010

The staff of the Committee on Public Access 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. Wells:

As you are aware, I have received your letter of April 13 and the materials attached to it. You have requested an advisory opinion regarding a denial of your request for a draft fiscal audit prepared by the Office of Mental Retardation and Developmental Disabilities (OMRDD) regarding "the Greater Amsterdam School Districts Tecler Pre-School Diagnostic Center" (the Center).

According to your letter, you requested a copy of a program audit conducted in 1982 by OMRDD regarding the Center, a copy of which was delivered to you in January of this year. In conjunction with that audit, OMRDD "on or about June 1982" began preparation of a fiscal audit of the Center. A request for the draft fiscal audit was sent to Michael Mascari, Assistant Commissioner, on February 24. John Harding responded on behalf of Mr. Mascari on March 4, indicating that the draft could be withheld under the Freedom of Information Law, and that "[I]n the event that you feel an appeal is warranted, you should contact Mr. William Knowlton", public access officer for OMRDD. On March 10, you appealed to Mr. Knowlton, who acknowledged its receipt on March 16, and stated that an appeal should be directed to Commissioner Slezak. As such, Mr. Knowlton forwarded your appeal to Commissioner Slezak. To date, no determination regarding your appeal has been rendered.

I would like to offer the following comments regarding the situation described in the correspondence.

First, although the fiscal audit might be characterized as a "draft", I believe that it is nonetheless subject to rights of access granted by the Freedom of Information Law. In this regard, §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."

Due to the breadth of the language quoted above, I believe that the draft fiscal audit constitutes a "record".

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 only one of the grounds for denial is relevant to the record sought. Due to its structure, however, portions of the audit, even though considered "draft", are in my opinion likely available under the Freedom of Information Law.

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. 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.

While I believe that the draft audit could properly be characterized as intra-agency material, or perhaps inter-agency material, since a copy was sent to the School District, those portions consisting of statistical or factual information [see e.g., Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979); Ingram v. Axelrod, App. Div., 456 NYS 2d 146 (1982)] are in my view available. It is noted, too, that it has been found that auditors' work papers consisting of statistical or factual data are available [see Polansky v. Regan, 81 AD 2d 102 (1981)]. Conversely, until the audit is made final, those portions reflective of advice, suggestions, recommendation, or impression, for example, could in my opinion be withheld at this juncture.

Lastly, as you indicated in your appeal, the Freedom of Information Law requires that a determination on appeal must be rendered within seven business days of the receipt of an appeal. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "...any person denied access to record may within thirty days appeal in writing such denial or 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."

While I believe that your initial request should have been directed to OMRDD's designated records access officer, Mr. Knowlton, rather than Mr. Mascari, it is clear that Mr. Knowlton considered your letter of March 10 an appeal. As such, the time limitation for rendering a determination on appeal expired approximately a month ago. Although it is likely preferable to obtain a determination, judicial interpretations of the Freedom of Information Law indicate that a failure by an agency to respond in a timely matter pursuant to §89(4)(a) constitutes a constructive denial and an exhaustion of one's administrative remedies that may be followed by the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 108 Misc. 2d 536, 87 AD 2d 388, ___ NY 2d ___ (1982)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Commissioner Slezak
Nancy Roth, Office of Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2289

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

April 18, 1983

Mr. Victor Crichton
[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 corespondence.

Dear Mr. Crichton:

I have received your letter of April 1 in which you requested records from this office.

It is noted at the outset that the address of the Committee has changed and that your letter was forwarded by the Office of General Services to the Committee and reached this office on April 14.

According to your letter and the correspondence attached to it, in January of 1979, you wrote to Stephen Greller, Acting District Attorney of Putnam County, for the purpose of requesting records pertaining to you concerning an arrest and charges that were apparently dismissed. Mr. Greller, in a letter dated January 11, 1979, wrote that "[I]t is the understanding of the office that the items you have requested are specifically exampted by Section 88, paragraph 7 of the Freedom of Information Act..." Since Mr. Greller added that, if you disagreed with his interpretation and could write to this office, you have requested the records from the Committee.

In this regard, I would like to offer the following comments and suggestions.

First, the Committee on Public Access to Records is responsible for providing advice 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 authority to require an agency to grant or deny access to records.

Second, to seek records under the Freedom of Information Law, requests should be directed to the agencies that possess the records sought. For instance, as you did in 1979, a request for records in possession of the District Attorney should be directed to his office.

Third, when submitting a request, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Due to the passage of time, if you make a request, it is suggested that you include as much detail as possible, such as names, dates, descriptions of events and similar information that might enable agency officials to locate the records sought.

Fourth, I disagree with the response sent to you by Mr. Greller in 1979. He cited a provision of the Freedom of Information Law as originally enacted in 1974. The Freedom of Information Law, however, was repealed and replaced with a "new" Freedom of Information Law that became effective on January 1, 1978.

The provision that might be viewed as a replacement for §88(7)(d) dealing with investigatory files compiled for law enforcement purposes is the current §87(2)(e). That 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 disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

In my view, the language quoted above is based upon potentially harmful effects of disclosure. For instance, if records compiled for law enforcement purposes pertain to an ongoing investigation, disclosure might interfere with the investigation. In such circumstances, the records could justifiably be withheld. On the other hand, if records relate to an investigation that has been terminated, disclosure would no longer interfere, and the records might be available.

With regard to the records that you are seeking, although I believe that §87(2)(e) would not likely apply, it is possible that other grounds for denial might in part be applicable, depending upon the contents of the records.

Lastly, I have enclosed a copy of §160.50 of the Criminal Procedure Law, which pertains to situations in which a criminal action or proceeding against a person is dismissed in favor of the person. In such situations, records may be returned to the person or sealed, depending upon the records and circumstances. It is suggested that you review §160.50 with your attorney if possible.

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:jm

Encs.

cc: Mr. Stephen Greller

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2890

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

April 18, 1983

Mr. Matthew Tallmer
[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. Tallmer:

I have received your letter of April 1, in which you requested a "ruling" regarding a request for records of the New York City Tax Commission.

According to your letter, while working as a freelance journalist for the Staten Island Register, you sought to obtain information pertaining to assessments at the Staten Island office of the Tax Commission. You wrote that you were informed that you needed the "permission of the chief assessor", Mr. Seymour Fetterman, because you are "not the owner of the property". You also stated that you were not permitted to look at the records, but rather that Mr. Fetterman instructed an employee to read the records to you. Further, when copies of records were sought, you were apparently told, without any reason, that you "could not xerox the files". You were also required to sign a paper, identify yourself and your affiliation with the newspaper, in order to "clear" your request.

Your questions involve the propriety of Mr. Fetterman's action and whether the Freedom of Information Law and/or §§1113 and 1114 of the New York City Charter grant access to the records in question.

I would like to offer the following comments regarding your inquiry and the situation described in your letter.

First, it is noted that this office does not have the authority to issue a "ruling" or a binding determination. On the contrary, the Committee on Public Access to Records has the authority to provide advice regarding the Freedom of Information and Open Meetings Laws.

Second, since the nature of the records sought was not indicated, clear direction regarding rights of access cannot be given. However, records containing information relative to assessments are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 102 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969); Szikszay v. Buelow, 436 NYS 2d 558 (1981); Morris v. Martin, 55 NY 2d 1026 (1980)]. Moreover, since Mr. Fetterman permitted an employee to read records to you, I would conjecture that the records fall outside of any statutory requirement of confidentiality, and that, therefore, the records are likely available under both the Freedom of Information Law and the provisions of the Charter that you cited.

Third, assuming that records are available for reading or inspection, there is also a right to request copies upon payment of the appropriate fees for photocopying [see attached Freedom of Information Law, §89(3)].

Fourth, Mr. Fetterman's responses appear to have been given without recognition of the procedural requirements of the Freedom of Information Law. In this regard, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations regarding the procedural aspects of the Law (see attached). In turn, §87(1) requires each agency to adopt regulations consistent with those of the Committee.

The regulations include various provisions, including requirements that a denial be given in writing, stating the reasons therefor, and that an applicant be apprised of his or her right to appeal a denial to the head of the agency [see regulations, §1401.7 and Freedom of Information Law, §89(4)(a)].

Fifth, you wrote that Mr. Fetterman required you to "sign a piece of paper" and indicate your affiliation with a newspaper. In my opinion, although an applicant may be required to submit a request in writing, he or she need not state an affiliation or a reason for seeking records. 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".

Lastly, with respect to the Freedom of Information Law and §§1113 and 1114 of the New York City Charter, the relationship between those provisions is in my view unclear. To the best of my knowledge, no judicial decisions have been rendered concerning the Freedom of Information Law as it affects the Charter provisions in question, or vice versa, since the amended Freedom of Information Law became effective in 1978.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Mary Mann

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2891

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

April 19, 1983

Mr. Larry Barnes
82-C-854
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. Barnes:

I have received your recent letter in which you requested assistance in obtaining records.

As I understand your letter, you have unsuccessfully attempted to obtain stenographic minutes of your trial as well as a probation report. In this regard, I would like to offer the following comments and suggestions.

First, with respect to stenographic minutes, it is noted that the Freedom of Information Law does not apply to the courts or court records. Nevertheless, many court records are available under various provisions of law (see e.g., §255 of the Judiciary Law). Therefore, it is strongly suggested that you attempt to reach your court appointed attorney or perhaps a representative of Prisoners' Legal Services for the purpose of seeking assistance.

Second, with regard to your probation report, assuming you are referring to a presentence report, access to such a record is governed by the provisions of §390.50 of the Criminal Procedure Law. Under the cited provision a presentence report is considered confidential, except under specified circumstances. Further, I believe that copies of the presentence report are obtainable only from the sentencing judge. As such, once again, it is recommended that you seek to contact 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2892

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

April 19, 1983

Mr. Louis M. Pinto
Claims Manager
General Accident Insurance
71 State Street
P.O. Box 369
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. Pinto:

I have received your letter of April 5 addressed to Ms. Baldasaro of this office.

You have asked that an advisory opinion be sent to the Syracuse Police Department "reminding them that they are in violation of the state Freedom of Information Law by charging $7.00 for police reports".

In conjunction with your request, a copy of this opinion will be sent to the Police Department. However, it is noted that this office has no authority to compel compliance with the Freedom of Information Law or state with certainty that an agency is in violation of the Law. Since the Committee can merely provide advice, I believe that only a court has the capacity to determine that a violation of law has been committed.

With respect to the fees assessed by the Department, it is noted that §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982 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 fee in excess of twenty-five cents per photocopy was valid, if it was established by law, such as a local law or ordinance, for example. 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 or other types of police reports, but rather fees charged for copies of records in general. From my perspective, although the twenty-five cent limitation may pertain to the reports in question, 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.

I hope that I 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: Syracuse Police Department

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2893

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

April 19, 1983

Mr. Fred Greenberg
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Greenberg:

I have received your letter of April 3 and the correspondence attached to it.

According to your letter, a request made under the Freedom of Information Law was delivered to William Del Seni, records access officer for the New York City Board of Education, on October 4. Apparently, Ruth Bernstein, deputy records access officer, wrote to you later that month requesting a clarification of your request and indicating that if no clarification was received by a specified date, the matter would be considered "closed". Notwithstanding Ms. Bernstein's letter, you appealed the denial based upon a failure to respond. Since you have not yet received the records sought, you have asked that I "investigate" the matter.

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

First, due to the limited physical and statutory resources of the Committee, this office does not have the capacity to conduct what might be characterized as an "investigation".

Second, if as Mr. Nolan indicated, Ms. Bernstein requested but never received a clarification of the records sought, it would appear that the matter had indeed been "closed" on the date specified by Ms. Bernstein. Under the circumstances, to maintain your request, additional clarifying information was apparently needed to ascertain the existence of the information sought and then to evaluate its contents in terms of rights of access granted by the Freedom of Information Law.

Third, if you continue to seek the records in question, assuming that records exist, it is suggested that you contact Ms. Bernstein. By so doing, you might be able to provide the necessary clarification for the purpose of submitting 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

RJF:jm

cc: Ruth Bernstein

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2894

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

April 19, 1983

Mr. Robert Carlsen
Village of Walton
Municipal Building
21 North Street
Walton, NY 13856

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Carlsen:

I have received your letter of April 6 addressed to Ms. Baldasaro of this office in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, the "Village of Walton received a comprehensive three year grant from H.U.D." Some of the grant monies were apparently designated for housing rehabilitation. In this regard, you wrote that:

> "As the program got underway, one thing became clear. That was the concern shown by many people regarding confidentiality and notoriety. Being in a small town we could understand that many of these people would be ashamed and embarrassed by their need to request assistance from government to repair their homes."

As such, the Village housing manager assured applicants that information regarding their identities, incomes and similar personal details "would be kept confidential".

Since accountability regarding the program is maintained by means of the submission to HUD of an annual report, which is available to the public, it is your contention that personal information regarding applicants need not be made available. Your question involves the propriety of the stance taken regarding access to records concerning the applicants.

I concur with your contentions. I would, however, like to offer the following observations with respect to the situation.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the Village of Walton, are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, the Freedom of Information Law enables an agency to withhold records or portions of records the disclosure of which would result in an unwarranted invasion of personal privacy [see §87(2)(b)]. While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view seek to enable government to prevent disclosures concerning the personal details of individuals' lives. As such, the central question involves the extent in which disclosure would constitute an unwarranted as opposed to a permissible invasion of personal privacy.

Third, from my perspective, a disclosure that permits the public to determine the general income level of a participant in the program would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, as you indicated, some individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law). In another area, §136 of the Social Service Law requires that records identifying applicants for or recipients of public assistance be kept confidential. As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy.

Fourth, it is emphasized that when dealing with privacy, attempts to balance interests and subjective judgments must of necessity by made. Therefore, although I might believe that disclosure of particular information would be offensive and result in an unwarranted invasion of personal privacy, another person might feel that disclosure would be innocuous, thereby resulting in a permissible invasion of personal privacy. In short, I do not feel that there are specific rules that one may follow in determining issues relative to personal privacy. However, based upon the Freedom of Information Law and the direction provided by other laws, such as the Tax Law and the Social Services Law, it would appear that the records reflective of the identities of individuals who receive grants under the program in question could justifiably be withheld.

Lastly, as a general rule, I do not believe that agency officials can promise confidentiality, unless a statute requires that particular records be kept confidential [see Freedom of Information Law, §87(2)(a); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. However, since the information in question appears to be deniable for the reasons indicated above, the promise of confidentiality given is likely harmless.

I hope that I 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-2895

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

April 19, 1983

Robert F. Reninger
[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. Reninger:

I have received your letter of April 7 in which you requested an advisory opinion.

Specifically, you have asked "whether a School District can limit access to District Records to those days on which the District Schools are in session." In the context of your question, you indicated that your request did not involve student records, but rather records "stored in the Central Administration Office which was open for business." You also indicated by means of the correspondence attached to your letter that the request, which was made on March 29, involved minutes of meetings of the Board of Education for January and February.

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

First, §89(1)(b)(iii) of the Freedom of Information Law requires that the Committee on Public Access to Records promulgate regulations regarding the procedural implementation of the Law. In turn, §87(1) requires each agency, including a school district, to adopt regulations consistent with those of the Committee.

Second, with respect to the hours during which requests may be made, §1401.4(a) of the Committee's regulations states that:

> "[E]ach agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

From my perspective, if the administrative offices of a school district are open for business, even though classes may not be in session, a request may be made during the regular business hours of the administrative offices.

Third, it is noted that the Open Meetings Law provides specific direction regarding the time within which minutes of 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 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 must be prepared and made available within two weeks of such meetings, and minutes reflective of action taken during an executive session must be prepared and made available within one week of the 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: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2896

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

April 19, 1983

Mrs. Marion M. Dumond
Library Director
Ellenville Public Library and Museum
40 Center Street
Ellenville, New York 12428

The staff of the Committee on Public Access 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. Dumond:

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

You have raised a variety of questions concerning the application of the Freedom of Information Law to a public library and the public's right of access to a set of survey maps in possession of the library. Specifically, you would like to determine whether copies of such maps must be made available given the fact that the collection is deteriorating due to age.

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

First, a public library is in my opinion subject to the Freedom of Information Law. Section 86(3) defines "agency" to include:

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

Further, §253(2) of the Education Law construes the term "public" library as:

> "...a library, other than professional, technical or public school library, established for free public purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public..."

Since a public library is a governmental entity performing a governmental function for a municipality, in this instance, Ellenville, I believe that the Ellenville Public Library falls within the requirements of the Freedom of Information Law.

You have also inquired as to the application of the Freedom of Information Law to "an archival collection of a local history museum operated by a public library". Without further knowledge of the legal arrangement by which the Ellenville Public Library operates the museum, I can only advise you that this opinion would apply to the archival records of a museum if the museum was a "governmental entity performing a governmental or proprietary function" for a municipality such as Ellenville.

Second, the Freedom of Information Law applies to all records of an agency. The definition of "record" in §86(4) of the Law is very broad and 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."

Therefore, the collection of local survey maps in my view constitute "records" subject to rights of access granted by the Freedom of Information Law. Moreover, the purpose for which a record may have been created is not determinative of its availability 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 grounds for denial appearing in §87(2)(a) through (h) of the Law. It is also noted that §89(3) of the Law provides in relevant part that an agency "shall provide a copy" of an accessible record on request. Therefore, the Freedom of Information Law grants the right to inspect as well as the right to copy.

Fourth, in addition to the New York State Freedom of Information Law, a public library is also subject to the provisions of the federal Copyright Act, which in some instances might limit the right to reproduce records in possession of libraries or archives. Specifically, 17 U.S.C.A. §108, entitled "Limitations on exclusive rights: Reproduction by libraries and archives", allows a library to make single copies of copyrighted materials under the following principles regarding "fair use":

> "(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
>
> (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
>
> (3) the reproduction or distribution of the work includes a notice of copyright."

Consequently, although copies must be made available under the Freedom of Information Law by an agency subject to the Law, a public library in my opinion should do so in conjunction with the requirements of the fair use standards contained in the Copyright Act.

Fifth, although an agency subject to the Freedom of Information Law must generally provide photocopies upon payment of the appropriate fees, the Law does not specifically address the concerns of an agency such as a public library, which is charged with the custody of historically valuable materials, such as archival records. Consequently, I believe that public libraries in possession of such records should follow a "common sense" approach in protecting its archival collections. In order to protect archival records from damage or destruction, it is suggested that controls may be exercised to prevent direct access to the records, possibly by limiting physical contact during inspection. Inspection by limited access may be the only means of complying with the Freedom of Information Law where attempts to photocopy the material would result in damage or destruction.

To provide an alternative to the further deterioration of your archival map collection, I have discussed the situation with the Office of the State Archives at the Department of Education. A representative of that office, Bruce Dearstyne, is in the process of planning a series of workshops on conservation methods which may be helpful to you; he can be reached at (518) 474-6926. It is suggested that you contact his office to obtain further details.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Assistant to the Executive
Director

PPB:RJF:jm

cc: Bruce Dearstyne

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2892

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

April 20, 1983

Mr. Lindsay Audin
[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. Audin:

I have received your correspondence of April 3, which reached this office on April 11.

According to your letter, you requested from this New York Energy Office the names of building operators who manage facilities using 5,000 kilowatt-hours of electricity per month and who reside within specified areas. The Energy Office denied your request on the basis of §§87(2)(b) and 89(2)(b)(iii) of the Freedom of Information Law. It is your contention that those provisions, which involve the protection of personal privacy, cannot justifiably be cited to withhold the records sought. In addition, you indicated that as chairman of the Board of the Energy Task Force, "a non-profit organization working for energy saving in the lower income community", you do not feel that the request was made for commercial or fund-raising purposes.

You have requested assistance from this office in obtaining the list and a clarification of requirements in the Freedom of Information Law regarding the capacity to appeal a denial.

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

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, it appears that the only 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". Additional guidance regarding the standard found in §87(2)(b) is provided by §89(2)(b), which lists five examples of unwarranted invasions of personal privacy. The provision cited by Mr. Klimberg, General Counsel to the Energy Office, 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..." [§89(2)(b)(ii)].

Third, in my view, the language quoted above represents the only instance in the Freedom of Information Law in which rights of access may be contingent on the reason for which a request is made. As a general rule, 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]. Nevertheless, since §89(2)(b)(iii) refers to the purpose for which records might be used, questions often arise regarding requests for lists and whether they would be used for "commercial or fund-raising purposes".

Fourth, assuming that the entity that you represent, the Energy Task Force, is indeed a not-for-profit corporation and that the list would not be used for commercial or fund-raising purposes, it would appear that the list should be made available. It is noted that three judicial decisions involving requests for lists of names and addresses have directed that lists requested by not-for-profit corporations should be made available under the Law, for §89(2)(b)(iii) would not be applicable [see New York State Association of Realtors, Inc. v. Paterson, Sup. Ct., Albany Cty.,

July 15, 1981; New York Teachers Pension Associates, Inc. v. Teachers' Retirement System of City of New York, 98 Misc. 2d 118, aff'd 71 AD 2d 250 (1979); and Matter of New York Veterans Police Association, 1st Dept., App. Div., NYLJ, March 7, 1983].

Fifth, with respect to an appeal, §89(4)(a) of the Freedom of Information Law states that an appeal may be directed to the head of the agency, or whomever is designated by the head of the agency to render determinations on appeal, within thirty days of a denial. Since the denial by Mr. Klimberg is dated March 14, more than thirty days have transpired. However, there is nothing in the Freedom of Information Law that would preclude you from submitting a new request [see Matter of Mitchell, Sup. Ct., Nassau Cty., NYLJ, March 9, 1979].

Lastly, since the time for submitting an appeal has terminated, it is suggested that you submit a new request to Mr. Klimberg. Further, it is also recommended that you provide the same type of information included in your letter addressed to this office, i.e., that you represent a not-for-profit corporation and that you indicate the purpose for which the records are requested. You might also want to indicate as well whether, if you receive such a list, it would be further disseminated or used only by the Energy Task Force.

I hope that I 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: Stanley B. Klimberg

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2898

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

April 20, 1983

Mr. Warren J. Grossman
[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. Grossman:

I have received your letter of April 12 in which you requested advice regarding the Freedom of Information Law.

Your first question involves "the steps to be taken, under the Freedom of Information Law, when there is no response from either the Records Access Officer or the duly designated Appeals Officer".

In this regard, both 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 for responses to requests.

Specifically, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt

of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. However, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7 (b)].

In my view, a failure to respond within the designated time limits results in a 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 grant access to the records sought or "fully explain in writing to the person requesting the record the reasons for further denial". 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 judicially 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, 108 Misc. 2d 538, 87 AD 2d 388, appeal dismissed, NYLJ, September 13, 1982].

In your second area of inquiry, you requested advice regarding "the legal steps that may be taken to obtain information denied under the Freedom of Information Law" and whether "there are provisions to recover legal costs incurred trying to obtain information denied".

As stated earlier, the "steps" to follow in seeking records are described in the Law and the regulations. If an agency denied access by means of a written determination on appeal or by means of a failure to respond within the statutory time limit, again, as indicated above, a judicial proceeding may be commenced under Article 78 of the Civil Practice Law and Rules.

With respect to the recovery of legal expenses, a new provision, §89(4)(c), which became effective on October 15, 1982, states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2899

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

April 20, 1983

Mr. Waldyr Correa
82-C-842
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. Correa:

I have received your letter of April 11 in which you requested assistance regarding your efforts to obtain records from the New York Telephone Company.

Specifically, according to your letter, it is your understanding that information in possession of New York Telephone is "a matter of public record since it is a part of a business transaction". You wrote further that you were informed that "New York Telephone monitors telephone calls and maintains records...for verifying what parties call who and the duration of the connection."

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

First, I am not sure that your information is accurate with respect to the monitoring of calls by New York Telephone.

Second, even if the New York Telephone maintains records as you have described them, I believe that they would fall outside the requirements of the Freedom of Information Law. In brief, the Freedom of Information

Law applies to records of agencies of government. Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

Since the New York Telephone Company is a private corporation and not a governmental entity, its records in my view fall outside the scope of the Freedom of Information Law, for it is not an "agency".

Lastly, although New York Telephone is not subject to the Freedom of Information Law, it is regulated by the Public Service Commission. To obtain more information regarding records of New York Telephone, it is suggested that you write to the Public Service Commission, Office of Consumer Complaints, Agency Building 3, Rockefeller Plaza, Albany, NY 12223.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2900

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 20, 1983

Mr. Angel Flores
81-A-3976 B.14/31
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. Flores:

I have received your recent letter in which you requested various materials regarding rights of access to records at both the state and federal government levels. You also raised a question regarding access to records of a hospital and social services agencies.

First, enclosed are the materials that your requested.

Second, with respect to your question, you are apparently seeking to establish your status as the father of a child in an attempt to "ward off any adoption proceedings". However, your requests for records have been denied by a hospital and social services agencies.

Under the circumstances, it is possible that the denials have been proper.

With respect to hospital records, it is noted that a private hospital and its records would likely fall outside the scope of the Freedom of Information Law. In brief, the coverage of Freedom of Information Law is limited to records of governmental entities in New York [see definition of "agency", §86(3)].

Further, even if the records are maintained by a public hospital, they could likely be denied under §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records 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, the first two of which involved:

> "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..."

With respect to social services agencies, often records of such agencies are required by statute to be kept confidential. For instance, §136 of the Social Services Law generally requires that records identifying applicants for or recipients of public assistance be kept confidential; similarly, §372 of the Social Services Law requires confidentiality regarding records pertaining to children involved in public assistance programs. Those records would be deniable under §87(2)(a) of the Freedom of Information Law concerning records that are "specifically exempted from disclosure by state or federal statute".

Lastly, it is suggested that you contact and discuss the matter with an attorney who has expertise regarding paternity and the Social Services 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-2901

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

April 21, 1983

Mr. Herbert J. Fabricant
Vice President & General Counsel
Catskill Regional Off-Track
Betting Corporation
Park Place
Pomona, NY 10970

Dear Mr. Fabricant:

I have received your letter of April 14, which reached this office today.

Your letter makes reference to an advisory opinion that I prepared at the request of Kenneth J. Franzblau on April 7. You indicated that you have not seen a copy of his letter to this office, and that, in the past, Mr. Franzblau sought a list of employees of the Corporation, with their home addresses. It appears to be your contention that since §87(3)(b) of the Freedom of Information Law refers to the "public office address", home addresses need not be made available.

In this regard, I have enclosed a copy of Mr. Franzblau's letter to me. Please note that he requested direction regarding rights of access to "the names, job titles, and job addresses" of the employees of the Corporation. As such, Mr. Franzblau did not refer to home addresses of employees.

Moreover, I concur with your intimation that home addresses of public employees generally need not be made available. In my view, a home address, a social security number, an indication of marital status or other personal information unrelated to the performance of one's official duties may be withheld or deleted from records on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(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:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2902

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

April 21, 1983

Mr. Michael Purcell
76-A-2063 (H2-211)
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. Purcell:

I have received your letter of April 12 in which you requested advice under the Freedom of Information Law.

Specifically, you have asked how you might obtain copies of medical records pertaining to you kept by Kings County Hospital, as well as a report of a psychologist who testified in Kings County Supreme Court prior to your trial. You indicated that the report is in possession of the Kings County District Attorney.

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

First, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject. The pamphlet may be particularly useful to you, for it contains a sample letter of request.

Second, with respect to records of Kings County Hospital, I believe that such records fall within the scope of the Freedom of Information Law, for the facility in question is a public hospital and, therefore, is an "agency" as defined by §86(3) of the Freedom of Information Law.

While medical records might be deniable if requested by a third party on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], some of the medical records are likely available to you if you present reasonable proof of identity [see Freedom of Information Law, §89(2)(c)(iii)].

It is likely however, that some of the records might justifiably be withheld. One of the grounds for denial in the Freedom of Information Law involves inter-agency and intra-agency materials [see §87(2)(g)]. Under that provision, statistical or factual information, such as laboratory test results, would in my view be available; nevertheless, those portions of the materials consisting of advice, recommendation or diagnostic opinion, for instance, might justifiably be withheld.

Perhaps a better method of obtaining medical records would involve a different provision of law, §17 of the Public Health Law. In brief, although that provision does not require a hospital or physician to provide access to medical records directly to a patient, a physician acting on behalf of a patient may request and obtain such records. Therefore, if possible, it is suggested that you contact a physician for the purpose of requesting the medical records on your behalf from Kings County Hospital.

Third, with regard to the psychologist's report, it is suggested that a request be directed to the "records access officer" for the Office of the Kings County District Attorney. It is noted that §89(3) of the Freedom of Information Law requires that a request "reasonably describe" 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 number and other information that may assist agency officials in locating the records sought.

Assuming that the psychologist's report was introduced at a public proceeding, it appears that it would be available to you.

In the alternative, if, for example, the District Attorney no longer has possession of the report, it might be part of the court file concerning your case. In this regard, while the courts and court records are not subject to the Freedom of Information Law, many such records are available under various provisions of law [see e.g., §255 of the Judiciary Law]. If you request the report from the court files, a request should be directed to the clerk of the court, again, providing as much 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.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2903

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

April 21, 1983

Mr. Douglas Blackshear
81-C-333
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. Blackshear:

I have received your letter of April 6 in which you requested assistance regarding access to records.

Specifically, you indicated that you are interested in gaining access to records concerning yourself relative to your confinement in correctional facilities. Further, you indicated that your institutional counselor informed you that you would be required to "submit a motion to the court in order to inspect and receive" copies of records pertaining to you.

I respectfully disagree with the statement made by your counselor, for records may be available to you under the Freedom of Information Law (see attached), and there may be no necessity of initiating a judicial proceeding. In this regard, I would like to offer the following comments and 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.

Consequently, while some of the records in which you are interested might be deniable under the Freedom of Information Law in whole or in part, others might be available to you.

Second, §89(1)(b)(iii) requires the Committee to promulgate regulations concerning the procedural implementation of the Freedom of Information Law. In turn, §87(1) requires each agency to adopt regulations consisting with those of the Committee.

The Department of Correctional Services has promulgated regulations under the Freedom of Information Law that provide direction regarding inmate records and the procedures that should be followed when requesting records. Enclosed is a copy of the Department's regulations regarding access to records. It is suggested that you carefully review them.

Third, §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. If, for example, you submit a request for records pertaining to you without greater detail, it is likely that such a request, due to its vagueness, would not reasonably describe the records sought. Therefore, when making a request, it is recommended that you submit as much detail as possible, including dates, topic areas, file designations, identification numbers and similar information that might enable agency officials to locate the records sought.

Lastly, with respect to records kept at your facility, the enclosed regulations indicate that a request should be directed to the facility superintendnet.

I hope that I 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-2904

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

April 22, 1983

Leonard W. Krouner
OF COUNSEL
[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. Krouner:

I have received your letter of April 18 in which you requested an advisory opinion regarding rights of access to notices of appeals.

Specifically, you asked whether notices of appeals described in §§5515 and 5526 of the Civil Practice Law and Rules (CPLR) "are public records when filed with the appropriate government officials".

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

First, the Freedom of Information Law applies to all records of an agency. In this regard, §86(4) of the Freedom of Information Law defines "record" to include:

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

Therefore, when a notice of appeal comes into the possession of an agency, I believe that it constitutes a "record" subject to rights of access.

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, in brief, §5515 of the CPLR states that an appeal is made by serving a notice of appeal on the adverse party and in the office where the judgment or order of the court is entered. Rule 5526 of the CPLR describes the content and form of a record on appeal.

Unless there is a statute that specifically prohibits disclosure of particular records, I believe that the records in question would be available under the Freedom of Information Law from the agency with which an appeal has been filed, for I do not believe that any of the grounds for denial would be applicable.

Fourth, viewing the capacity to gain access to the records from a different vantage point, it appears that they would be available from other sources under other provisions of law. It is noted that the Freedom of Information Law is applicable to records of an "agency" as defined in §86 (3). The cited provision specifically excludes from the scope of the Freedom of Information Law records of the judiciary. "Judiciary" is defined in §86(1) of the Freedom of Information Law to mean "the courts of the state, including any municipal or district court, whether or not of record."

While the Freedom of Information Law does not apply to courts and court records, there are various other provisions of law which in my view generally grant access to the records that are the subject of your inquiry. 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."

Based upon the foregoing, it would appear that the records in question are available upon filing from the clerks of the appropriate courts. If that is so, I believe that the same records in possession of an agency subject to the Freedom of Information Law would be equally available from the agency.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2905

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

April 25, 1983

Ms. Roseann Skidmore
[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. Skidmore:

I have received your letter of April 16 in which you raised a series of questions regarding the Freedom of Information Law (see attached).

Your first question concerns the subject matter list and whether particular departments of county government are required to maintain such a list.

In my view, an answer to your question is dependent upon the direction given by the regulations adopted by a county under the Freedom of Information Law.

It is noted initially that agencies are required to prepare subject matter lists. Section 87(3)(c) of the Freedom of Information Law states that each agency "shall" maintain:

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

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 governing the procedural apsects of the Law. In turn, §87(1) requires each agency to develop its own regulations consistent with those of the Committee. With regard to a public corporation, such as a county, §87(1)(a) states that:

> "[W]ithin sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on public access to records in conformity with the provisions of this article, pertaining to the administration of this article."

As such, a county legislative body is in my opinion required to "promulgate uniform rules and regulations" applicable to all agencies under its aegis, including the county departments to which you referred.

The regulations promulgated by the Committee provide direction concerning the preparation of a subject matter list and who is responsible for its maintenance. Section 1401.2(a) of the regulations states in relevant part 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 tilte and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Further, §1401.2(b) provides that:

> "[T]he records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list..."

Since the governing body of a public corporation must designate one or more records access officers, whoever has been designated a records access officer is responsible for maintaining an up to date subject matter list.

In some counties, only one records access officer may have been designated. Under that circumstance, the designated records access officer should in my view maintain a subject matter list regarding the records of all county departments and offices. In other counties, records access officers may have been designated by department. Under that circumstance, each records access officer in my opinion would be required to maintain a subject matter list concerning the records of his or her department.

Your second area of inquiry involves a situation in which "incoming mail is time stamped with a date and time" by a county department. Since you were denied access to copies of materials that you sent to a department and that the department sent to you, you have asked whether such records are "obtainable under the Freedom of Information Law", and whether the denial may be appealed.

Materials that you transmit to an agency or which the agency transmits to you are obviously known to you. Therefore, I do not believe that any ground for denial listed in §87(2) of the Freedom of Information Law could justifiably be cited to withhold such materials. In addition, those materials in my view fall within the definition of "record" appearing in §86(4) of the Law. That provision defines "record" to include:

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

Due to the breadth of the language quoted above, materials that you send to a department would be "records" subject to rights of access. Similarly, copies of materials sent to you that remain in possession of the department also constitute "records".

The final question concerns the time within which an agency is required to respond to a request. Apparently when you requested a response within five business days of receipt of your request by the agency, you were told by agency officals that "you have no right in law to direct such ultimatums to us and we certainly are under no obligation to attend to them."

As you intimated, 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 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-2906

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 25, 1983

Dennis P. Buckley
Assistant Counsel
NYS Department of Agriculture
and Markets
Albany, New York 12235

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Buckley:

I have received your letter of April 13 and the materials attached to it and appreciate your interest in complying with the Freedom of Information Law.

According to your letter, Soypro International, Inc. (Soypro) initiated preparation of a feasibility study regarding the location of a soybean processing plant in central New York with a group of central New York farmers known as Lake Country Soya. Apparently the study was prepared by means of a grant from the federal government, which expired, and later via a contractual agreement between the Department of Agriculture and Markets (the Department) and Soypro. Copies of the report have been furnished to the Division of Farmers Home Administration (FHA) of the U.S. Department of Agriculture, the Department, and Lake Country Soya, which in turn "gave copies of the report to various financial entities" in order to encourage fiscal participation in plant construction.

On approximately December 20, both the FHA and the Department received requests for a copy of the report from the Agricultural Reclamation Corp. (ALR). You indicated that ALR may be interested in doing a feasibility study regarding locating a soybean processing plant in northern New York. Although the Department has not yet determined

rights of access to the report, you wrote that the freedom of information officer for FHA denied access to various aspects of the report, which you identified in your letter. The basis for denial under the federal Freedom of Information Act was 5 U.S.C. §552(b)(4), which states that the Act does not apply to "trade secrets and commercial or financial information obtained from a person and privileged and confidential".

Most recently, you received a letter from the president of Soypro regarding the release of the study and the possibility of the issuance of an opinion by this office. Mr. Fischer wrote that the:

> "...analytical methods employed, however, in developing valid conclusions from the data are unique, and originated with Soypro International. Soypro, as the source of those methods, could be seriously and adversely affected by making them available at this time to competitors, or to those who could use those methods to implement a project which would be competitive to the one under development by Lake Country Soya."

As such, Mr. Fischer suggested that "the analytical method as well as other materials in the report" should be considered "ineligible for release" under the Freedom of Information Law.

Under the circumstances, you have requested an opinion regarding rights of access to the Soypro report. In this regard, I would like to offer the following comments and observations.

First, since the report has been furnished pursuant to contract by Soypro to the Department, I believe that it is a "record" subject to rights of access granted by the Freedom of Information Law. 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."

Due to the breadth of the definition, it is in my view clear that the report in question constitutes a "record".

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, it would appear that the only ground for denial of significance is §87(2)(d), which states that an agency may withhold records or portions thereof that:

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

It is noted in this regard that the phrase "trade secret" is in my view subject to various interpretations. Further, the language of §87(2)(d) is flexible and is not open-ended. Although a record might at one time be considered a trade secret which if disclosed would cause substantial injury to the competitive position of a commercial enterprise, it is possible that specific events as well as the passage of time might result in an alteration of the effects of disclosure. While disclosure of a record today might cause substantial injury to a corporation's competitive position, the same information if disclosed in the future might not result in the harmful effects of disclosure envisioned in §87(2)(d).

Relevant in my opinion is the fact that the report has been disclosed by Lake Country Soya to various third parties. While those third parties might not be subject to access laws, such as state or federal freedom of information provisions, there is no law of which I am aware that would preclude those entities from further disseminating the report in whole or in part. Further, if indeed the report has been disseminated to third parties, to the extent that competitive injury could result, such injury may have already occurred.

It is noted, too, that questions regarding the sufficiency of an assertion that a record constitutes a trade secret often involve either technical expertise or knowledge of a particular industry. To be sure, I do not possess either expertise or knowledge concerning the soybean industry.

Nevertheless, having reviewed the report, it is in my view questionable whether its contents could be characterized as trade secrets that fall within the scope of §87(2)(d). Moreover, having reviewed those aspects of the report denied by the FHA, it is difficult to understand the breadth of the denial. For instance, you indicated that FHA withheld page ix under the "trade secret" exception in the federal Freedom of Information Act. That page quoted in full contains the following information:

> "IX. Processor Margins. Included in full.
>
> X. Possible Sites for the Facility. Included in full.
>
> XI. Financial Projections. Summarized.
>
> XII. Summary and Conclusions. Included in full."

From my perspective, a denial of access to the information quoted above is somewhat mystifying, for it is sufficiently brief and vague that it could not in my view result in any competitive disadvantage if disclosed.

Similarly, entire chapters of the report were denied under the "trade secret" exception of the federal Act. In many instances, however, the information contained in those chapters is clearly based upon information provided by government sources. As such, presumably it was or could be made available to any person under the federal Act. In short, without expertise or knowledge of the industry, while I could not advise with certainty that the contents of the report do or do not constitute trade secrets, I do not believe that the breadth of the denial by FHA was appropriate.

Fourth, viewing the situation from a somewhat different vantage point, as you are aware, the Freedom of Information Law contains relatively new provisions regarding the procedural treatment of trade secrets. In brief, §89(5) of the Freedom of Information Law indicates that when a corporation submits records to a state agency that it considers to be trade secrets, the corporation may request

that the agency maintain such records separate and apart from all other agency records. Further, if a request for such records is made, the corporate submitter of the records must be informed of the request and given an opportunity to indicate why disclosure in its view would cause substantial injury to the competitive position of the firm. However, I do not believe that the new provisions are applicable to the situation described in your letter for two reasons. Section 89(5) applies only to "a person acting pursuant to law or regulation" [see §89(5)(a)(1)]. In this instance, the report was submitted to the Department pursuant to a contractual agreement under which the Department paid a substantial sum for completion of the report. Further, unless I am mistaken, there was no request at the time of submission of the report to the Department to the effect that it should be considered a trade secret in whole or in part.

Fifth, there is little in the way of judicial interpretation of §87(2)(d) of the Freedom of Information Law. The one decision of which I am aware and which you cited in your letter is Belth v. Insurance Department [406 NYS 2d 649, NYLJ, January 9, 1978]. In that case, it was held that computer models submitted to a regulatory agency regarding the means by which rates are derived could be withheld. In my view, the computer models sought in Belth, supra, represent records substantially different from the report in terms of content and utility to competitors. With respect to the report, although computer models may have been developed and used in its preparation, that type of information is not included in the report itself.

Sixth, it is emphasized that the Freedom of Information Law is permissive. The introductory language of §87 (2) indicates that an agency "may" withhold records or portions thereof that fall within one or more of the ensuing grounds for denial. Therefore, unless records fall within a statute the prohibits disclosure [see §87(2)(a)], an agency may in my view disclose records, even though a ground for denial might be applicable.

In sum, I believe that the report in question is subject to rights of access granted by the Freedom of Information Law, that the denial of certain aspects of the report by a federal agency was overbroad, that the extent to which §87(2)(d) might apply is questionable, and that the Department may disclose the report even if portions might be legally withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: R.W. Fischer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2907

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

April 25, 1983

Mr. Noel A. Chandonnet
Assistant Vice President
Government Employees Insurance
Company of Washington, DC
750 Woodbury Road
Woodbury, New York 11797

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Chandonnet:

I have received your letter of April 15 in which you requested an advisory opinion under the Freedom of Information Law.

Your question focuses upon "the propriety of fees set by the New York City Police Department for police reports". Attached to your letter is a series of correspondence indicating that the New York City Police Department charges ten dollars for police reports. Further, a form included among the correspondence indicates that the fee is not refundable even if no record is found.

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

As you are aware, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches, "except when a different fee is otherwise prescribed by statute". Unless I am mistaken, there is no statute that permits New York City to assess a search fee regarding the reports in question, nor is there a statute that permits the assessment of a fee in excess of twenty-five cents per photocopy.

Apparently the Police Department has based its fee upon §66-a of the Public Officers Law. In addition, other correspondence from the Department indicates that the fee of ten dollars is based upon §1105 of the New York City Charter as well as the determination rendered in Fox v. City of New York, 28 AD 2d 20 (1967).

Although §66-a of the Public Officers Law deals with accident reports and enables "the authorities having custody of such reports" to "prescribe reasonable rules and regulations in regard to the time and manner of such inspection", there is nothing in the cited provision that refers to a particular fee that may be assessed for inspection or copying.

Having reviewed the cited provision of the New York City Charter, I do not believe that §1105 establishes specific fees. On the contrary, §1105(a) states that:

> "[E]ach head of an agency may, except as otherwise provided by law, make rules and regulations for the conduct of his office or agency to carry out its powers and duties."

In my view, a fee adopted pursuant to §1105 would involve the promulgation of a regulation. Further, I do not believe that a fee established by regulation would fall within the exception in §87(1)(b)(iii) of the Freedom of Information Law permitting the assessment of fees established by "statute". Moreover, the amendment of the Freedom of Information Law replacing the term "law" with "statute" was in my opinion intended to supersede fees established by regulation. In its fourth annual report to the Governor and the Legislature on the Freedom of Information Law, the Committee recommended the amendment that became law on October 15, 1982, stating that:

> "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."

If the Committee's recommendation could be considered as an indication of legislative intent, I do not believe that a fee established by regulation pursuant to §1105 of the New York City Charter could serve to supersede the limitation of twenty-five cents per photocopy found in the Freedom of Information Law.

Lastly, as indicated previously, Fox v. City of New York, supra, has also been cited as a basis for the propriety of the fee in question. However, Fox deals with access to photographs found within accident reports; it does not deal with traditional photocopies of records. It is noted, however, that the fees for copies of photographs could in my view exceed twenty-five cents, for such records are not generally photocopied, and, as such, the fee for copies of photographs may be based upon the actual cost of reproduction in accordance with §87(1)(b)(iii) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rosemary Carroll

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2908

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

April 25, 1983

Ms. Ellen Barohn
The Village Times
P.O. Box VT
Setauket, NY 11733

The staff of the Committee on Public Access 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. Barohn:

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

According to your letter and the materials attached to it, you requested from the Three Village School District records pertaining to a School District employee "who has agreed to pay the district the sum of $10,000". You also indicated that your request is based upon the belief "that the employee in question agreed to pay the $10,000 because of an infraction of the rules governing either the sick leave or sabbatical leave policy of the school district".

From my perspective, records indicating the terms of the agreement between the employee and the District, as well as the identity of the employee, are available under the Freedom of Information Law. In this regard, I would like to offer the following comments.

It is noted initially 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.

While some of the grounds for denial might be relevant to the agreement and the identity of the employy involved, I do not believe that any could be cited to withhold the agreement itself or the name of the employee.

Perhaps the most relevant ground for denial is §87 (2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In 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 oficial 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); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); 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].

The decision cited above that is closest in terms of its facts to the situation that you described is Geneva Printing, supra. In that case, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. Part of the settlement involved an agreement to the effect that its terms would remain confidential.

Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefitted by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employees with the power to suppress the terms of any settlement".

Based upon the Freedom of Information Law and its judicial interpretation, therefore, it is my view that records reflective of the terms of the agreement, including the identity of the employee, are accessible.

The remaining ground for denial of possible significance is §87(2)(g). That provision 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. 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 records sought could likely be characterized as intra-agency materials. However, I believe that the agreement between the employee and the District is reflective of a final agency determination and, therefore, is available (see Farrell, Geneva Printing, Sinicropi, supra).

With respect to records pertaining or perhaps leading to the agreement, I believe that the two grounds for denial cited earlier are relevant.

If, for instance, memoranda concerning the situation were transmitted between or among District officials, such memoranda would in my view be intra-agency materials. To the extent that they contain advice, suggestion, or recommendation, I believe that they could be withheld.

On the other hand, however, it would appear that records indicating the amount of sick time accumulated or used for instance, consist of statistical or factual information and would be available under §87(2)(g)(i). Further, I believe that such records would be relevant to the performance of a public employee's official duties. It is noted that an explanation of why sick time might have been used, i.e., a description of the 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 opinion 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 statistical or factual information relative to the use of sick leave. Similar principles would in my view apply to records relating to sabbatical leave.

I hope that I 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: Ferdinand Leuffen
School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2909

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

April 26, 1983

Ms. Jo Ann Cahn
Stults & Marshall
10 East 40 Street
New York, NY 10016

The staff of the Committee on Public Access 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. Cahn:

I have received your letter of April 15 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 unsuccessfully requested records from the New York City Department of Cultural Affairs. Specifically, you wrote that "it appears to be the agency's position that regulations which govern agency decision-making are not final agency policy if they have neither been officially promulgated nor approved by the Commissioner." Further, in a response to a request dated January 13 by Mr. Howard Rubenstein, Director of Management Services and Records Access Officer for the Department, it was stated that "informal regulations" do exist, but Mr. Rubenstein denied on the basis of §87(2)(g) of the Freedom of Information Law because they were not "formally approved".

I would like to offer the following comments regarding your request and the denial.

First, as indicated by Mr. Rubenstein, rights granted under the Freedom of Information Law pertain to existing records. Section 89(3) of the Law states that, as a general rule, an agency is not required to create a record in response to a request. Therefore, to the extent that the information sought does not exist in the form of a record or records, the Department in my view would have no obligation to prepare records on your behalf.

Second, based upon both your description of the "informal regulations" as well as the explanation given by Mr. Rubenstein, I do not believe that §87(2)(g) could appropriately be cited to withhold those records, whether "formally approved" or otherwise.

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 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 sought could in my view properly be characterized as "intra-agency materials". Nevertheless, guidelines regarding "ACC meetings", "membership on the committee", and "other procedural matters such as appeals", whether officially adopted in the form of regulations or otherwise, appear to be relied on by the Department in the performance of its official duties. If that is so, I believe that the guidelines or informal regulations, regardless of the manner in which they may be documented, would constitute "final agency policy" accessible under §87(2)(g)(iii).

Further, prior to the effective date of §87(2)(g) but after its approval by the Legislature, the Assembly sponsor indicated that it is the intent of §87(2)(g) "that any so-called 'secret law' of an agency be made available." If indeed the Department relies upon the "informal regulations" or "guidelines" that you are seeking, I believe that they could be considered the "secret law" of the agency and available on that basis under §87(2)(g)(iii).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Howard Rubenstein

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2910

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

April 27, 1983

Mr. Ralph Cipriano
Time-Union
Box 15-627
Albany, NY 12212

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cipriano:

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

According to the correspondence attached to your request, you requested from the Albany Police Department:

> "records which contain statistical or factual tabulations or data of number of days & dates absent from scheduled employment for James Tuffy of Police Department during month of February, 1983".

The request was denied by T. Garry Burns, records access officer, on the basis of §§87 and 89(2)(b) of the Freedom of Information Law, which state that records may be withheld when disclosure would constitute "an unwarranted invasion of personal privacy". Your inquiry concerns the propriety of the denial.

In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, in my view, records solely reflective of factual information relative to the number of days and dates on which a police officer may have been absent would not fall within §§87(2)(b) or 89(2)(b) of the Freedom of Information Law.

As indicated by Mr. Burns, one of the grounds for denial in the Freedom of Information Law indicates that an agency may withhold records or portions thereof when disclosure would result in an unwarranted invasion of personal privacy. However, based upon various judicial determinations, it appears that the provisions cited by Mr. Burns as the bases for the denial could not be justified.

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 the information you are seeking, statistical or factual data regarding the days and dates absent from scheduled employment, is accessible. It has been advised in the past that records indicating a public employee's attendance, such as the amount of sick, personal or medical leave 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 withhold 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.

I hope that I 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: T. Garry Burns
Philip T. DiPace
Alderman Harold Greenstein

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2911

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

April 27, 1983

Mr. Harold Konigsberg
71-A-0224
Eastern New York Correctional Facility
Box 338
Napanoch, New York 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. Konigsberg:

I have received your letter of April 18 addressed to Gilbert P. Smith, Chairman of the Committee on Public Access to Records. As a matter of policy, the staff of the Committee generally responds to inquiries and prepares advisory opinions.

According to your letter, on March 28, you submitted requests to the Division of Criminal Justice Services involving information pertaining to yourself and another named individual. Apparently you received a response from the Division indicating that information regarding the other individual could be withheld. With respect to the request concerning yourself, no response was given. You have asked that this "office direct the DCJS to provide [you] with the requested information..." concerning yourself.

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

First, the authority of the Committee on Public Access to Records is solely advisory. As such, this office cannot require an agency, such as the Division of Criminal Justice Services, to grant or deny access to records.

Second, I believe that the criminal history records pertaining to you should have been made available by the Division of Criminal Justice Services. It is suggested, however, that you may be able to obtain the information in question

pertaining to yourself by means of a different vehicle. Specifically, 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 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.

Lastly, with respect to records pertaining to the other individual, it is possible in my view that the denial may have been appropriate. While I believe that records indicating a conviction would be accessible, for such records are likely available from other sources (i.e., a court clerk), a record regarding an arrest that did not result in a conviction may be deniable under the Freedom of Information Law on the ground that disclosure would result in an unwarranted invasion of personal privacy [see §87(2)(b)] or under §160.50 of the Criminal Procedure Law. The cited provision of the Criminal Procedure Law pertains to situations in which criminal charges have been dismissed in favor of an accused. In such situations, records pertaining to the arrest generally are sealed.

I hope that I 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-2912

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

April 27, 1983

Mr. David J. Weaver
[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. Weaver:

I have received your letter of April 17 as well as the materials attached to it.

According to a copy of a request for records made under the Freedom of Information Law, on March 17, you asked for "supporting documents" regarding a check issued to John Hawkins for $212 by the Spencerport Central School District. In conjunction with your request, at a meeting of the Board of Education on April 12, a member of the Board asked: "What you are going to do with the information?" You answered that you were not prepared to discuss your reasons for the request at the time.

Your first question in relation to the facts described above is whether the Board of Education has "the right to question the citizens who request to inspect or copy government records". As a general rule, I believe that the reasons or motives for which a request for records is made are irrelevant to rights of access. In an early landmark decision rendered under the Freedom of Information Law, it was held in Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165] that records accessible under the Freedom of Information Law should be made "equally available to any person, without regard to status or interest". Consequently, under the circumstances, I do not believe that a reason for requesting

the records in question had to be given. Therefore, while anyone may ask questions, I do not believe that your capacity to gain access to the records sought could be conditioned upon the reason for which a request was made. Moreover, I do not believe that records could be withheld due to a failure to state the reason for making a request.

Your second area of inquiry concerns the "behavior of the Board" and whether it is regulated by the Freedom of Information Law. In a related vein, you asked whether citizens may initiate a civil suit "when the questions by the Board are designed to embarrass a resident with slanderous comments and remarks". In this regard, the Freedom of Information Law deals solely with access to government records in New York. With respect to legal action that might be taken, I can only suggest that you consult with an attorney.

Lastly, you asked whether the District's records access officer must "report to the Board all requests for government records through the Freedom of Information Law". You asked further whether the records access officer must "provide at district expense a copy of the requested document to each board member".

In my opinion, there is nothing in either the Freedom of Information Law or the regulations promulgated by the Committee, which govern the procedural aspects of the Law, that would require a records access officer to report all requests or provide copies of all requested documents to members of a board of education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Larry Becker

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-293

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

April 29, 1983

Mr. James Mescall
[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. Mescall:

I have received your letter of April 19 in which you raised questions regarding rights of access to personnel records pertaining to you.

Specifically, you wrote that you were an employee of the Office of Court Administration (OCA). Having applied for a similar position, you indicated that you could not be rehired because "there is something in [your] personnel folder that is negative."

Your question is whether you have the right to inspect and copy the contents of your personnel file, even though you are no longer employed by OCA.

Although I cannot provide a specific answer, I would like to offer the following comments regarding your inquiry.

First, the Freedom of Information Law is applicable to records of agencies. In this regard, §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."

In this regard, this office has consistently advised and two courts have found that OCA is an "agency" required to comply with the Freedom of Information Law [see Babigian v. Evans, 427 NYS 2d 688 (1980) and Quirk, In Re, Sup. Ct., New York Cty., NYLJ, June 4, 1982]. Nevertheless, OCA, unless it has altered its stance, contends that it falls within the definition of "judiciary" and, therefore, is outside the scope of the Freedom of Information Law.

Second, it is noted that all records of an agency are available, except those records or portions of records that fall within one or more among eight grounds for denial listed in §87(2)(a) through (h) of the Law.

Third, assuming that OCA is subject to the Freedom of Information Law, rights of access to your personnel file would likely be based upon the nature of the records within the file.

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..."

Under the language quoted above, inter-agency or intra-agency materials consisting of advice, recommendation, opinion and similar commentary may in my view be withheld. However, those portions consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations should in my opinion be made available. Therefore, if, for example, the "negative" aspect of your personnel file consists of factual information or a final determination, I believe that it should be made available.

Fourth, when making a request, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, if you submit a request, it is suggested that you address it to the public information officer of OCA and that you include as much detail as possible, including dates, titles, descriptions of events and similar information.

Enclosed for your consideration 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:jm

Encs.

cc: Public Information Officer,
Office of Court Administration

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2914

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

May 4, 1983

Ms. Antoinette Witkowski
[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. Witkowski:

I have received your letter of April 25 and the news articles attached to it.

Your inquiry concerns a request for records of a fire company. Although the request was initially denied, the records were found to be available under the Freedom of Information Law by means of a judicial determination [Decker v. Ardler and Greenville Fire Dept., Inc., Sup. Ct., Orange Cty., August 31, 1982]. Since the decision, however, the records sought were apparently transferred to the district attorney, for they constituted evidence against the treasurer of the fire company, who, according to the news articles, pleaded guilty to stealing funds of the fire company over a three year period.

Since the records sought under the Freedom of Information Law have not yet been made available, you have asked for comments and suggestions.

First, as a matter of policy and ethical considerations, this office will not prepare an advisory opinion if it is known that litigation is pending under the Freedom of Information Law. It is my understanding, however, that that the litigation cited above under the Freedom of Information Law has been finally determined.

Second, the news articles indicate that an agreement may be reached regarding disclosure after sentencing on May 17. As such, it is suggested that you and your attorney keep abreast of developments until that time.

Third, assuming that the case against the treasurer will be closed on May 17, it would appear that the records in question would be accessible from any agency that possesses them. While the records were being used by the District Attorney, it might have been argued that disclosure would have interfered with an investigation. However, if the investigation has terminated, it would in my view be difficult to justify any ground for denial [see e.g., Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., June 24, 1982 and Hawkins v. Kurlander, 458 NYS 2d 872 (1983)].

In sum, since the judicial proceedings in which the records are involved are apparently about to end, it is suggested that through your attorney, you continue to urge that the records be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2915

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

May 4, 1983

Mrs. Ethel Benvenuto
[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 Mrs. Benvenuto:

I have received your letter of April 22 and the materials attached to it.

Your questions involve two applications for access to records of the Deer Park Union Free School District as well as the procedures to be followed by an agency regarding responses to requests.

The first request for records involved the "Superintendent's additional $1,000 for dinner: accounting of monies and dinners attended". In response to the request, you were asked to "be specific as to dates and period of time that you are referring to in this request".

In this regard, I would like to offer the following comments.

First, when the Freedom of Information Law was originally enacted in 1974, the Law required that an applicant request "identifiable" records. That language resulted in difficulty, for often members of the public did not have sufficient information to request an "identifiable" record. As a consequence, in one of a series of amendments to the Freedom of Information Law that became effective on January 1, 1978, the standard required to be met by an applicant for records was altered. Currently, §89(3) of

the Freedom of Information Law requires that an applicant request records "reasonably described". As such, a person requesting records need not identify the records sought with particularity. Further, the courts have held generally that if the agency can determine the nature of the records sought, the applicant has met his or her burden of reasonably describing the records [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations that govern the procedural aspects of the Law. In turn, §87(1) requires each agency, such as a school district, to adopt regulations consistent with those of the Committee.

Relevant under the circumstances is §1401.2(b) of the Committee's regulations, which in part requires that the "records access officer is responsible for assuring that agency personnel...assist the requester in identifying requested records, if necessary".

Consequently, I believe that it was the responsibility of the designated records access officer to provide assistance to you if the request did not reasonably describe the records sought to the extent that an appropriate response could be given.

Third, under the circumstances, it is suggested that you submit a new request. Based upon the advice given in the preceding paragraphs, while I do not believe that you must specify the dates of the dinners attended by the Superintendent, a general indication of the period of time within which the dinners might have been attended would in my view be appropriate. For instance, if you merely make the same request and indicate your interest in gaining access to such records regarding dinners attended during the past year, I believe that such a request would reasonably describe the records sought.

The second request involves records reflective of the attendance of central office administrators for a specified time period. In response, you were asked to be "more specific", and to "indicate by name what administrators you are referring to."

Once again, the records access officer in my view should have assisted you in identifying which administrators may have been the subject of your request. However, such a step may have been unnecessary and a response should have been given if the administrators in question are few in number and well known to the person responding to your request.

Lastly, in conjunction with your question regarding procedures applicable relative to responses to requests, I have enclosed a copy of the regulations promulgated by the Committee.

Further, as you may be aware, the Freedom of Information Law and the regulations provide guidance regarding the time within which responses to requests must 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 determin 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, 108 Misc. 2d 536, 87 AD 2d 388, ___ NY 2d ___ (1981)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Eleanor Free

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2916

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

May 5, 1983

[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 [redacted]:

I have received your letter of April 26 in which you requested assistance from this office.

According to your letter, some time ago, you discovered that you were a "foundling". Apparently, you contacted the Angel Guardian Home in Brooklyn, and were informed that it has records pertaining to you. However, the date of birth indicated was characterized as "arbitrary" since you were found on a particular date and brought then to a hospital.

Your questions involve your capacity to review records pertaining to you at the Angel Guardian Home and to obtain a birth certificate.

Although I am not sure that I can provide direct assistance to you, I would like to offer the following comments and suggestions.

First, the Freedom of Information Law is applicable to records of agencies of government in New York, and §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."

It appears that the Angel Guardian Home is a private, not for profit or religious corporation that is not a governmental entity. If that is so, it is neither subject to the Freedom of Information Law, nor would it be obligated to disclose records in its possession. This is not to suggest that the Home could not permit you to review the records in question, but rather that the Home would not be required to do so under the Freedom of Information Law.

Second, I have contacted the Bureau of Vital Records at the State Health Department on your behalf. The bureau keeps vital records regarding births, deaths and marriages for the entire state, except New York City. However, I was informed that you should be able to apply for and obtain a birth certificate from the New York City Health Department, Bureau of Records and Statistics, 125 Worth Street, New York, NY 10013. A certificate can apparently be issued upon payment of four dollars and a statement of your name and the names of your adoptive parents. It is suggested, however, that you call that office to confirm the information given to me. The telephone number is (212) 247-0130.

In short, while it is doubtful in my view that information regarding your background exists beyond what you now know, it appears that you do have the authority to obtain a birth certificate.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2917

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

May 10, 1983

Mr. Jon Wechsler
President
Millbrook Teachers Association
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 Mr. Wechsler:

I have received your letter of April 27 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, the Millbrook Teachers Association has unsuccessfully requested a copy of the contract between the Board of Education and its superintendent, Mr. John Glennon. To date, Mr. Glennon has indicated that the refusal is based upon a contention that he "doesn't have a contract".

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

First, it is noted that the Freedom of Information Law is applicable to existing records. Section 89(3) of the Freedom of Information Law states in part that, as a general rule, an agency, such as a school district, is not required to create or prepare a record in response to a request. Therefore, if, for example, there is no contact, the response of the Superintendent would in my view be proper because the District would be under no obligation to create such a record in response to your request.

Second, if a contract does exist, I believe that it would be available under the Freedom of Information Law.

In this regard, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available except to the extent that records or portions thereof that fall within one or more ensuing grounds for denial appearing in §87(2)(a) through (h) of the Law.

Although two of the grounds for denial might relate to a superintendent's contract, I do not believe that either could justifiably be asserted as a basis for denial.

One ground for denial of potential significance is §87(2)(b), which states that an agency may withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". While a contract might identify a particular individual, the courts have held on several occasions public employees enjoy a lesser degree of privacy than members of the public generally. Further, in terms of the Freedom of Information Law, it has been held on several that records relevant to the performance of a public employee'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, Oct. 30, 1980]. Based upon case law, if a contract exists, it is my view that such a document is clearly relevant to the performance of the duties of the superintendent, and that, therefore, §87(2)(b) could not be cited as a basis for withholding.

The other ground for denial of possible significance 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. 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.

If a contract exists, I believe that it could be characterized as "intra-agency" material. Nevertheless, it would likely be reflective of both the policy of the School District or Board of Education as well as a final determination made by an agency. Therefore, §87(2)(g) could not in my view justify withholding an employment contract between the Board and the Superintendent.

Lastly, §89(1)(b)(iii) of the Freedom of Information Law requires that the Committee on Public Access to Records promulgate regulations governing the procedural aspects of the Law. In turn, §87(1) requires each agency, in this instance the School Board, to adopt its own regulations consistent with those of the Committee.

In this regard, one aspect of the regulations involves the designation and duties of a records access officer. In conjunction with both §89(3) of the Freedom of Information Law and §1401.2(b)(6) of the Committee's regulations, if it is indicated that records sought do not exist, a person requesting such records may request a certification in writing to that effect from the records access officer. It is suggested that you seek such a certification regarding the existence of the contract.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee 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.
cc: John Glennon

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2918

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

May 10, 1983

Mr. Maxwell Loftin
82-A-5715
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

Dear Mr. Loftin:

I have received your recent letter in which you asked for assistance regarding a request directed to the New York Police Department under the Freedom of Information Law.

According to your letter, in January you requested a tape of a 911 telephone call that you made to the Police Department. Having been initially denied, you appealed. In response to the appeal, it was indicated that more than seven business days would be needed to render a determination. Under the circumstances, you asked that this office intercede for the purpose of learning of the reason for the delay.

Since the receipt of your inquiry, a copy of a response to your appeal dated May 3 was forwarded to this office by the Department. The response indicated that no record of your call exists.

Under the circumstances, if the record sought does not exist, I do not believe that I can provide assistance, for the Freedom of Information Law in my view no longer is applicable. It is noted in this regard that the Freedom of Information Law pertains to existing records. Further, §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. In addition, agencies often destroy records in accordance with law based upon schedules that permit the routine destruction of records after they have been maintained for specific periods.

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-2919

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

May 11, 1983

Mr. Robert T. Krolikowski
[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. Krolikowski:

I have received your recent letters concerning requests directed to the Commission on the Quality of Care for the Mentally Disabled.

Your questions involve the administrative procedures utilized under the Freedom of Information Law, the necessity of seeking the services of an attorney in the event of the initiation of an Article 78 proceeding, and the statute of limitations regarding such a proceeding.

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

As you may be aware, §89(3) of the Freedom of Information Law indicates that any person may request records from an agency. In the event of a denial, the applicant may within thirty days of the denial appeal to the head or governing body of the agency or whomever is designated to render determinations on appeal [see Freedom of Information Law, §89(4)(a)]. On receipt of an appeal, the appeals officer has seven business days either to grant access to the records sought or to uphold the denial, fully explaining the reasons in writing for the denial.

The only remaining step following a denial on appeal would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. The statute of limitations in such a proceeding is four months. Therefore, in the context of your question, an applicant for records may initiate a challenge to a denial under the Freedom of Information Law within four months of the date of a determination rendered on appeal to deny access to records.

In terms of desireability or necessity of seeking the services of an attorney, it is in my view always preferable to employ an attorney when a judicial proceeding is contemplated.

Lastly, it is noted that records pertaining patients in mental hygiene facilities are generally required to be kept confidential under §33.13 of the Mental Hygiene Law. Under §45.09 of the Mental Hygiene Law the Commission on the Quality of Care for the Mentally Disabled has the right to obtain such records. However, the cited provision also states that:

> "Information, books, records or data which are confidential as provided by law shall be kept confidential by the commission and any limitations on the release thereof imposed by law upon the party furnishing the information, books, records or data shall apply to the commission."

Therefore, although certain records may be disclosed by the Commission, I would conjecture that many of its records must be kept confidential under the Mental Hygiene Law. In such cases, the Freedom of Information Law would not affect rights of access to records; §87(2)(a) of the Freedom of Information Law enables an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". In this instance, either §33.13 or §45.09 of the Mental Hygiene Law would constitute statutes requiring confidentiality of certain 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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2920

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

May 11, 1983

Mr. Earl C. Knight
Negotiation Consultants & Co.
Executive Offices
Anthony Estates
Liebler Road
Boston, New York 14025

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Knight:

I have received your letter of May 1 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, on April 26, you requested copies of various contracts between the Town of Boston and two consulting firms. The Town Clerk indicated that you would be assessed a fee of fifty cents per photocopy. When you questioned the fee, the Clerk apparently stated that, prior to the passage of the Freedom of Information Law, the Town charged one dollar per photocopy, but that the fee was reduced to fifty cents per photocopy when the Law became effective. It is your view that under the "Law as of January 1, 1978", a charge of no more than twenty-five cents per photocopy should be assessed.

I agree with your contention and would like to offer the following comments.

It is noted at the outset that an amendment to the Freedom of Information Law regarding the fees that may be assessed for photocopies became effective on October 15, 1982. From January 1, 1978 to October 15 of last year, §87(1)(b)(iii) of the Freedom of Information Law permitted an agency to assess a fee of up to twenty-five cents per photocopy, unless a different fee was prescribed by "law". That provision was discussed in the Committee's fourth annual report on the Freedom of Information Law, which recommended an amendment that is now law. With respect to the cited provision of the Freedom of Information Law, 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 conjunction with the Committee's recommendations, §87(1)(b)(iii) now states that an agency may assess a fee of up to twenty-five cents per photocopy, unless a different fee is prescribed by "statute". Therefore, even if the fee of fifty cents was established by means of local law, which is not a statute, I do not believe that it remains effective in view of the amendment to the Freedom of Information Law. Stated differently, based upon the amendment regarding fees, I believe that the Town can charge no more than twenty-five cents per photocopy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Herbert Klein

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2921

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

May 11, 1983

Mr. Harold Brady
75-A-2737
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. Brady:

I have received your letter of April 24 which pertains to requests made under the Freedom of Information Law directed to the Governor and the Dutchess County Bar Association.

With respect to your request sent to the Governor's New York City office, I have contacted the Governor's office on your behalf. In this regard, your inquiry was forwarded from New York City to Albany and apparently was subsequently mislaid. It has been suggested that you submit a new request to Mr. Scott Fein, Assistant Counsel to the Governor, Executive Chamber, the Capitol, Albany, New York 12224. Mr. Fein informed me that upon receipt of a new request, he will respond promptly.

The request sent to the Dutchess County Bar Association in my view falls outside the scope of the Freedom of Information Law. The Freedom of Information Law is applicable to records of government agencies in New York. 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 govern-

> mental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since the Bar Association is a private rather than a governmental entity, it is not in my opinion subject to the requirements of the Freedom of Information Law.

In terms of your question concerning the relationship between the Dutchess County Bar Association and the Judicial Conference, it is suggested that you contact the Office of Court Administration, which is located at the Empire State Plaza, Agency Building 4, Albany, New York 12223.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2922

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
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MARCELLA MAXWELL
STEPHEN PAWLINGA
BARBARA SHACK
GAIL S. SHAFFER
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 11, 1983

Ms. Roseann Skidmore
[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. Skidmore:

I have received your letter of May 4 and the correspondence attached to it. Having reviewed the materials, I would like to offer the following comments.

First, it is emphasized that the Freedom of Information Law is a law concerning rights of access to existing 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 this regard, in several aspects of your correspondence with the Ulster County Department of Social Services, it appears that you raised questions or requested information rather than records. To the extent that your requests involve information that does not exist in the form of a record or records, the Freedom of Information Law in my view would not apply.

Second, the only significant disagreement that I have with respect to a letter addressed to you by Robert C. Myers of the Department involves his contention that the Department is not required to maintain a subject matter list. As indicated to you in an opinion of April 25, each agency subject to the Freedom of Information Law is required to maintain and make available a subject matter list in accordance with §87(3)(c) of the Law. To assist you further, a copy of that opinion will be sent to both Mr. Myers and Commissioner Kramer.

Lastly, as of today, having reviewed our files, I do not believe that this office has received any documentation regarding your appeals made under the Freedom of Information Law. In this regard, as you are aware, §89(4)(a) of the Freedom of Information Law requires an agency to transmit to the Committee copies of appeals and the determinations that follow. Further, as you indicated in your appeal to Commissioner Kramer, determinations on appeal must be rendered within seven business days of their receipt [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: Commissioner Kramer
Robert C. Myers

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-879
FOIL-AO-2923

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

May 12, 1983

Mr. James E. Switzer
School District Clerk
Wayne Central School District
6076 Ontario Center Road
Ontario Center, NY 14520

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Switzer:

I have received your letter of May 9 and appreciate your continuing interest in complying with the Freedom of Information Law.

Your inquiry concerns the "salary listing" required to be prepared under the Freedom of Information Law. Specifically, you wrote that "the question centers on whether the salary, name and public office address information is to be for the current school year or for the past school year." It is your view that the information in question should refer to salaries for the current fiscal year. A second question is whether the list should be "formally incorporated in Board of Education minutes."

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

First, as you are aware, §87(3)(b) of the Freedom of Information Law states 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 language quoted above is in my view somewhat unique, for it represents one of the few instances in the Freedom of Information Law in which an agency is required to prepare a record.

Second, I agree with your contention that the payroll record envisioned by §87(3)(b) should pertain to the current fiscal school year, rather than a previous school year. Further, to fully comply with §87(3)(b), it is my view that the payroll listing should be current on an ongoing basis. Stated differently, if, for instance, employees are hired by or leave the employ of the District during the course of a fiscal year, the payroll listing should be altered to reflect both the additions to and the removals from the employ of the District.

Lastly, with respect to whether the payroll listing should be incorporated in minutes, I do not believe that such action is required. In this regard, I direct your attention to §101 of the Open Meetings Law. The cited provision provides what might be characterized as minimum requirements concerning the contents of minutes. With regard to minutes of 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."

Based upon the language quoted above, although the Board of Education might take action relating to a list of employees in conjunction with the Freedom of Information Law, I do not believe that there is any requirement in the Law concerning the incorporation of the list in the 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2924

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

May 12, 1983

Ms. Helen C. Heller
Executive Director
United Parents Associatons
of New York City, Inc.
95 Madison Avenue
New York, NY 10016

The staff of the Committee on Public Access 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. Heller:

I have received your letter of May 5 in which you raised questions regarding rights of access to "Disclosure of Interests Questionnaires" required to be submitted to the New York City Board of Education by its employees.

The questions concern the relationship between a by-law of the Board of Education requiring confidentiality and the Freedom of Information Law, the extent to which the contents of the questionnaires may be withheld, and the nature of a proceeding initiated under Article 78 of the Civil Practice Law and Rules.

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

First, having reviewed an advisory opinion addressed to you on the same subject on October 30, 1981, my view of rights of access remains the same as that suggested in 1981.

Second, I do not believe that the by-law requiring confidentiality adopted by the Board of Education can diminish rights of access granted by the Freedom of Information Law. The by-law in question (Article 6, Section 6.3) states that:

> "Disclosure statements and financial statements filed with the board of education or a community school board pursuant to this article shall be deemed to involve confidential matters of personal privacy. The use and diclosure of information contained in said forms shall be restricted to official internal review and/or investigation and to law enforcement agencies."

Although records may in some instances be characterized as "confidential", they may be considered confidential in my view only when a statute, an act of the State Legislature or Congress, so prescribes. In terms of the Freedom of Information Law, §87(2)(a) permits an agency to withhold records that "are specifically exempted from disclosure by state or federal statute". Since the by-law in question is not a statute, I do not believe that it can require confidentiality relative to the records in question. On the contrary, it is my opinion that the records are available, except to the extent that one or more of the grounds for denial appearing in the Freedom of Information Law may justifiably be cited.

Third, a proceeding initiated under Article 78 of the Civil Practice Law and Rules is the vehicle under which members of the public may generally seek review of actions taken by agencies or public officers in New York. In the context of the Freedom of Information Law, an applicant for records must exhaust his or her administrative remedies prior to the initiation of an Article 78 proceeding.

Based upon the correspondence attached to your letter, your most recent request was denied by the Deputy Records Access Officer. At this juncture, the next step would involve appealing the denial in conjunction with §89(4)(a) of the Freedom of Information Law. That provision states that an appeal may be made within thirty days of a denial and should be directed to the head or governing body of the agency, or whomever is designated to render determinations on appeal. The appeals officer designated by the Board of Education is John Nolan, Secretary to the Board. Should a denial be upheld following an appeal, a person may initiate a proceeding under Article 78.

It is noted that, as a general rule, a member of the public who initiates an Article 78 proceeding has the burden of proving that an agency's determination was unreasonable or that a public officer failed to perform a duty required to be performed. However, §89(4)(b) of the Freedom of Information Law states specifically that the agency has the burden or proving that records withheld in fact fall within one or more of the grounds for denial appearing in §87(2) of the Freedom of Information Law.

Lastly, it is noted that I have contacted Counsel to the Board of Education on your behalf for the purpose of suggesting that the Board's by-law requiring confidentiality of the questionnaires be reviewed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-881
FOIL-AO-2925

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

May 12, 1983

Dennis T. Barrett, Esq.
Barrett, Maier & Barrett, P.C.
80 E. Main Street
Webster, New York 14580

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Barrett:

I have received your letter of May 5 addressed to Ms. Baldasaro of this office.

Your inquiry concerns the Open Meetings Law as it relates §3020-a of the Education Law. Specifically, you wrote that your concern:

> "...was with whether the action of the Board of Education pursuant to that section in considering at Executive Session whether probable cause exists to present charges under that section is entirely exempt from the Open Meetings Law as a quasi-judicial proceeding."

It is your understanding that Ms. Baldasaro expressed the belief that the portion of a proceeding conducted under §3020-a to which you alluded above is entirely exempt from the Open Meetings Law.

Having discussed the matter with Ms. Baldasaro, it appears that there may have been some misunderstanding. It is our view that the step in §3020-a of the Education Law that you described does not fall within the exemption for quasi-judicial proceeding appearing in §103(1) of the Open Meetings Law.

While it is often difficult to draw a line of demarcation between a quasi-judicial proceeding and an administrative or quasi-legislative proceeding, Black's Law Dictionary defines "quasi-judicial" as:

> "[A] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

From my perspective, based upon the language of §3020-a of the Education Law, the step in that provision in question is not quasi-judicial, for it involves merely a finding of probable cause; I do not believe that there is any significant investigation or final determination that is rendered.

Subdivision (1) of §3020-a concerns charges that may be made "against a person enjoying the benefits of tenure". Subdivision (2) states that:

> "[U]pon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify such board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists."

From that point, depending upon the response of the person charged, hearings may be held that might be considered quasi-judicial in nature. Nevertheless, the steps leading to the proceeding would not in my view be quasi-judicial for the reasons expressed above; rather it appears that they are largely administrative.

As such, in my view, when a board discusses charges pursuant to §3020-a(2) of the Education Law, it is required to comply with the Open Meetings Law. I believe that notice must be given and that a meeting of the Board of Education must be convened open to the public. However, as you are aware, the Open Meetings Law permits a public body to enter into an executive session in accordance with §100(1) of the Open Meetings Law. Relevant under the circumstances would be §100(1)(f), 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."

Since charges would likely involve a review of the employment history of a particular person or perhaps a matter leading to the discipline or dismissal of a particular person, I believe that an executive session could properly be held to consider charges made against a person.

It is noted, too, that this office has advised that the identity of a person who may be the subject of discussion in an executive session need not be included in a motion to enter into an executive session. In my view, a motion indicating that a public body seeks to discuss the employment history of a particular person or a matter leading to the discipline of a particular person would constitute a sufficient motion for entry into an executive session.

With respect to minutes, as you are aware, §101 of the Open Meetings Law requires that minutes be prepared when action is taken either during an open meeting or an executive session. However, §101(3) states in part 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..." In this regard, as you are aware, it was held in Herald Company v. School District of City of Syracuse [430 NYS 2d 460 (1980)] that charges reflective of a finding of probable cause against a named individual need not be made available under the Freedom of Information Law. Based upon that decision, minutes would not in my view be required to identify a person who may be the subject of a finding of probable cause.

I hope that I 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-2926

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

May 16, 1983

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

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hembrooke:

I have received your letter of May 10 in which you requested an advisory opinion under the Freedom of Information Law.

Your question pertains "to a request to provide the names, addresses and telephone numbers of parents of children" of the Delaware Valley Central School District, and whether the information should be released under the Freedom of Information Law.

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

First, it is emphasized that a federal law, rather than the New York Freedom of Information Law, is in my view most relevant to a determination regarding rights of access to the information sought.

Specifically, under the circumstances, it appears that the provisions of the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment", governs access to the records in question.

In brief, the Buckley Amendment states that an educational agency or institution subject to its provisions cannot disclose "education records", a term broadly defined, identifiable to a particular student or students without the consent of the parents of the students. The regulations promulgated under the Buckly Amendment by the United States Department of Education provide additional guidance which, in my view, leads to a conclusion that the information sought may be denied.

Section 99.3 of the regulations defines various terms. In this regard, "disclosure" is defined to include:

> "...permitting access or the release, transfer, or other communication of education records of the student or the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any other means to any party."

Further, "personally identifiable" is defined to mean:

> "...that the data or information includes (a) the name of a student, the student's parent, or other family members, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable."

Based upon the definitions quoted above, which include reference to disclosure of the names of students' parents, it is my view that the Buckley Amendment prohibits disclosure of the information sought, unless the parents consent to disclosure.

Second, although the Freedom of Information Law provides broad rights of access, the first ground for denial in the Freedom of Information Law pertains to records that are "specifically exempted from disclosure by state or

federal statute [see §87(2)(a)]. In this instance, since a federal statute exempts the information from disclosure, the Freedom of Information Law could not in my opinion be cited as a basis for 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-2927

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

May 16, 1983

Mr. Norman S. Rosenblum
[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. Rosenblum:

As you are aware, I have received your letter of April 20 in which you requested an advisory opinion. The delay in response was due to the Committee's policy concerning the avoidance of issuing advisory opinions when it is known that litigation under the Freedom of Information Law is pending. However, since you have informed me that litigation that you initiated has been terminated, I would like to offer the following comments.

According to your letter, the Village of Mamaroneck "has not designated an Official Records Access Officer nor have they designated an Official Appeals Board or Agency".

In this regard, I direct your attention to provisions of both the Freedom of Information Law and the regulations promulgated by the Committee.

In terms of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural aspects of the Law. In turn, §87(1) requires the governing body of a public corporation, in this instance the Board of Trustees of the Village of Mamaroneck, to adopt regulations consistent with those of the Committee.

One aspect of the Committee's regulations pertains to the designation of one or more records access offficers. Section 1401.2(a) states in part 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."

As such, I believe that the Village Board of Trustees is required to designate one or more records access officers by means of adoption of rules and regulations.

With respect to appeals, §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."

Further, §1401.7(a) of the Committee's regulations provides 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."

In view of the foregoing, I believe that the Village Board of Trustees is required to designate an appeals person or body for the purpose of reviewing appeals of denials of access made initially under the Freedom of Information Law by a designated records access officer or due to a failure to respond to a request within the appropriate time [see Freedom of Information Law, §89(3); regulations, §1401.5(d) and §1401.7(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: Village Board of Trustees
Milton Berner, Village Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-885
FOIL-AO-2928

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

May 18, 1983

Ms. Alice Knapik
[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. Knapik:

I have received your letter of May 12 in which you raised a series of questions involving the Freedom of Information and the Open Meetings Laws.

It is apparently your view that the Town Board of the Town of Glen has held various "closed door meetings". Based upon your correspondence, it appears that some of the closed meetings may have been appropriate, while others should have been open.

The first situation that you described pertains to a complaint relative to a contaminated well. You wrote that there was a meeting with an attorney on the subject and that no other mention was made of the problem until the Town Board adopted a resolution to "buy the house for $10,000".

In this regard, the Open Meetings Law is generally based upon a presumption that meetings of public bodies are required to be open. Some five years ago in a landmark decision, the state's highest court determined that the definition of "meeting" includes any gathering of a quorum of a public body for the purpose of conducting pubic business, whether or not there is an intent to take

action and regardless of the manner in which a gathering may be characterized [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, any convening of a quorum of the Town Board for the purpose of conducting public business in my view would constitute a meeting subject to the Open Meetings Law that should be preceded by notice (see attached Open Meetings Law, §99) and convened open to the public.

It is noted, however, that §103 of the Law contains "exemptions". If an exemption applies, the Open Meetings Law does not. Of possible significance in this instance is §103(3), which states that "matters made confidential by federal or state law" are exempt from the Open Meetings Law.

It is has been advised in the past that if a public body meets with its attorney solely for the purpose of seeking legal advice, the communications between the attorney and the public body fall within the scope of the attorney-client privilege. Since such communications are confidential under state law, they would fall outside the scope of the Open Meetings Law. If, however, other meetings occurred during which the advice of the Town Board's attorney was not sought, those gatherings should in my view have been conducted pursuant to the Open Meetings Law.

The second situation that you described concerns an executive session held for the purpose of discussing "personnel". Following the executive session, you wrote that the Supervisor mentioned veterans and thereafter the Supervisor appointed a Veterans Committee. During the following month, the Committee met in an "informational meeting". You indicated that, since the informational meeting was held, no additional information regarding the work of the Veterans Committee has been disclosed.

Although some issues regarding "personnel" may properly be considered during an executive session, the Open Meetings Law provides limitations concerning the scope of the "personnel" exception for executive session.

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 view, if the executive session was held to discuss the creation of a veterans committee, such a discussion involved policy and not any "particular person". Under those circumstances, I do not believe that any ground for executive session would have applied.

Nevertheless, if after determining to create a veterans committee, the Board sought to discuss particular individuals to be appointed to such a committee, I believe that an executive session to consider the appointments of particular persons to the committee would have been proper.

It is also noted that the Veterans Committee is in my view a "public body" required to comply with 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."

Since the Veterans Committee was designated by the Town, and in view of judicial interpretations of the Open Meetings Law, I believe that the Veterans Committee is itself a "public body" subject to the Open Meetings Law in all respects [see e.g., Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)].

The third situation described in your letter involves the purchase of property by the Town. You wrote that "Town officials came from behind close[d] doors, with minds made up to purchase the building for $58,000". Apparently residents of the Town indicated their disapproval of the action and the Town Board voted against the purchase of the building. Following the vote, you indicated that you were unsuccessful in your efforts to obtain copies of records relating to the transaction.

In terms of the Open Meetings Law, it would appear that one of the grounds for executive session may have been relevant to the issue. Specifically §100(1)(h) states that a public body may enter into an executive session to discuss:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

Under the lanugage quoted above, not every discussion regarding the proposed transfer of real property may be discussed during an executive session; on the contrary, an executive session held under §100(1)(h) is appropriate only when "publicity would substantially affect the value" of the property. Since the particulars surrounding the purchase appear to have been known, it is difficult to envision how publicity would have substantially affected the value of the property. If publicity would not have substantially affected its value, it does not appear that an executive session could appropriately have been held.

With respect to access to records, I direct your attention to 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Under the circumstances, records pertaining to the situation would in my view be available, unless a ground for denial applies. Without greater knowledge of the contents of the records, I cannot provide specific advice.

Your last question concerns Town records generally. If I understand your comment correctly, you indicated that the Supervisor stated that his records are not available to the public.

In my view, books of account, contracts, ledgers and similar records relating to financial transactions of a municipality, including a town, are available under several provisions of law, including the Freedom of Information Law, §87(2)(g)(i), §51 of the General Municipal Law and §29 of the Town Law, which is entitled "Powers and duties of supervisor". Section 29 of the Town Law states in subdivision (4) 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."

Based upon the provision quoted above, records concerning town finances are required to be kept and made available by the town supervisor during "all reasonable hours of the day".

As requested, enclosed are twenty copies of the brochure entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-884
FOIL-AO-2929

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

May 18, 1983

Ms. Beatrice M. Mills
[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. Mills:

I have received your recent letter in which you raised a series of questions involving the Board of Trustees of the Village of Sylvan Beach.

Your first question concerns meetings of the Board held in relation to the budget process. According to your letter, the Board held a meeting "at about 3 p.m. without notice to the public" on April 18 during which "they made changes in the Village Budget". On the evening of the 18th, a meeting was held on the budget, and due to controversies regarding the budget, it was continued the next day. You wrote, however, that notice concerning the meeting of April 19 "was never posted and was never put in the paper..."

In this regard, it is noted that the Mayor of Sylvan Beach, Joseph DeFazio, also wrote to the Committee. I would also like to point out that the Open Meetings Law likely was not completely applicable to the situation, for the gatherings held on the evening of April 18 and on April 19 were public hearings subject to provisions of the Village Law.

Section 5-508 of the Village Law required publication of a legal notice regarding the public hearing on the evening of April 18. Mayor DeFazio wrote that a legal notice was published in the Rome Sentinel and that "notice was also posted in 6 locations throughout the Village on April 11, 1983".

Subdivision (3) of §5-508 of the Village contains direction relative to situations in which a public hearing cannot be completed on the date on which it is scheduled, stating that "[T]he hearing may be adjourned from day to day but not beyond the twentieth day of April..." Based upon the provisions of the Village Law, it appears that the public hearings were conducted properly. Further, Mayor DeFazio wrote that approximately the same number of people attended the hearings on April 18 and 19.

With respect to the gathering held in the afternoon of April 18, if in fact four members of the Board met to discuss the budget, that gathering in my view was a "meeting" subject to the Open Meetings Law that should have been preceded by notice and convened open to the public.

Your remaining areas of inquiry concern games of chance played at a village park, items sold at a flea market in the park and the amount of tax paid by the owner of a restaurant. In all honesty, this office has no expertise regarding those issues.

However, I would like to offer a suggestion relative to the assessment of the property on which the restaurant is located.

In this regard, it is noted that the Freedom of Information Law provides broad rights of access to government records. Assessment rolls and related information are generally available. Perhaps it might be worthwhile to compare the assessments concerning properties similar to or near the restaurant in question. If, based upon a review of available records, it is found that inequities exist, perhaps persons owning similar properties could challenge their assessments.

I hope that I 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 DeFazio

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2930

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

May 23, 1983

Mr. Maxwell Loftin
82-A-5715 D-7-20
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

Dear Mr. Loftin:

I have received your letter of May 12 in which you requested assistance in obtaining a tape recording of a 911 emergency call to the New York City Police Department.

In terms of background, your initial request was denied. In response to an appeal, you were informed that no "memorialization" of the call exists. It is your contention, however, that a serial number appearing on your correspondence with the Department indicates that a record regarding your call continues to exist.

To assist you, I have contacted the Department on your behalf and have learned that the serial number pertains to the request rather than the 911 call.

I was also informed that since your original request erroneously referred to a call made in 1981, rather than 1982, the Department is in the process of attempting to locate either a tape or a "sprint" printout concerning your call.

In short, if no record regarding your call exists, the Freedom of Information Law in my view no longer would be applicable. However, based upon my conversations with Department officials, a search is being made for records regarding the correct date of your call, and I am sure that you will receive a prompt and appropriate response from 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2931

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

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 23, 1983

Mr. Gordon E. White
Deseret News
Washington Bureau
Box 3067
Alexandria, VA 22303

Dear Mr. White:

Your correspondence addressed to Attorney General Abrams has been forwarded to this office for response.

The question involves testimony given before a grand jury in Nassau County in 1938, and whether there is "any bar in New York State Law to [your] seeing such records at this time."

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

First, this office is responsible for advising with respect to the Freedom of Information Law. In this regard, it is noted that the Freedom of Information Law does not apply to the courts or court records.

Second, the Criminal Procedure Law generally requires that records pertaining to grand jury proceedings remain confidential. Specifically, §190.25(4) of the Criminal Procedure Law states that:

> "[G]rand jury proceedings are secret, and no grand juror, other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court,

> disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. For the purpose of assisting the grand jury in conducting its investigation, evidence obtained by a grand jury may be independently examined by the district attorney, members of his staff, police officers specifically assigned to the investigation, and such other persons as the court may specifically authorize. Such evidence may not be disclosed to other persons without a court order. Nothing contained herein shall prohibit a witness from disclosing his own testimony."

The language quoted above does not indicate when, if ever, records of grand jury proceedings become available.

Third, §89 of the Judiciary Law (see attached) pertains to the disposition of court records. Since Nassau County is within the purview of the Appellate Division, Second Department, it is suggested that you write to the Clerk of the Appellate Division at 45 Monroe Place, Brooklyn, New York 11201. Perhaps the Clerk could inform you as to whether the records in question continue to exist, and if so, whether a court order would be required to inspect 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

Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2932

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

May 23, 1983

Mr. Ronald F. Rizzo
20536-053
F-Unit
P.O. Box 900
Ray Brook, NY 12977

Dear Mr. Rizzo:

I have received your letter of May 17 in which you requested information and procedures under the "Right to Know Law".

Please be advised that rights of access to records of state and local government in New York are generally governed by the provisions of the Freedom of Information Law. As you indicated, the federal Freedom of Information and Privacy Acts are applicable to records of federal agencies. Consequently, those Acts do not apply to records of state or local government. It is noted, too, that New York has not yet enacted any general privacy law.

With respect to procedures, §89(3) of the Freedom of Information Law requires that an applicant for records submit a request in writing that "reasonably describes" the records sought. Additional direction is provided in regulations promulgated by the Committee that govern the procedural aspects of the Law.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be particularly useful to you, for it contains sample letters of request and appeal.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2933

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

May 23, 1983

Mr. Joseph Lee King
Superintendent of Schools
Three Village Central School District
Nicoll Road
Setauket, NY 11733

The staff of the Committee on Public Access to 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:

Ms. Mary Anne Weber, Managing Editor of the Three Village Herald, has forwarded to this office a copy of your determination on appeal to withhold the name of a teacher involved in a disciplinary action that led to a stipulation of settlement.

Since an advisory opinion prepared by this office dated April 25 dealt with the same issue, and since a copy of that opinion was sent to the District's freedom of information officer and the Board of Education, I assume that you are familiar with my views relative to rights of access. However, having read your determination, I respectfully offer the following additional comments.

First, in withholding the name of a teacher who is the subject of the inquiry, you stated the belief "that the District has balanced this statutory right [regarding access to records] with the right of confidentiality possessed by the teacher". In my view, the teacher has no "right of confidentiality", for records may be considered "confidential" only when a statute so provides. Further, for reasons that will be discussed more fully in the ensuing paragraphs, I do not believe that any statute would, under the circumstances, confer confidentiality.

Second, as indicated in the opinion of April 25, it has been found judicially on several occasions that records relevant to the performance of a public employee's duties are generally available on the ground that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy [see Freedom of Information Law, §87 (2)(b); 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); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); 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]. You wrote that the stipulation of settlement "has a temporary file life after which it will no longer exist", and that, as such, you do not believe that the stipulation is "relevant to the work of the school district".

In my view, a violation of District rules by a teacher does not involve a personal detail of the teacher's life unrelated to the performance of his or her duties; contrarily, a violation would in my opinion be relevant to the performance of both the teacher and the agency that established the rules, in this case, the District. Further, a payment made by the teacher to the District due to a violation is in my opinion clearly relevant to the District and its taxpayers.

Third, while §3020-a of the Education Law indicates that some records may be expunged, I do not believe that the cited provision would permit expungement of the stipulation of settlement. Specifically, in a tenure proceeding initiated under §3020-a of the Education Law, the last sentence of subdivision (4) entitled "Post hearing procedures", states that: "[I]f the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record". In my view, the substitution of an agreement for the report of the hearing panel would not constitute an "acquittal". As such, I do not believe that the expungement provisions described in §3020-a(4) of the Education Law would be applicable to the situation that you presented.

Moreover, in discussing the expungement provisions, in Matter of Appeal of Gideon Hirsch (Decision No. 9583, January 4, 1978) the Commissioner of Education wrote that:

> "[I]t is clear from the language of this subdivision that charges must be expunged from an employee's record only where the employee has been acquitted after a hearing has been held concerning such charges. The language of the subdivision does not, in my opinion, require or imply that where charges have been brought against an employee and subsequently withdrawn, such charges and all references to them be expunged from the employee's record".

In view of the foregoing, even though charges may have been withdrawn, it does not appear that the teacher was acquitted. On the contrary, it would appear that charges were withdrawn in conjunction with an agreement to settle the matter. As such, provisions in §3020-a that confer confidentiality by means of expungement are not in my opinion applicable.

Fourth, you indicated that counsel advised that "information may be deemed confidential when documentation relates to inter-agency or intra-agency materials..." under certain circumstances. In this regard you wrote that the stipulation of settlement is deniable under §87(2)(g) of the Freedom of Information Law, indicating that it is not a final determination, and that the Board agreed to keep the teacher's name confidential.

In my opinion, since the stipulation of settlement is binding upon the District and the teacher, it is final determination available under §87(2)(g)(iii). It is emphasized that a decision cited in my earlier opinion, Geneva Printing Co. v. Village of Lyons, supra, found in a similar factual situation that a settlement agreement arising out of a disciplinary action is a final determination available to the public and that the name of the employee charged was available based upon a finding that disclosure of the name would not constitute an unwarranted invasion of personal privacy.

The same case involved an agreement to keep the entire settlement confidential. While your agreement to keep the name of the teacher confidential was not apparently carried out by means of a collective bargaining agreement, I believe that the principles expressed in Geneva Printing, supra, are applicable to the instant situation, for the court found that:

> "[I]n Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement with bargained away the board of education's right to inspect personnel files was unenforcable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

As indicated above, to the extent that an agreement requiring confidentiality conflicts with the Freedom of Information Law, it is in my opinion invalid. In this case, I do not believe that there is any statutory basis for withholding the teacher's name. On the contrary, based upon judicial interpretations of the Freedom of Information Law cited earlier and in the opinion of April 25, a record indicating the name of the teacher in question is in my opinion accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary Anne Weber

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2934

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

May 23, 1983

Professor Bruce E. Altschuler
SUNY/Oswego
Department of Political Science
Oswego, NY 13126

Dear Bruce:

Thanks for sending materials used in the process of seeking a pistol permit. The topic itself is interesting, in part because of a judicial decision that I will describe later. Moreover, from a personal perspective, reviewing the records that you sent was enlightening, for I often write advisory opinions based solely on the Law and without knowledge of the specific contents of records that may be the subject of an opinion.

Having read the forms, I would like to offer the following comments.

First, as you know, the Freedom of Information Law is the state statute that deals generally with access to and the capacity to withhold records. However, when another statute deals directly with particular records, it would be considered a "special statute" that prevails over a general statute, such as the Freedom of Information Law.

Second, I would conjecture that while you might find the questions raised to be somewhat objectionable, in my opinion, there is nothing illegal about the questions or the forms, for there are statutes dealing specifically with the licensing process and the records.

The focal point regarding the process is §400.00 of the Penal Law.

In terms of the character reference form that you completed, subdivision (3) of §400.00 states that an agency in receipt of an application may seek whatever "facts may be required to show the good character, competency and integrity of each person or individual signing the application". Therefore, there is little limitation of the scope of an inquiry.

With respect to question 8 concerning prior arrests, indictments or convictions, as a general rule, questions cannot be asked regarding arrests. Under the Human Rights Law (Executive Law, §296), it is considered an "unlawful discriminatory practice" to ask about arrests, based upon an intent to avoid an arrest that did not result in a conviction from following a person through the course of his or her life. Nevertheless, subdivision (16) of §296, which generally precludes that questions be raised pertaining to arrests or criminal accusations that did not result in convictions, also states that:

> "provided, however, that the provisions hereof shall not apply to the licensing activities of governmental boards in relation to the regulation of guns, firearms and other deadly weapons."

As such, questions regarding arrests may be raised.

I would guess that questions regarding family court proceedings would be justified because juvenile or youthful offenders involved in which might otherwise be considered crimes are often treated differently through proceedings conducted in family court.

In short, while the questions might be considered an invasion of privacy, there appear to be statutory bases for asking them.

Third, with regard to the application itself, §400.00 (5) of the Penal Law states in part that "[T]he application for any license, if granted, shall be a public record." It has been contended by agencies and in a dissenting opinion in a determination by the Court of Appeals that certain aspects of an approved application may be withheld under the Freedom of Information Law on the ground that disclosure could "endanger the life or safety" of named individuals

[see Freedom of Information Law, §87(2)(f)]. However, the majority of the Court of Appeals in Kwitny v. McGuire [422 NYS 2d 867, aff'd 77 AD 2d 839, aff'd 53 NY 2d 968 (1981)] found that the quoted portion of §400.00(5) is as broad as the language indicates. In its opinion, the majority intimated that if the language is overly broad in granting access, the Legislature should address the problem.

Similarly, if, for example, you believe that certain aspects of the forms represent unwarranted invasion of privacy, the solution would involve legislation. Perhaps such legislation could confer confidentiality regarding certain aspects of the forms, while ensuring public access to the remainder.

I hope that I have been of some assistance and that our paths will cross again. If you have any questions, or if you would like to discuss the issues, 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-2935

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

May 23, 1983

Mr. Bart M. Carrig
Assigned Counsel Administrator
Blumberg & Blumberg
New Temperance Hall
37 North Ann Street
Little Falls, NY 13365

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Carrig:

As you are aware, your letter of May 12 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government (formerly 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, as Assigned Counsel Administrator for Herkimer County, you are responsible for implementing §722 of the County Law, which pertains to legal representation of persons who are financially unable to obtain counsel. Having received a request from the Judiciary Committee of the County Legislature for a copy of an "Affidavit of Financial Status of an individual who sought appointment of assigned counsel", you have asked whether you are "required or permitted to disclose" the affidavit "a) to a Committee of the Legislature; b) to the Legislature or c) to the public or newspaper upon application under the Freedom of Information Act".

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

First, in terms of background, §722 of the County Law requires the governing body of a county to "place in operation" in a county a "plan for representation" by counsel.

Second, having reviewed §722 and the remaining provisions of Article 18-B of the County Law, I do not believe that there is any specific direction given regarding disclosure of the affidavit in question.

Third, since there is no provision of which I am aware that deals specifically with disclosure of the affidavit, it is my view that you are permitted to disclose the affidavit to either the County Legislature or a committe of the Legislature, assuming that the request is made in conjunction with the performance of official duties. While I do not believe that the Freedom of Information Law would be applicable to a request made by a legislative body acting in the performance of its duties, other provisions of the County Law may be cited to provide guidance. For instance, §209 of the County Law entitled "Investigations" states that:

> "[T]he board of supervisors is empowered to conduct an investigation into any subject matter within its jurisdiction, including the conduct and performance of official duties of any officer or employee paid from county funds and the accounting for all money or property owned by or under the control of the county. The power to conduct investigations may be delegated to a committee of the board. The chairman of the board and any member of such committee may issue a subpoena requiring a person to attend before the board or such committee and be examined in reference to any matter within the scope of the investigation, and in a proper case to produce all books, records, papers and documents material or relevant to the investigation. A subpoena issued under this section shall be regulated by the civil practice law and rules. The chairman of the board and any member of such committee may administer the oath to any witness and adjournments may be taken from time to time."

Based upon the language quoted above, it appears that the chairman of the County Legislature or a member of a committee may subpoena the affidavit. As such, if the document is subpoenaed, disclosure would be required; if the document is merely requested by the Legislature or a committee thereof, disclosure would in my view be permitted.

Lastly, a request for the affidavit under the Freedom of Information Law be a member of the public or news media could in my opinion be denied. One of the grounds for denial in the Freedom of Information Law involves the capacity to withhold records or portions thereof when disclosure would constitute an "unwarranted invasion of personal privacy". Although that standard is flexible and subject to various interpretations, it has been advised in a number of contexts that personal financial information may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-887
FOIL-AO-2936

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

May 24, 1983

Ms. Cissy Falk
LegiTech
99 Washington Avenue
Albany, NY 12210

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Falk:

I have received your letter of May 16 in which you requested an advisory opinion.

According to your letter, LegiTech, the firm by which you are employed, is a "legislative information service". Among the services you provide "is access to legislative committee votes". You indicated that "[R]ecently LegiTech discovered many of the official votes obtained from the Senate Journal Clerk's office have been changed to add members as voting when they were previously recorded as absent". Further, to highlight the discrepancies, you enclosed separate copies of records of the same committee votes. In each of the examples that you sent, "not only has a vote been added, but the totals have been changed on the official records."

Your question involves "the legality of this practice of adding votes after the original vote has been recorded".

It is noted at the outset that this office is responsible for providing advice with respect to the Freedom of Information and Open Meetings Laws. Based upon provisions of those statutes, §41 of the General Construction Law, and judicial determinations that relate to the issue that you

raised, the "practice" as you described it, is in my view inconsistent with the Freedom of Information and Open Meetings Laws. In this regard, I would like to offer the following comments.

First, I believe that a committee of the Senate or the Assembly is a "public body" required to comply with the Open Meetings Law. Section 97(2) of that statute 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."

A committee of either house is an entity consisting of at least two members, it is in my opinion required to conduct public business by means of a quorum of its membership, and it performs a governmental function for the state. Moreover, the definition quoted above as amended in 1979 makes specific reference to committees and subcommittees.

Second, of relevance under the circumstances is the term "quorum", which is defined in §41 of the General Construction Law as follows:

> "[W]henever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board of similar body, a majority of the whole number or 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, a public body cannot in my opinion carry out any of its powers or duties unless it conducts a meeting duly held upon reasonable notice to all the members. As such, it is my view that a public body may deliberate and has the capacity to act only during duly convened meetings. Further, by implication, I believe that a member of a public may cast a vote only at a duly convened meeting of the public body.

Moreover, §97(1) of the Open Meetings Law defines "meeting" to mean "the official convening of a public body for the purpose of conducting public business". In my opinion, the term "convening" means a physical coming together. Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble syn see "SUMMON" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" requires the assembly of a group in order to constitute a quorum of a public body. As stated earlier, it is my opinion that a member may cast a vote only at a "meeting", a convening of a quorum of a public body.

Although I could not locate any judicial determination that deals specifically with the issue, there are several opinions, all of them rendered by appellate courts, that intimate that the physical presence and majority vote of a quorum of a public body is necessary for the taking of action [see e.g., Matter of Smithtown v. Howell, 31 NY 2d 365 (1972); Rockland Woods v. Village of Suffern, 40 AD 2d 385 (1973); and Squicciarini v. Planning Board of the

Town of Chester, 48 AD 2d 687 (1975)]. Squicciarini, supra, dealt with a situation in which a town planning board consisted of seven members, and in which a vote of three in favor with one abstention was cast. The Court stated that "[T]he planning board's denial of petitioners' application was by less than a majority of its seven members. Such vote was ineffectual...and was equivalent to nonaction" (id.). If an absent member could have cast a vote following the meeting, perhaps the result may have been different. However, by implication, it does not appear that such a vote could legally have been cast.

I am not suggesting that the practice would, under the specific circumstances that you described, alter the nature of action taken by a committee. However, based upon the decisions cited above, it is reiterated that a vote of a member of a public body may in my view be cast only at a duly convened meeting of the public body.

Third, viewing the matter from a somewhat different perspective, the legislative declaration of the Open Meetings Law, §95, states in part that:

> "[I]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

One of the ingredients described in the statement of legislative intent pertains to the ability to "observe the performance of public officials...and listen to the deliberations and decisions that go into the making of public policy." In short, if a member of a public body is absent from a meeting but later adds his or her vote to the vote previously taken by the public body, the public could not "observe" that member's performance.

Further, the Open Meetings Law contains direction regarding the content of minutes. Section 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."

Further, which respect to minutes of open meetings, §101 (3) states in relevant part 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..."

When the provisions quoted above are read in conjunction with the Freedom of Information Law, I believe that minutes must indicate the votes of members present at meetings. Section 88(3)(a) of the Freedom of Information Law, which applies specifically to the State Legislature, states that:

> "[E]ach house 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..."

In my view, the requirement concerning the creation of a voting record concerns the vote of a member "in...every committee and subcommittee meeting in which the member votes". Stated differently, if a member votes during a meeting, §88(3)(a) in my opinion requires that the member's vote be recorded; conversely, if a member is not present at a meeting, I do not believe that the record of votes required to be prepared could reflect a vote of that member.

In sum, it is my view that the records required to be prepared under the Freedom of Information and Open Meetings Laws must reflect the votes taken by members at meetings, and that the practice that you described is inconsistent with the provisions discussed in the preceding paragraphs.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 886
FOIL-AO- 2937

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

May 24, 1983

Mr. Joseph J. Carrus
[redacted]

The staff of the Committee on Open Government 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 May 16 in which you requested an advisory opinion.

According to your letter, "the NAACP is suing the City of Dunkirk and HUD" relative to low income housing. You wrote further that "[T]he lawyers of all parties have signed a preliminary agreement" regarding "sites, sewage, streets, etc." Nevertheless, having requested information on the subject, the City has denied access on the ground that litigation is pending. Since the City of Dunkirk and HUD "are not in litigation with each other", your question is whether "information in meetings between the city and HUD [can] be kept secret..."

In all honesty, without additional facts concerning the situation, I cannot provide either specific advice or a specific answer. However, I would like to offer the following general comments.

First, with respect to meetings between "the city and HUD", I direct your attention to the Open Meetings Law (see attached). In brief, the Open Meetings Law is applicable to meetings of public bodies and requires that all such meetings be open to the public, unless an "executive session" closed to the public may properly be held.

In the context of your question, it is unclear who attends the meetings. If, for example, the staffs of the City and HUD meet, no public body would be present, and the Open Meetings Law would not in my view be applicable. If, on the other hand, a quorum of the City Council convenes with representatives of HUD, that type of gathering would in my opinion constitute a "meeting" subject to the requirements of the Open Meetings Law.

It is emphasized, however, that §100(1)(d) of the Open Meetings Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". If the meetings in question involve the discussion of litigation initiated against the City by the NAACP, it appears that an executive session could appropriately be held.

There may be other sources or vehicles that may be used to obtain the information sought. While courts and court records fall outside the scope of the Freedom of Information Law, many court records are available from the clerk of a court (see e.g., Judiciary Law, §255). As such, it is suggested that you might want to request records from the clerk of the court in which the suite was brought.

In addition, it is suggested that you submit a request for the information sought under the Freedom of Information Law (see attached). To submit a request, §89(3) of the Freedom of Information Law requires that the records sought be "reasonably described".

Further, although I am not familiar with the records in which you may be interested, a denial based upon a contention that litigation is pending without more specificity may be insufficient, particularly if the records sought have been disclosed to all of the parties involved. Therefore, while I cannot advise that records reflective of the information sought must be made available, it is possible that they may be accessible, depending upon their nature.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2938

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

May 27, 1983

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

The staff of the Committee on Open Government 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 May 19, as well as the materials attached to it.

You have requested my comments regarding the fees that may be assessed for photocopies under the Freedom of Information Law in relation to a resolution adopted by the Town of Boston in 1975. In brief, the resolution established a fee of fifty cents per photocopy.

In terms of background, the resolution adopted in 1975 was promulgated under the Freedom of Information Law as originally enacted. The original statute made no reference to a specific limitation regarding fees for copying. The regulations promulgated by the Committee limited fees to twenty-five cents per photocopy, unless some other provision of law permitted the assessment of a higher fee. When the Freedom of Information Law was amended in 1977 and effective on January 1, 1978, reference was made in §87(1)(b)(iii) to a limitation of twenty-five cents per photocopy, unless a different fee was prescribed by law. However, effective October 15, 1982, the only instance in which more than twenty-five cents per copy may be assessed would involve a statute approved by the State Legislature permitting a higher fee.

As stated in the Committee's 1981 report to the Governor and the Legislature on the Freedom of Information Law (December 3, 1981), in which the Committee recommended the change that is now law:

> "[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 view of the foregoing, I do not believe that the fifty cent fee established in 1975 is valid; on the contrary, the Town in my view is now restricted to charging no more than twenty-five cents per photocopy for records sought under the Freedom of Information Law.

It is suggested that you discuss the matter with the Town Board, for it is the Board's responsibility under §87 (1) of the Freedom of Information Law to adopt rules and regulations consistent with the Law and the regulations promulgated by the Committee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2939

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

May 27, 1983

Mr. James Elder
83-A-1309 D-7-29
Box 51
Comstock, New York 12821

Dear Mr. Elder:

I have received your letter of May 25 in which you requested that this office "look into" a situation in which you were apparently charged with arson and were later involved in a proceeding before the Superintendent of your facility.

Please be advised that the Committee on Open Government is responsible for advising with respect to the Freedom of Information and Open Meetings Laws. As such, the Committee does not have the authority to investigate the occurrence that you described or to require an agency to grant access to records.

It is suggested, however, that you might want to request records regarding the incident under the Freedom of Information Law. In making a written request, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Further, the regulations of the Department of Correctional Services indicate that a request for records kept at a correctional facility should be directed to the facility superintendent.

Since you characterized you letter as a "notice of appeal", and since this office has no jurisdiction regarding the matter, it is also suggested that you discuss the situation with your counselor or a representative of Prisoners' Legal Services or a similar legal aid group. Perhaps one of those individuals could appropriately advise you regarding the nature of an appeal.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2940

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

May 27, 1983

Mr. Earl C. Knight
Negotiation Consultants & Co.
Executive Offices
Anthony Estates
Liebler Road
Boston, NY 14025

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinions is based solely upon the facts presented in your correspondence.

Dear Mr. Knight:

I have received your letter of May 19, which again concerns the assessment of a fee of fifty cents per photocopy by the Town of Boston.

Please be advised that I have discussed the matter with Mr. Klein, Town Clerk, and I believe that the controversy will be resolved.

Mr. Klein in my view has acted in accordance with rules established by the Town Board in 1975. Further, it is emphasized that in my opinion it is not the responsibility of the Town Clerk, but rather the Town Board, to establish rules and regulations consistent with the Freedom of Information Law.

In this regard, §87(1) requires "the governing body of each public corporation", in this instance, the Town Board, to promulgate rules and regulations consistent with the Committee's regulations and "in conformity" with the Freedom of Information Law.

As such, it is suggested that you raise the issue with the Town Board rather than the Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Herbert Klein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2941

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

May 31, 1983

Mr. Steven R. Shapiro
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Shapiro:

I have received your letter of May 17, in which you requested an advisory opinion under the Freedom of Information Law.

Your question is as follows:

> "[M]ay a public agency refuse to comply with the provisions of the Freedom of Information Law on the ground that the person seeking the records is involved in litigation?"

Apparently, the question was precipitated by a denial of a request made under the Freedom of Information Law for records of the New York City Bureau of Labor Services. In the initial denial, it was indicated that the Civil Liberties Union represents plaintiffs in a federal suit "in which the City is a defendant". It was also stated that the records requested "could have been sought through the authorized discovery devices in the course of that litigation", that "Discovery is now closed", and that the "effect of granting the subject FOIL request would be to extend the plaintiffs' discovery period".

It is your contention that "Nothing in the Freedom of Information Law authorizes a litigation exemption". Further you wrote that:

> "[F]irst, the litigation relied on by the agency to justify its denial of Ms. Lowry's FOIL request raises a challenge to the constitutionality of New York City's foster care system and, therefore, involves an issue of obvious public concern. Second, the Bureau of Labor Services is not itself a defendant in that litigation."

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

First, although the litigation initiated in federal court involves constitutional challenges and an issue of significant public concern, those factors are in my view irrelevant to rights of access granted by the Freedom of Information Law.

Second, if the Bureau of Labor Services is not a defendant in the litigation, it is difficult, from my perspective, to justify a denial based upon the pendency of litigation.

Third, I concur with your analysis of the case law regarding the relationship between the Freedom of Information Law and discovery. In short, it is my view that the pendency of litigation, based upon the facts presented in your correspondence, does not alter whatever rights might exist independently under the Freedom of Information Law.

In my opinion, the Freedom of Information Law and provisions pertaining to discovery involve vehicles separate and distinct in terms of procedure and, in many instances, disclosure. As stated by the Court of Appeals in Matter of John P. v. Whalen:

> "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced (Matter of Fitzpatrick v. County of Nassau, Dept. of Public Works, 83 Misc 2d 884, 887-888, aff'd 53 AD 2d 628) nor restricted (Matter of Burke v. Yudelson, 51 AD 2d 673, 674) because he is a litigant or potential litigant" (54 NY 2d 89, 99).

Fitzpatrick, supra, involved a request for an opinion of an expert prepared for litigation, which was protected under §3101(d) of the Civil Practice Law and Rules. There, the Freedom of Information Law could not be invoked to obtain records that could be considered confidential by statute. Burke, supra, concerned a situation that appears to be similar to that described in your letter, for the records, which were prepared in the ordinary course of business, were requested by a litigant. In granting access, the Court found that if records are available under the Freedom of Information Law, "they are not restricted ipso facto because the applicant is also a litigant" (id.).

The most recent decision on the issue of which I am aware cited each of the decisions to which reference was made in the preceding paragraph. Specifically, in Moussa v. State, it was held that:

> "the standing of one who seeks to discover records under the discovery provisions of Article 31 of the CPLR is as a litigant, and is neither enhanced nor restricted, because he may have access, as a member of the public, to those records under the Freedom of Information Law. The procedures to be followed under each of these statutes are distinctly different. If the claimants desire to obtain the information they seek under the Freedom of Information Law, they must first apply to the records access officer and if their application is denied, they must appeal to the appeals officer" [App. Div. 458 NYS 2d 377, 378 (1982)].

In sum, based upon judicial interpretations of the Freedom of Information Law, the involvement in litigation by the Civil Liberties Union against New York City does not in my opinion, under the circumstances, alone constitute a valid basis for withholding the records sought, particularly if the Bureau, as you indicated, "is not itself a defendant in that litigation".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Douglas H. White

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2942

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

June 6, 1983

Mr. Wallace Nolen
881 Gerard Avenue
Bronx, NY 10451

Dear Mr. Nolen:

I have received your letter of May 11, which reached this office on May 24.

You have asked that I comment with respect to a letter addressed to the Honorable Benjamin Nolan, Administrative Judge of the Civil Court of the City of New York. Your letter of Judge Nolan concerns access to records in possession of the Civil and Small Claims Courts in Bronx County. It is apparently your contention that the records sought are available under §§255, 255-a and 255-b of the Judiciary Law.

It is noted that the Committee on Open Government is responsible for providing advice under the Freedom of Information Law. In this regard, as you are aware, the Freedom of Information Law is applicable to agency records. 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."

In turn, §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 excludes the courts and court records from its coverage. Although the provisions that you cited appear to be clear in their direction, I do not believe that it would be appropriate to comment or advise relative to the provisions of the Judiciary Law that you cited.

It is suggested, however, that you seek the advice and services of the Office of Court Administration.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Honorable Benjamin Nolan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 2943

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

June 6, 1983

Ms. Marian Schwartz
Glickman & McAlevey & Greenwald
Suite 301
120 North Main Street
New City, NY 10956

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Schwartz:

As you are aware, I have received your letter of May 20 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry focuses on a request to the Village of Suffern "for vouchers of the Suffern Village Attorney, for time expended on the Goldstein v. Fire Department case". The records sought involve the number of hours the Village attorney spent working on the case, the amounts paid to him in 1981, 1982 and 1983 "and whether these figures represent his entire fee for the case".

You indicated that the request was denied "on the grounds that the Village Attorney is on retainer and his fees are not subject to the Freedom of Information Laws."

It is your view that your firm "has a reasonable business basis for the request", for the records apparently relate to your claim for time expended in a suit pending in federal court. Further, you expressed the opinion that "our reading is that the matter should be disclosed in any event".

I am in general agreement with your contention for the following reasons.

First, the Freedom of Information Law is expansive in scope. 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 breadth of the language quoted above, to the extent that the Village maintains information sought in the form of a record or records, those materials are in my view subject to rights of access.

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, there are two grounds for denial of potential significance. However, neither in my opinion could appropriately be cited to withhold the records sought.

One of the grounds 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 sought could likely be characterized as "intra-agency" materials. Nevertheless, it appears that they would consist solely of "statistical or factual" information that is accessible under §87(2)(g)(i).

The other 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". In this regard, although a village board of trustees may engage in an attorney-client relationship with its attorney, under which communications between the attorney and the client are privileged (see §4503, Civil Practice Law and Rules), 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)].

In my view, the information sought falls outside the scope of the attorney privilege and, therefore, must be made available. It is noted, too, that in a recent decision rendered under the Freedom of Information Law, it was held that checks indicating payment by a village to its attorney were available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Lastly, although your firm might have a "reasonable business basis" for seeking the records, your interest in the records sought is, in my opinion, irrelevant. As indicated in Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], a case in which a litigant requested records from a municipality, records accessible under the Freedom of Information Law should be made equally available "to any person, without regard to status or interest".

In sum, assuming that the Village maintains records reflective of the information sought, I believe that the records are available for the reasons expressed in the preceding paragraphs.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Suffern

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2944

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

June 9, 1983

Ms. Theresa Kluko
Secretary
Lindenhurst Memorial Library
One Lee Avenue
Lindenhurst, NY 11757

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kluko:

I have received your letter of June 1 and, as requested, have enclosed twenty pamphlets entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

With respect to your question, I do not believe that any "special forms" are needed or required to request records under the Freedom of Information Law. In this regard, §89(3) of the Freedom of Information Law (see attached) states that an agency may require that a request be made in writing and that the applicant "reasonably describe" the records sought. There is nothing in the Freedom of Information Law that indicates that a particular form must be employed for the purpose of requesting records. As a consequence, this office has consistently advised that any request made in writing that reasonably describes the records sought should be sufficient.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2945

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

June 9, 1983

Ms. Patricia H. Charlton
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Charlton:

I have received your letter of May 20 in which you requested an advisory opinion under the Freedom of Information Law.

In terms of background, you wrote that the Board of Education of the Vestal Central School District in November of 1982 hired Dickinson-Gamble Architects to prepare a feasibility study regarding remodeling the African Road Elementary School. In February, 1983, the architects submitted a cost estimate of $350,000 to the Superintendent. Later that month, the Board of Education "voted to contract with Dickinson-Gamble Architects to draw up preliminary plans...for a sum not to exceed $3,550.00."

On April 18, you requested the plans, but your request was denied on April 28 on the ground that "Communication between architect and district are intra-agency communications which are deniable under Freedom of Information Law".

Based upon the facts as you have described them, the plans that you are seeking are, in my opinion, available under the Freedom of Information Law. In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, the basis for withholding cited by the District concerns intra-agency communications that fall within the scope of §87(2)(g) of the Freedom of Information Law. Due to a change in the District's relationship with Dickinson-Gamble Architects, I do not believe that the plans requested could be characterized as "intra-agency" communications.

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..."

Inter-agency communications in my opinion involve materials transmitted between agencies, i.e., from one agency to another. Intra-agency materials pertain to those materials transmitted between or among officials of a single agency.

It is noted that §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 architectural firm is a private corporation, I believe that it falls outside the definition of "agency". Consequently, I do not believe that plans tranmitted by Dickinson-Gamble to the District could be characterized as intra-agency communications.

I am aware that a judicial determination, Sea Crest v. Stubing [442 NYS 2d 130, 82 AD 2d 546 (1981)], found that materials transmitted by an engineering firm to a town constituted "intra-agency" materials. However, the Court in Sea Crest indicated that its conclusion was based on a finding that the firm was acting as a consultant, in essence, as an extension of the agency.

It appears that Dickinson-Gamble was acting as a consultant in late 1982 and during the beginning of 1983 when it was involved in the preparation of a feasibility study. At that time, the firm served largely as a consultant or advisor.

Nevertheless, when the firm was engaged by the District as a contractor to prepare plans, I believe that the firm's status as a consultant, and, therefore, its relationship with the District changed. Although it is possible that records transmitted between the District and the architectural firm might have been considered intra-agency communications when the firm was engaging in the preparation of the feasibility study, I do not believe that the plans that you requested fall within §87(2)(g), for the firm is no longer apparently acting as a consultant, but rather as a contractor.

Moreover, even if the plans in question could be characterized as "intra-agency" communications, §87(2)(g)(i) requires that "statistical or factual tabulations or data" found within such communications must be available. From my perspective, building plans might be considred statistical or factual information that are available even if the plans are "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

cc: Dr. John J. Keough, Superintendent
School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2946

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

June 9, 1983

William R. Ashburn
Chief of Police
City of Beacon
Office of Police Department
463 Main Street
Beacon, New York 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Chief Ashburn:

I have received your letter of May 26 in which you described problems relative to the limitation imposed by the Freedom of Information Law regarding fees for copies.

In short, you indicated that it is often time consuming to locate records sought, that requests are often received "without a stamped return enevelope", and that you believe that the fee of twenty-five cents that may be assessed is objectionable due to the time and resources involved in locating records. You have asked for "any alternative" that might decrease the difficulties that you have described.

In this regard, it has been recommended that a police department request that applicants for copies of accident reports, for example, submit their requests with stamped self-addressed envelopes. In order to make your intention to require the inclusion of a stamped envelope known, it is suggested that you include a notation to regular applicants for accident reports that such a requirement would begin on a particular date. Perhaps that type of innovation would lessen the difficulties that you have faced.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2947

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

June 10, 1983

Mr. John Stone
82-A-1575 A-4-26
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government 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 29 in which you requested assistance regarding the use of the Freedom of Information Law.

According to your letter, you have apparently encountered difficulty in obtaining medical and personal information contained in your departmental folder. You also requested information regarding the means by which you may obtain the Department of Correctional Services master index.

In this regard, I would like to offer the following comments and suggestions.

First, with respect to the procedures that should be followed, the Department of Correctional Services has promulgated regulations regarding access to records of the Department. Enclosed is a copy of those regulations, which make specific reference to disclosure of inmate records (§5.21), medical records (§5.24), the custodian of records (§5.15), and the subject matter list (§5.13), which is also known as the master index. It is suggested that you review the regulations carefully.

Second, it is noted that §89(3) of the Freedom of Information Law requires that a request reasonably describe the records sought. Consequently, a request for a departmental folder without additional description might not enable Department officials to determine which records have been requested. Similarly, if, for example, you have a lengthy history of medical problems, a request for medical records without additional description regarding a particular event or illness, for instance, might not constitute a request for records reasonably described.

Third, various aspects of the records in question might justifiably be withheld. With respect to medical records, it has been advised in the past that those aspects of medical records consisting of statistical or factual information (i.e., a laboratory test result) should be made available under §87(2)(g)(i) of the Freedom of Information Law. Nevertheless, portions of medical records consisting of advice, recommendation or opinion, for example, could likely be withheld under §87(2)(g).

Lastly, it is noted that the subject matter list or "master index" would not pertain to particular records regarding a specific individual. Section 87(3)(c) of the Freedom of Information Law concerning the subject matter list 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."

As such, the Department's master index would not identify every record of the Department or every record pertaining to a particular inmate. On the contrary, the master index refers to categories of records maintained by 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2948

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

June 10, 1983

Mr. Peter J. Millock
General Counsel
NYS Department of Health
Tower Building
The Governor Nelson A. Rockefeller
Empire State Plaza
Albany, New York 12237

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Millock:

I have received your letter of May 16, which reached this office on May 25.

According to your letter, you:

> "...are concerned with the requirement that FOIL requests be granted or denied within ten business days of acknowledging receipt of the request and the present procedure of providing the requestor with documents based upon an offer to pay the required fees."

In conjunction with the statement quoted above, you wrote that broad, "general" requests are anticipated with regard to hazardous waste enforcement proceedings, and that, if such requests are made, Department employees would be "diverted" from their public health activities. As such, you suggested that the Committee's regulations be amended to permit an agency to acknowledge the receipt of a request and, thereafter, take up to sixty days to determine initially to grant or deny access to the records sought.

I would like to offer the following comments and suggestions concerning your remarks.

First, it is noted that agencies rarely complain that the time limits for responses to requests found in the Freedom of Information Law and the regulations promulgated by the Committee are inordinately short. Further, while an extension to sixty days for responding to a request would represent a maximum time limit, I would conjecture that agencies would in some instances use such a provision as a delaying tactic. This office often receives complaints that responses to requests for records readily located are delayed to the fifth business day or the tenth business day following an acknowledgment of the receipt of a request. While such strategies are in my view likely legal, they would not conform with the spirit or intent of the Freedom of Information Law.

It is also emphasized that the vast majority of agencies subject to the Freedom of Information Law are relatively small units of local government. In my opinion, the adoption of your proposal would unnecessarily extend the time for response for records that can generally be located and evaluated quickly by the majority of agencies subject to the Freedom of Information Law.

I would like to point out, too, that compliance with the Freedom of Information Law has been construed by the courts to be an obligation of an agency. For instance, in United Federation of Teachers v. New York City Health and Hospitals Corporation, [428 NYS 2d 823 (1980)], it was held that a shortage of manpower to comply with a request could not constitute a valid defense, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law". The Court of Appeals in Doolan v. BOCES [48 NY 2d 341 (1979)] found that "[M]eeting the public's legitimate rights of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" (id. at 347).

While I do not agree with your proposal for the reasons expressed above, I would be pleased to discuss the matter with you in an effort to reach a reasonable alternative.

With respect to fees, it has consistently been advised that an agency may, pursuant to §89(3) of the Freedom of Information Law, require payment in advance of the preparation of copies of records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2949

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

June 13, 1983

Ms. Roseann Skidmore
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Skidmore:

I have received your letter of May 27 in which you raised questions regarding the Freedom of Information Law.

Your first question involves the "options" available to you in a situation in which no response to an appeal has been rendered. In this regard, as you are likely aware, §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."

As such, the Law requires that a determination must be rendered within seven business days of the receipt of an appeal.

If no determination is rendered within seven business days, one option would involve contacting the appeals person or body in an effort to assure that a response is provided. In the alternative, it has been held that, if no determination is rendered following an appeal of an initial denial of access to records, the applicant has exhausted his or her administrative remedies and may initiate a proceeding under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD 2d 388, __ NY 2d __ (1982)].

The second question involves the propriety of a denial of your request for the home address of an Ulster County employee. In my opinion, a public employee's home address is deniable.

It is noted that the Freedom of Information Law, §87 (3)(b) requires each agency to maintain a payroll record that includes the name, public office address, title and salary of every officer or employee of the agency. While a public employee's public office address is clearly available under the Freedom of Information Law, it is my view that disclosure of the home address would constitute "an unwarranted invasion of personal privacy" and, therefore, could be withheld under §87(2)(b) of the Freedom of Information Law.

I would like to point out, too, that the Freedom of Information Law as originally enacted in 1974 contained a provision similar to §87(3)(b), but that provision [formerly §88(1)(g)] referred to the "address", without specifying whether the payroll listing should refer to the home or public office address. In my opinion, the clarification requiring reference to the public office address was intended to avoid any requirement that a home address of a public employee be disclosed. In sum, I do not believe that the Freedom of Information Law requires the disclosure of a public employee's home address.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2950

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

June 13, 1983

Mr. Phil Vita
79-A-1803
P.O. Box 149
Attica, NY 14011

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Vita:

I have received your letter of May 27 and the correspondence attached to it.

According to the correspondence, you are interested in learning the date on which an indictment was signed and the dates on which a named individual served as grand jury foreman.

In this regard, I would like to offer the following comments.

First, the Freedom of Information Law is applicable to agency 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 does not apply to the courts or court records.

Second, the provision that you cited in your correspondence is §2019-a of the Uniform Justice Court Act. That statute applies only to records in possession of courts subject to the Uniform Justice Court Act; it does not apply to records of a supreme court. I have, however, enclosed a copy of §255 of the Judiciary Law, which provides broad rights of access to court records.

Third, if you are unsuccessful in obtaining records directly from the court, some of the information in question might be available from the District Attorney. Consequently, you might want to request the records under the Freedom of Information Law from the District Attorney. Enclosed are copies of the Freedom of Infomration Law and an explanatory pamphlet that may be useful to you.

Lastly, under the circumstances, it is suggested that you discuss the matter with a legal aid attorney or a representative of Prisoners' Legal Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2957

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

June 13, 1983

Mr. Patrick J. King
[redacted]

The staff of the Committee on Open Government 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 May 27 as well as the materials attached to it.

Having reviewed the materials, I am not sure that I understand the nature of the records that you are seeking. Nevertheless, I would like to offer the following comments regarding the materials.

First, the only request enclosed with your letter involved the subject matter list prepared by the Office of Corporation Counsel. Although you enclosed a response to your requests submitted on May 18, you did not include a copy of those requests. The response to those requests by Joan Carley, Records Access Officer, contains a denial based upon all of the bases for withholding listed in the Freedom of Information Law. In addition, however, you were granted access to some records, directed to various other departments within the City of Long Beach regarding certain other records, and were advised that you could review records at the Office of Corporation Counsel after having arranged a "mutually convenient schedule of dates". Consequently, it appears that the response is reflective of an effort to cooperate with you and to fulfill your requests to the extent required by the Freedom of Information Law.

Second, it appears that several aspects of the requests may have been somewhat broad. Here I direct your attention to §89(3) of the Freedom of Information Law, which requires that an applicant request records "reasonably described". In this regard, I would conjecture that a request for "all inter-office memoranda" in general or pertaining to oneself might not "reasonably describe" the records sought, depending upon the extent to which such records exist or the means by which they are filed and maintained. It is suggested that you contact the records access officer for the purpose of determining the nature of the records sought with greater familiarity.

Third, there may be records requested that could justifiably be denied. For example, with respect to the "inter-office correspondence" to which you referred, one of the categories of records that you "assume" is available under the Freedom of Information Law, there may be aspects of such materials that may be withheld. 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..."

Based upon the language quoted above, while some aspects of inter-agency or intra-agency materials must be made available, others, such as those reflective of advice, opinion or recommendations, for example, may in my view be withheld.

Fourth, since your request involves records of the Office of Corporation Counsel, I would like to point out that other types of materials might also be withheld. Records that fall within the scope of the attorney-client privilege as well as those reflective of attorney work product could in my view be withheld due to the provisions of the Civil Practice Law and Rules, §3101, when read in conjunction with §87(2)(a) of the Freedom of Information Law.

In sum, without greater knowledge of the nature of the records that you have requested, I do not believe that I can provide direction of a more specific nature. However, once again, it is suggested that you discuss the request with the records access officer for the purpose of reasonably describing the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joan Carley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-895
FOIL-AO-2952

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

June 14, 1983

Mr. Richard G. Della Ratta
Della Ratta & Palmiotto
650 Franklin Street - 409
Schenectady, NY 12305

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Della Ratta:

I have received your letter of June 1 and the materials attached to it.

You wrote that it is your understanding that "when a vote is made in Executive Session concerning a tenured teacher, minutes should be kept..." You indicated further that your understanding is based upon an opinion that I prepared and which you attached to your letter.

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

First, having reviewed the opinion that you attributed to me, I do not believe that I prepared the documentation. There is nothing, however, in the enclosed opinion with which I strongly disagree.

Second, as you are aware, the Open Meetings Law generally permits public bodies to take action during appropriately convened executive sessions. Nevertheless, this office has consistently advised that, due to judicial interpretations of §1708(3) of the Education Law [see e.g., Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); and Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd ___ NY 2d ___ (1982)], school boards must take action only during open meetings, unless there is specific statutory direction to the contrary.

One of those instances in which such statutory direction is given involves §3020-a of the Education Law pertaining to charges made against a tenured individual. Specifically, §3020-a(2) states in part that:

> "[U]pon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail."

In view of the language quoted above, action by a board of education regarding a finding of probable cause following receipt of charges must be accomplished during an executive session.

Third, with respect to minutes, §101 of the Open Meetings Law provides what in my view may be characterized as minimum requirements concerning the contents of minutes. With regard to minutes of executive sessions, §101(2) states that:

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

From my perspective, the Open Meetings Law does not require that minutes must make reference to the nature of comments made or that they constitute the equivalent of a verbatim account of what may have been stated during an executive session. Rather, minutes of executive session are required to consist of a record or summary of a final determination, and that date and vote thereon. Further, if no action is taken during an executive session, there is not, in my opinion, any requirement that minutes must be prepared.

Fourth, as indicated above, §3020-a(2) of the Education Law requires that a detailed statement of charges must be forwarded to the accused employee. As such, it would appear that such a record is more detailed than minutes required to be prepared under the Open Meetings Law, and that the statement is available as of right under the Education Law to an employee who has been charged. It is noted, however, that it has been held judicially that the charges are deniable if requested by the public under the Freedom of Information Law [Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Therefore, under §101(2) of the Open Meetings Law, it is possible that minutes might be prepared, but that they need not be made available under the Freedom of Information Law.

Lastly, assuming that the records in question exist and pertain to your client, and assuming that the client is the subject of charges brought under §3020-a of the Education Law, it would appear that such records are available for inspection and copying to the client or his or her legal representative. In this regard, Mr. Lawrence, Assistant Superintendent of the Hudson City School District, wrote that "[W]e are not obligated to provide access to our photocopy equipment or to provide copies for you". In my opinion, if a record is available under either the Freedom of Information Law or some other provision of law, such as §3020-a of the Education Law, copies must be made by the agency 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: Lester L. Lawrence

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2953

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

June 14, 1983

Mr. Mitchell I. Feld
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Feld:

I have received your letter of June 2.

Your inquiry concerns "the proper procedure under the Freedom of Information Act to obtain information on whether a person has a criminal record." You also asked which agencies "are charged with the responsibility of administering the Judicial branch".

With respect to criminal records, a response is in my view dependent in part upon whether you are seeking records pertaining to yourself or to others. The procedure for requesting criminal history information pertaining to oneself is found in 9 NYCRR §6050, a copy of which is enclosed. The cited regulations were promulgated by the Division of Criminal Justice Services, which maintains criminal history information. Also enclosed are §§6051 and 6150.

If a request involves criminal records of others, I believe that the Division generally denies such requests due to considerations of privacy.

As an alternative, however, records of convictions are also maintained by the clerks of the courts in which the convictions occurred. I believe that such records are generally available from the clerks under §255 of the Judiciary Law (see attached).

Lastly, the agency that administers the judicial branch is the Office of Court Administration, which is located at the Empire State Plaza, Agency Building 4, Albany, NY 12223.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2954

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

June 15, 1983

Ms. Peg Washburn
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Washburn:

I have received your letter of June 7 which pertains to a denial of access to records that you requested.

Specifically, you wrote that you are interested in obtaining a list of "names of people who have received funding through the H.U.D. or Keuka Housing Program. In response to your request, the Director of the H.U.D. program indicated that "it would break the hearts of some of the people if their names were to be disclosed". It is your contention that "the program is not something you should be ashamed of".

In this regard, I would like to offer the following comments.

First, the New York Freedom of Information Law is applicable to records in possession of units of state and local government. Since H.U.D. is a federal agency, its records would not be subject to the New York Freedom of Information Law, but rather the provisions of the federal Freedom of Information Act. If, however, the information sought is in possession of a unit of municipal government, the provisions of the New York Freedom of Information Law would be applicable.

Second, assuming that the records in question are maintained by an agency subject to the Freedom of Information Law, rights of access are in my view dependent on whether grants made under the program are awarded on the basis of income eligibility. In short, if only those with an income below a certain amount are eligible, it is likely that the names of recipients could be witheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87 (2)(b)].

In this regard, while I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view seek to enable government to prevent disclosures concerning the personal details of individuals' lives. As such, the central question involves the extent to which disclosure would constitute an unwarranted as opposed to a permissible invasion of personal privacy.

From my perspective, a disclosure that permits the public to determine the general income level of a participant in the program would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy. If on the other hand, there is no income eligibility requirement for participation in the grant program, the records sought in my view would be accessible under the Freedom of Information Law.

Lastly, if you believe that that H.U.D. program has not been administered appropriately or that staff has engaged in questionable conduct, it is suggested that you contact the H.U.D. regional office in Buffalo or that agency's inspector general.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2955

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

June 15, 1983

Reverend Bob Lily
[redacted]

Dear Reverend Lily:

I have received copies of various requests and appeals sent to this office that you submitted under the Freedom of Information Law to entities of both state and local government.

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

First, as you may be aware, §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". In this regard, while it is possible that some of your requests might have reasonably described the records sought, it is likely in my view that an insufficient description of the records requested was present in several of the requests. Often, depending upon the nature of an agency's filing or indexing systems, it may be impossible to locate records merely by means of a name or caption. It is suggested for the future that as much specificity be provided as possible, including dates, identification numbers, descriptions of events, and similar information that might enable agency officials to locate records sought.

Second, in the event of a denial, you requested that agencies "provide a complete itemized inventory and detailed factual justification of total or partial denial of documents." In the case of an initial denial of access, the regulations promulgated by the Committee merely indi-

cate that the reasons for a denial must be stated in writing. Further, although judicial interpretations of the federal Freedom of Information Act have in some instances required the preparation of a so-called "Vaughn Index" that itemizes and describes the records denied, there is no statutory requirement to do so under the New York Freedom of Information Law, and there is no judicial decision of which I am aware that would require the preparation of such a detailed denial.

Third, it is emphasized that the Freedom of Information Law is a statute pertaining to access to records. It is not in my view a law that requires that additional or perhaps related actions be taken. For instance, you raised questions in your requests regarding the destruction of records and an identification of "systems of records searched...as well as the scope, depth, and nature of the search". In short, I do not believe that the Freedom of Information Law would require responses relative to those areas of inquiry.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-899
FOIL-AO-2956

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

June 15, 1983

David Kelsey
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kelsey:

As you are aware, I have received your letter of June 6 and the materials attached to it.

Your inquiry concerns requests directed under the Freedom of Information Law to the Akron Central School District, as well as the "appropriateness" of an executive session held by the District's Board of Education.

First, with respect to your requests made under the Freedom of Information Law, having reviewed the materials, while I believe that the information sought is accessible, I would like to offer comments regarding the form in which your requests were made.

In one of the requests of May 10, you asked for the salaries of various named administrators by preparing boxes within which the Superintendent could write figures reflective of salaries. From my perspective, although the salary information is clearly available, you were essentially asking that a District official prepare a new record on your behalf. In this regard, §89(3) of the Freedom of Information Law states in part that an agency is not obligated to create a record in response to a request. I believe that the request should likely have involved payroll records required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law. The cited provision requires each agency to maintain:

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

Based upon a review of payroll records envisioned by §87 (3)(b), you could obtain the same information without asking that District officials complete the form that you devised.

Similarly, in your inquiries made in 1981, you requested salary information pertaining to all"non-teaching personnel". If such a record did not exist, the District would in my view have no obligation to create a new record on your behalf. Once again, a more appropriate request in my view would have involved an attempt to review the payroll record required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law.

With regard to the other request of May 10, you raised questions regarding policies. In my view, a more appropriate request under the Freedom of Information Law would have involved a request for current policies on the subjects that you described. Upon receipt of those records, a comparison could be made between existing policies and those formerly adopted.

Your remaining question regarding the Freedom of Information Law concerns a charge of sixty dollars for a copy of the payroll record. When you first requested that record in 1981, apparently the District obtained the information from the local BOCES and charged you sixty dollars on the basis of computer time. In my opinion, that fee is inappropriate. Once again, §87(3)(b) of the Freedom of Information Law requires each agency to maintain a payroll record. Based upon the language of that provision, I believe that the School District is required to have in its possession on an ongoing basis a list of employees which includes their names, public office addresses, titles and salaries. The fee that may be assessed for a copy of such a record would be twenty-five cents per photocopy.

Lastly, your letter and the minutes of a meeting of the Board of Education indicate that the Board held an executive session to discuss your requests made under the Freedom of Information Law.

As you are aware, the Open Meetings Law requires that a meeting of a public body, including a board of education, must be open to the public except when an issue may be discussed during an executive session. However, a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the topics that may appropriately be considered during an executive session. In my opinion, a discussion of your request would not have fallen within any of the grounds for 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. David W. Fish
School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 2957

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

June 17, 1983

Ms. Alice Knapik
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Knapik:

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

Your inquiry involves a request for the record of a $5,800 deposit made for the purchase of a building. According to your letter addressed to the town attorney for the Town of Glen, "[T]his building was going to be purchased for $58,000.00 to be used by Town Offices and to house the records of the past and future." The Town Supervisor, Harold R. Bellinger denied the request on the basis of §87(2)(d) of the Freedom of Information Law.

In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, the ground for denial cited by Mr. Bellinger, §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 injory to the competitive position of the subject enterprise..."

Under the circumstances described in your correspondence, it does not appear that §87(2)(d) is applicable, for the deposit could not in my view be characterized as a trade secret; further, the deposit is not maintained for the regulation of commercial enterprise.

Third, if the facts that you presented are accurate, there is in my opinion no ground for denial in the Freedom of Information Law that could be cited to withhold the record in question. On the contrary, the record would appear to be available under the Freedom of Information Law and §29 of the Town Law, which was quoted in relevant part in my earlier letter to you.

Fourth, §87(1) of the Freedom of Information Law requires each agency, including the Town of Glen, to promulgate rules and regulations consistent with those of the Committee and in conformity with the Law. In this regard, §89(4)(a) of the Freedom of Information Law provides 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."

The rules required to be adopted by the Town Board must designate a person or body to render determinations on appeal following denials of access to records. It is suggested that you attempt to learn who has been designated to hear appeals and submit an appeal to that person or body.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Harold Bellinger
Edgar Leonhart

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2958

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

June 17, 1983

Ms. Coleta A. Glass
Village Clerk
Village of Hamburg
Village Hall
46 Main Street
Hamburg, NY 14075

Dear Ms. Glass:

I obtained a copy of Local Law No. 2 of 1983 adopted by the Village of Hamburg Board of Trustees when that law was submitted to the Department of State.

In brief, Local Law No. 2 establishes fees not to exceed one dollar per photocopy and two dollars for each search for records requested under the Freedom of Information Law.

From my perspective, the fees established by Local Law No. 2 are inconsistent with the Freedom of Information Law. In this regard, I would like to offer the following comments.

First, as you may be aware, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations regarding the procedural aspects of the Law. In turn, §87(1) requires each agency, such as the Village of Hamburg, to promulgate rules and regulations pursuant to those adopted by the Committee.

Second, §87(1)(b)(iii) indicates that an agency's rules and regulations 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 statute."

The language quoted above sets a maximum fee of twenty-five cents per photocopy, unless a different fee is prescribed by statute. Moreover, the Freedom of Information Law makes no reference to search fees and §1401.8 of the Committee's regulations (see attached) specifically precludes the assessment of a search fee, unless such a fee is authorized by statute.

Third, Local Law No. 2 refers to Chapter 73 of the Laws of 1982, which amended the Freedom of Information Law relative to fees for photocopies. In terms of background, §87(1)(b)(iii) of the Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different feel was prescribed by "law". Chapter 73 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, 1982, 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.

In view of the foregoing, it is suggested that the Board review and revise the local law recently adopted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2959

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

June 17, 1983

Mr. Richard R. Behrens
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Behrens:

I have received your letter addressed to Senator Moynihan and myself regarding requests for records directed to the New York City Board of Education.

Based upon your letter and the correspondence attached to it, it is your view that the Board has responded by means of "non-answers" and "other imaginative turn-downs".

In this regard, I would like to offer the following comments.

First, the Freedom of Information Law is a vehicle under which an individual may request and, depending upon rights of access granted by the Law, obtain records. However, §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. In view of the responses to several of your requests, it appears that the Board does not in many instances maintain the records sought. Under those circumstances, the Board would not in my opinion be required to create a new record on your behalf.

Second, §89(3) also requires that an applicant submit a request for records "reasonably described". Often the capacity of agency officials to locate information is dependent upon the manner in which the records are maintained or filed. Therefore, even though a request might be specific, an agency might have no way of locating the information sought. I would conjecture, too, that several of your requests would involve a review of a number of systems of records in order to develop the information sought. If that is so, the Board might not have the capacity to locate the information sought and, moreover, to respond to your requests, new records would have to be created.

Lastly, §89(3) of the Freedom of Information Law states in part that, if an agency determines that it does not maintain the records sought, an applicant may request that the agency "certify that it does not have possession of such record or that such record cannot be found after diligent search." You may want to consider requesting such a certification.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Daniel P. Moynihan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2960

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

June 20, 1983

Ms. Margaret Pottick
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Pottick:

I have received your letter dated May 23 which reached this office on June 9. If indeed your letter was mailed in March, I hope that you will understand the reason for the delay in response.

In terms of the background of your inquiry, you are the subject of charges brought under the Civil Service Law regarding "living out of Nassau County". Apparently, due to local residency laws, employees of Nassau County are required to live in the County. In this regard, you wrote that the director of your agency has a Suffolk County address, but that the Department "has made no move toward bringing him up on the same charge".

You indicated that, under the circumstances, you are interested in viewing the record of your director "to determine whether or not he has a legal waiver of residence, and, if so, on what legal grounds he was able to obtain such a waiver in his competitive class title". You stated that you are also interested in viewing the names and addresses of all employees of the County Departments of Social Services and Corrections.

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

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, as a general rule, I believe that an agency may withhold home addresses on the ground that disclosure would result in "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. It is noted that each agency subject to the Law is required to maintain:

> "a record setting forth the name, public office address, title and salary of every officer or employee of the agency..." [see §87(3)(b)].

Based upon the language quoted above, which makes specific reference to a requirement that the payroll record refer to employees' public office addresses, it has been advised that home addresses need not be disclosed. The rationale regarding the withholding of home addresses is based upon the notion that the home address of an employee generally is irrelevant to the performance of his or her official duties.

I know of no judicial determination rendered under the Freedom of Information Law concerning a request for a home address that is sought for the purpose of determining compliance with a local residency law. However, due to the requirements of such law, it is possible that a court might find that the only method of determining compliance would involve a review of employees' home addresses. Prior to the enactment of the Freedom of Information Law, a decision rendered in Supreme Court, Nassau County, referred to payroll information and found that home addresses generally need not be made available. However, the Court also stated that:

> "[T]he employees' home addresses, however, do not carry the same prima facie public importance and unless a specific 'private' need is shown for them, they need not be disclosed. See, 15 Op.St.Compt. 377 (1959). In such instances, the strength of the competing consideration of employee privacy must be balanced against the marginal benefit in the public's knowledge of this specific information, such as protection against 'cronyism' or violations of local

> residence laws, and some cause be shown to warrant their disclosure" [Winston v. Mangan, 338 NYS 2d 654, 662 (1972)].

From my perspective, the language quoted above infers that there may be situations in which the home address is relevant to the performance of one's official duties and should perhaps be made available.

In the context of your question, if a waiver of a residency requirement has been granted to your director, it is my view that the determination by the agency to waive such a requirement would be available. Although the home address of the individual in question might justifiably be denied, the waiver itself would not in my opinion constitute an unwarranted invasion of personal privacy if disclosed. Further, the issuance of such a waiver would in my view be reflective of a final agency determination that is accessible under §87(2)(g)(iii) of the Freedom of Information Law.

With respect to the names and addresses of all employees of particular departments, although I believe that home addresses generally may be withheld for the reasons noted above, I could not conjecture as to the nature of a determination that might be rendered judicially when there is a local residency requirement. Nevertheless, once again, I believe that waivers granted by agencies regarding residency requirements are likely accessible under the Freedom of Information Law.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet that might be helpful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2961

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

June 21, 1983

Ms. Mary O. Furey
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Furey:

I have received your letter of June 6, as well as the policy and procedures adopted by the Board of Education of the Ballston Spa School District under the Freedom of Information Law.

You have requested my opinion regarding the procedures and the form used for making requests. In this regard, I would like to offer the following comments.

First, the regulations indicate that they are based upon the "Freedom of Information Law, Chapters 578, 579 and 580, Laws of 1974..." The reference cited in the regulations pertains to the Freedom of Information Law as originally enacted. That statute was repealed and replaced by Chapter 933 of the Laws of 1977, which became effective on January 1, 1978.

Second, as a consequence, the application form used to make requests is outdated in some respects. For instance, the grounds for denial appear to be based upon the original Freedom of Information Law, rather than the current statute. Further, there is a space in which an applicant should indicate who he or she is "representing".

In my opinion, that space likely should not be included in the form, for it has been found that records accessible under the Freedom of Information Law 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]. Therefore, even if an applicant for records represents another person, as a general rule, that should not affect rights of access.

Third, part A.1 of the regulations requires that "[R]equests for access to school records must be filed in writing on forms provided by the school district." Neither the Freedom of Information Law nor the regulations promulgated by the Committee, which govern the procedural aspects of the Law, refers to a particular form that should or must be used when requesting records. On the contrary, it has consistently been advised that any request in writing that reasonably describes the records sought [see Freedom of Information Law, §89(3)] should suffice. It has also been advised that a failure to complete a form prescribed by an agency cannot validly serve as a basis for delaying or denying a request.

Fourth, part F. of the regulations is entitled "Subject Matter of List" and refers to "[A] listing of subject matter of records available for inspection". Once again, the provision appears to be based on the original Freedom of Information Law. That statute required that agencies prepare a list, by category, of available records. The current Law, however, 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" [Freedom of Information Law, §87(3)(c)].

As such, the subject matter list should refer by category, in reasonable detail, to all records of the District, and not only to those considered to be available.

Fifth, part G. of the District's regulations alludes in part to personnel records and states that those records cannot be disclosed "without the prior consent of the Teacher". While some personnel records may in my view be withheld, it has been held in a variety of contexts by the courts that many aspects of personnel records are available under the Law. If you would like more information on that topic, it can be provided on request.

Lastly, in an effort to help agencies develop regulations consistent with those promulgated by the Committee as required by §87(1)(a) of the Freedom of Information Law, the Committee has prepared model regulations. To inform the Board of Education of the latest procedural requirements of the Freedom of Information Law, the enclosed regulations and model regulations will be sent to the Board with a copy of this opinion.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 900
FOIL-AO- 2962

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

June 21, 1983

Mr. Robert W. Parks
General Manager
Tri-States Publishing Company
84-88 Fowler Street
Port Jervis, NY 12771

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Parks:

I have received your letter of June 8, as well as that of Mr. Glass of June 13. Mr. Glass is Corporation Counsel for the City of Port Jervis. The correspondence pertains to committees of the City of Port Jervis and their responsibilities under the Open Meetings Law. The interest in compliance with the Open Meetings Law expressed by yourself and Mr. Glass by means of his thoughtful letter is much appreciated.

Since there are differences of opinion expressed by yourself and Mr. Glass in relation to occurrences involving the Port Jervis Public Works Committee, the ensuing comments will be largely legal in nature.

First, as Mr. Glass has conceded, meetings of a committee are subject to the Open Meetings Law. In this regard, the application of the Open Meetings Law is determined in part by the definition of "public body". That term includes:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body" [see Open Meetings Law, §97(2)].

Although Mr. Glass recognized the change in the Open Meetings Law made in 1979 that clearly brought committees and subcommittees within the scope of the Law, he also indicated that §101 of the Law regarding minutes remained unchanged. It appears to be his contention that requirements concerning minutes apply only to the governing body, the Common Council of the City of Port Jervis, and not advisory bodies, such as the Public Works Committee.

In my opinion, even though a committee might not have the authority to take final and binding action, I believe that it is a "public body" required to carry out whatever obligations might exist under the Open Meetings Law. Stated differently, it is my view that the Public Works Committee is itself a public body required to provide notice in accordance with §99 of the Open Meetings Law, required to follow the procedure prescribed by §100(1) prior to entry into an executive session, and required to prepare minutes to the extent prescribed by §101. I would like to point out, too, that it has been held judicially that advisory committees are themselves public bodies required to prepare minutes, even though their minutes may be reflective of advice [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY ad 995 (1982)]. Therefore, §101 concerning minutes refers to governing bodies as well as advisory bodies.

Second, you raised questions regarding notice of meetings and "[H]ow much prior notification is required". It appears that your question was precipitated by a situation in which notice of the wrong time was given. Mr. Glass has indicated that the error was inadvertent and that steps have been taken to ensure that the appropriate notice is given.

For future reference, §99(1) of the Open Meetings Law pertains to 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) concerns 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 "to the extent practicable" at a reasonable time prior to such meetings.

As such, although the Open Meetings Law does not preclude the holding of emergency meetings, for example, efforts must in my view be made to provide notice pursuant to §99(2). In those instances, compliance might merely involve posting notice in the usual locations and telephoning representatives of the news media.

Third, the major source of controversy between yourself and Mr. Glass concerns minutes of meetings of committees. On one hand, in describing the business of the Public Works Committee, you wrote that:

> "[T]here are a series of discussions, reports on work completed, and recommendations agreed upon by the committee members. These recommendations will later be presented to the full council for approval. Notes are kept by Councilman Richard McGoey throughout the meeting. There are no votes taken, but there is a general consensus on most matters."

On the other hand, Mr. Glass wrote that, although notes may be taken by individual members:

> "no votes are taken, no motions are passed, no resolutions are offered and no action is taken at a workshop or committee meeting. It would be an exercise in futility to require minutes where the minutes would be a blank page."

Consequently, minutes are not taken.

With respect to minutes of open meetings, §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."

The language quoted above in my view represents what may be characterized as minimum requirements concerning the contents of minutes. Clearly §101 does not require that every comment made at a meeting be recorded or that a verbatim account of a meeting be prepared.

However, as noted earlier, it was held in Syracuse United Neighbors, supra, that advisory committees must prepare minutes. From my perspective, if the Public Works Committee offers a proposal, as a body, to the Common Council, such a step is in my view reflective of action taken by the Committee that must be recorded in minutes, even if the Common Council has the authority to accept, reject or modify the Committee's recommendation. Therefore, if a "consensus" is reached by the Committee to forward a proposal to the governing body, I believe, based upon the language of the Open Meetings Law and its judicial interpretation, that minutes should be prepared.

Similarly, since a committee is itself a public body, it may enter into executive sessions where appropriate [see Open Meetings Law, §100(1)(a) through (h)]. However, the Law contains procedural requirements that must be accomplished during an open meeting before an executive session may be held. Specifically, §100(1) states in relevant part that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Since a motion must be made prior to entry into an executive session, and since minutes must include reference to motions, a committee that enters into an executive session must in my opinion maintain minutes that include reference to motions to go into executive sessions.

In a related area, I direct your attention to the Freedom of Information Law. Section 87(3)(a) states that each agency, including a committee, shall maintain:

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

In my opinion, the record of votes envisioned by §87(3)(a) should be included in minutes, when action is taken by a committee. Once again, while action taken by a committee might not be the final action, which may only be taken by the Common Council, such a step is its (i.e., the committee's) final action.

Fourth, you referred to the "subject matter of list" of the City of Port Jervis. In this regard, §87(3)(c) of the Freedom of Information Law states that each agency shall maintain:

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

Mr. Glass indicated that the subject matter list is available on request.

Lastly, both your letter and that of Mr. Glass referred to notes taken by members of the Public Works Committee at its meetings. I believe that the notes are subject to whatever rights of access might exist under the Freedom of Information Law.

It is noted that the Freedom of Information Law is expansive in scope due in part to the definition of "record". Section 86(4) provides that the term "record" 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."

In a situation that may be somewhat similar to that described, it was found that notes of meetings prepared by the Secretary to the Board of Regents and kept separate from minutes constituted "records" subject to rights of access. Therefore, it appears that the notes in question are accessible or deniable depending upon the extent to which one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Freedom of Information Law might apply [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:jm

cc: William A. Glass, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2963

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

June 21, 1983

Mr. Michael J. Hutter
Executive Director
Law Revision Commission
488 Broadway
Albany, NY 12207

Dear Mr. Hutter:

Thanks for sending Professor Martin's article in which he recommended an amendment to the Code of Evidence concerning an "official information" privilege.

From my perspective, the proposed language would likely muddy the waters and tend to create a relationship between the Freedom of Information Law and discovery devices employed in the context of litigation that does not now and probably should not exist.

It is noted at the outset that, in my opinion, one of the basic principles of the Freedom of Information Law is that records accessible under that statute 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 stated by the Court of Appeals in Matter of John P. v. Whalen [75 AD 2d 1021 (1980); aff'd 54 NY 2d 89 (1981)] "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted... because he is also a litigant or a potential litigant."

Conversely, §3101(a) of the Civil Practice Law and Rules requires "full disclosure of all evidence material and necessary in the prosecution or defense of an action..." Unlike the Freedom of Information Law, where the only question involves the extent to which the grounds for

denial of access may be appropriately asserted [see §87(2)(a) through (h); also Doolan v. BOCES, 48 NY 2d 341 (1979)], the question raised under §3101 of the Civil Practice Law and Rules involves what is material and necessary.

As such, there may be situations in which records are neither material nor necessary, but in which they are available to any person under the Freedom of Information Law. The reverse may also be true, i.e., that records may justifiably be withheld under the Freedom of Information Law, but they may be material and necessary relative to litigation and, therefore, available under discovery.

Perhaps the issue was discussed most clearly in a fairly recent decision of the Appellative Division, Fourth Department. In Moussa v. State [App. Div., 458 NY 2d, 91 AD 2d 863 (1982)], it was found that, even though records may be available under the Freedom of Information Law, they are not necessarily available under Article 31. The Court cited the language of the Court of Appeals from Matter of John P., supra, in that one who seeks records under the Freedom of Information Law "is as a member of the public". The Court also found that:

> "[A]s a corollary, the standing of one who seeks to discover records under the discovery provisions of Article 31 of the CPLR is as a litigant, and is neither enhanced nor restricted because he may have access, as a member of the public, to those records under the Freedom of Information Law. The procedures to be followed under each of these statutes are distinctly different. If the claimants desire to obtain the information they seek under the Freedom of Information Law, they must first apply to the records access officer and if their application is denied, they must appeal to the appeals officer. They cannot seek redress from the court until they exhaust these administrative remedies..." (Moussa, supra, at 378).

In short, while the Freedom of Information Law and Article 31 of the Civil Practice Law and Rules are both disclosure devices, they are, in terms of their use (and potentially, their utility) separate and distinct. To relate them or place them under an omnibus disclosure umbrella, as Professor Martin has proposed, would in my view fail to consider the distinctions, in terms of their use and intent, between the two vehicles. Again, under the Freedom of Information Law, the applicant "is as a member of the public"; under discovery, the applicant "is as a litigant".

Second, while I agree with Professor Martin's analysis of the "three categories of official information", for the reasons expressed in the preceding paragraphs, I feel that the proposal is faulty, for it is based upon erroneous assumptions - that the Freedom of Information Law and discovery devices are related in terms of use, that they "mesh", and most importantly, that rights of access under the two vehicles are concurrent.

This letter, written by me at the Department of State to you at the Law Revision Commission, could likely be withheld under the Freedom of Information Law, for it is advisory and, therefore, deniable in great measure if not in toto under the Freedom of Information Law. If it is "material and necessary" to litigation, however, it would likely be available to a party under Article 31 of the Civil Practice Law and Rules. Consequently, I believe that Article 31 now deals with Professor Martin's third category of information, the information that is neither clearly available under the Freedom of Information Law nor clearly confidential by statute.

While I am no expert on the subject of discovery, it is possible that Professor Martin's proposal would create a new area of privilege applicable only to government records. My question is, very simply, whether that would be fair. In the context of litigation, should a non-government party have less access to government information than government has with respect to the information of its non-government adversary?

Further, as Professor Martin pointed out in his discussion of the Love Canal case (92 A.D. 2d 416), where the State Legislature seeks to remove records from the scope of discovery, it may do so by means of statutory language prohibiting the use of discovery. There are numerous statutes that deal with particular records and the inapplicability of discovery devices [e.g., as indicated in Matter of John P., supra; §230 of the Public Health Law; as indicated in New York State Dept. of Taxation and Finance v. New York State Department of Law, 44 NY 2d 575 (1978), §697 of the Tax Law; see also Labor Law, §537; Civil Rights Law, §50-a; and Mental Hygiene Law, §33.13].

My point is that when the Legislature does not want records to be subject to discovery, it provides specific direction to that effect. Where there is no such specific direction, the existing law concerning discovery and disclosure is likely sufficient.

I hope that I have been of some assistance. I would appreciate hearing from you to learn of your thoughts on the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2964

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

June 21, 1983

Hon. Robert P. Egan
Mayor
Village of Johnson City
Office of the Mayor
Municipal Building
Johnson City, NY 13790

Dear Mayor Egan:

Thank you for sending copies of an appeal made under the Freedom of Information Law by Mr. Douglas Ritter and your determination.

Although I am not familiar with the records requested, it does not appear that the stated reason for denial is appropriate.

Mr. Ritter requested "files" regarding property located at 106 Main Street in Johnson City, as well as an inspection report. Joan Spalik, Village Clerk denied the request, apparently on the advice of the Village Attorney on the ground that litigation is pending between the Village and the owners of the property. You affirmed the denial following an appeal on the same basis as that offered by the Clerk.

In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, none of the grounds for denial deal specifically with records concerning litigation. One of the bases for withholding, however, pertains to records that are "specifically exempted from disclosure by state or federal statute" [see Freedom of Information Law, §87(2)(a)]. One statute that exempts records from disclosure is §3101(d) of the Civil Practice Law and Rules, which concerns "material prepared for litigation". To the extent that the records sought were prepared solely for litigation, I agree that they may be withheld. However, if the records sought were prepared in the ordinary course of business or for multiple purposes, one of which is litigation, neither §3101(d) of the Civil Practice Law and Rules nor §87(2)(a) of the Freedom of Information Law could in my view justify a denial [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234].

Third, in a situation dealing with reports of building inspectors, it was held that such reports were accessible under the Freedom of Information Law as originally enacted, as well as §51 of the General Municipal Law [see Young v. Town of Huntington, 388 NYS 2d 978 (1976)]. I have no knowledge of whether the records sought are analogous to those requested in Young. Nevertheless, a review of that decision might be worthwhile. If a copy of Young is unavailable to you or your attorney, I would be pleased to send a copy on request.

In sum, it is respectfully requested that you review your determination to deny the request.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 902
FOIL-AO-2965

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

June 22, 1983

Mr. Irving Schachter
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schachter:

I have received your letter dated May 27 in which you raised questions regarding the Freedom of Information and Open Meetings Laws.

You indicated that you wanted a response for the purpose of presenting a research paper on June 8. In this regard, it is noted that your letter was postmarked June 13 and reached this office on June 15.

With respect to your questions, I would like to offer the following comments.

First, you have requested a citation for the provision of law concerning the definition of "executive session". I direct your attention to §97(3) of the Open Meetings Law, which defines "executive session" to mean:

> "...that portion of a meeting not open to the general public."

Second, you have asked whether the term "executive session" as used in §3020-a(2) of the Education Law has the same meaning as the term "executive session" appearing in the Open Meetings Law. In my opinion, "executive session" is used in both provisions to pertain to a situation in which the public may be excluded from a meeting

and in which a public body is permitted to conduct its business in private. However, there are distinctions between the Open Meetings Law and the cited provision of the Education Law. In the case of the former, as you may be aware, §100(1) requires that a procedure must be accomplished during an open meeting before a public body is permitted to enter into an executive session. Further, the Open Meetings Law indicates that a public body may enter into an executive session to discuss certain matters, but only after having carried a motion by a majority vote of its total membership. Section 3020-a(2) of the Education Law states in part that "the employing board, in executive session, shall determine..." whether probable cause regarding charges against a tenured person exists. It is possible, therefore, that a board of education, for example, acting under §3020-a(2) of the Education Law, is required to consider the charges during an executive session.

Your next question is whether an executive session may be held "without a public meeting first being held". In my opinion, since an executive session is a portion of an open meeting, a public body must convene an open meeting prior to entry into an executive session. As indicated earlier, the procedural requirements for entry into an executive session involve a motion made and carried during an open meeting. As such, under the Open Meetings Law, it is in my view clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting during which the public may be excluded.

If an executive session is held by an "employing board" pursuant to §3020-a(2) of the Education Law "without there being first an open meeting and the board takes action", you asked whether the action would have legal effect and if a finding of probable cause remains valid. From my perspective, there is no automatic invalidity of action due to a violation of the Open Meetings Law. On the contrary, I believe that action of a public body remains valid or legal unless and until a court renders a determination to the contrary. It is noted that §102 of the Open Meetings Law states that a court may in its discretion and upon good cause shown nullify action taken in violation of the Open Meetings Law. As such, a court is not required to nullify action taken in violation of the Open Meetings Law.

The next area of inquiry pertains to a situation in which there are nine members of an "employing board" and seven meet to enter into an executive session following a vote of four to three in favor of an executive session. Your question is whether "this is a lawful executive session". In my opinion, under the Open Meetings Law, on a board consisting of nine members, an affirmative vote by five would be necessary to approve any motion, including a motion to enter into an executive session. As indicated in §100(1) of the Open Meetings Law, a motion to enter into an executive session must be carried by a "majority vote of its total membership" [see also, General Construction Law, §41].

In the case of an executive session held under §3020-a (2) of the Education Law, it is not clear whether the same conclusion would be reached. If that provision requires that an executive session be held, it might be argued that the employing board has no discretion and that it must enter into an executive session. However, it might also be contended that any action taken by a board consisting of nine members must be accomplished by a majority vote of its total membership.

Your last question involves a situation in which an "employing board" enters into an executive session and finds probable cause, "but keeps no minutes of this session". Your question is whether if minutes are not prepared, such a failure would invalidate the finding of probable cause. Once again, I believe that any such invalidation could be carried out only by a court. Further, as you are likely aware, §3020-a(2) requires that if an employing board determines that probable cause exists, "a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certfied mail". Assuming that such a step is taken, it would appear that minutes of the executive session might make reference only to the fact that a finding of probable cause was reached, with the date and the vote of the members. I do not believe that minutes of a more expansive nature would be required to be compiled. It is noted, too, that while the notification prescribed in the preceding paragraph must be sent to the accused employee, and that §101(2) of the Open Meetings Law requires that minutes be prepared which action is taken during an executive session, it has been held that charges based upon a finding of probable cause may be withheld under the Freedom of Information Law [see Herald Company v. School District of City of Syracuse, Sup. Ct., Suffolk Cty., NYLJ, Nov. 18, 1977].

Lastly, as requested, enclosed are copies of the Freedom of Information Law, the Open Meetings Law, and summaries of judicial determinations rendered under both of those statutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2966

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

June 23, 1983

Mr. Floyd Youman
81-A-905
Drawer B
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Youman:

I have received your letter of June 21 and the correspondence attached to it.

According to the correspondence, you are interested in obtaining records pertaining to you generally, as well as particular court records.

In this regard, I would like to offer the following comments.

First, the Freedom of Information Law is applicable to agency 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 does not apply to the courts or court records.

Second, I have, however, enclosed a copy of §255 of the Judiciary Law, which provides broad rights of access to court records. As such, it is suggested that you direct a request under the Judiciary Law to the clerk of the court that maintains the records in question.

Third, if you are unsuccessful in obtaining records directly from the court, some of the information in question might be available from the District Attorney. Consequently, you might want to request the records under the Freedom of Information Law from the District Attorney. Enclosed are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you.

Lastly, under the circumstances, it is suggested that you discuss the matter with a legal aid attorney or a representative of Prisoners' Legal Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2967

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

June 27, 1983

Mr. Michael Spearman
79-A-2595
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Spearman:

I have received your "affidavit" as well as a determination on appeal regarding a request for records directed to the New York City Police Department. You indicated that you cannot understand why the records requested have been denied.

In this regard, I would like to offer the following comments.

First, the records were apparently requested under the "F.O.I.A./F.O.I.L. & Privact Act". The "F.O.I.A." and Privacy Act represent federal legislation; both of those Acts apply to records in possession of federal agencies. The statute that does apply under the circumstances is the New York Freedom of Information Law, which pertains to records of state and local government in New York.

Second, having reviewed the nature of the information sought, it is noted that the Freedom of Information Law requires that an applicant request records "reasonably described" [see Freedom of Information Law, §89(3)]. Although you requested various records pertaining to a

particular indictment, it is possible in my view that records sought could not be located without additional descriptive information. In the future, when making a request, it is suggested that you include as much detail as possible in order to enable agency officials to locate the records sought.

Lastly, the records requested apparently pertain to an event that occurred "in or around Westchester County". As noted by Rosemary Carroll, Assistant Deputy Commissioner of the New York City Police Department, since the incident occurred outside the jurisdiction of the New York City Police Department, it is unlikely that the Department would maintain the records requested. It is suggested, therefore, that your requests be sent to the appropriate officials of Westchester County.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rosemary Carroll

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2968

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

June 29, 1983

Mr. Douglas Ritter
[redacted]

The staff of the Committee on Open Government 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 20 which pertains to a denial of access to records by the Village of Johnson City.

It is noted that I am somewhat familiar with the situation, for, as required by §89(4)(a) of the Freedom of Information Law, Mayor Egan forwarded to this office a copy of your appeal and his determination. Since I disagreed with the rationale for the determination, I wrote directly to the Mayor regarding your request. Enclosed is a copy of my letter to Mayor Egan of June 21.

Having reviewed my earlier letter, it is reiterated that the Freedom of Information Law requires that all records be made available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2) of the Law. Further, the fact that litigation might relate to the records sought would not in my view necessarily remove them from the scope of rights of access.

It is my hope that Mayor Egan has reviewed my earlier letter for the purpose of determining with certainty whether the records sought might justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Mayor Egan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2969

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

June 29, 1983

Mr. Albert Saqqal
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Saqqal:

As you are aware, I have received your letter of June 15, as well as the materials attached to it.

In brief, several months ago, you requested a variety of information from the Office of Mental Retardation and Developmental Disabilities (OMRDD). Since no response to your request had been received as of the date of your letter, you requested that this office "do something meaningful to correct this matter."

Since the receipt of your letter, I have contacted, on your behalf, Mr. Harrie C. Patrick, Deputy Counsel of OMRDD. Mr. Patrick informed me at the time that he was in the process of preparing a response to your request. I have since received a copy of a letter dated June 24 sent to you by Mr. Patrick pertaining to your request.

Although several aspects of the information sought have been or will be made available to you, Mr. Patrick indicated that more specificity would be required to locate records with respect to other aspects of your request.

In this regard, I would like to offer two comments.

First, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". As Mr. Patrick indicated, there are several areas of your request that likely do not reasonably describe the records sought. For instance, one of the areas of your request involved "Records relating to the Storage of furniture from Gouverneur after May 1, 1978". While OMRDD might maintain records on the subject, those records may not be filed or indexed in such a way that the agency can locate them based upon your description of the records. For future reference, when making a request, to reasonably describe the records sought, it is suggested that you provide as much detail as possible, such as dates, file designations, descriptions of events, names of contractors, and similar details that would enable agency to locate the records sought.

Second, it is emphasized that the Freedom of Information Law is a vehicle by which an individual may request records. Section 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. In some instances, information sought might not exist in the form of a record or records.

In a related vein, the Freedom of Information Law is not a vehicle by which public employees may be questioned or cross-examined. Consequently, your request to speak with particular named employees falls outside the requirements of the Freedom of Information Law. In my view, a request to speak with a particular employee would constitute a matter involving personal discretion on the part of the individual.

Lastly, it is suggested that you contact OMRDD's records access officer for the purpose of identifying with greater specificity the records in which you might be 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: Harrie C. Patrick
Vincent Montalbano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-2970

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

June 29, 1983

Ms. Nedda Allbray
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Allbray:

I have received your letter of June 21 in which you requested an advisory opinion under the Freedom of Information Law. Your inquiry pertains to a denial of access to records by the Department of General Services of the City of New York. Enclosed with your letter are copies of your request, the Department's denial, your appeal and a "sample copy" of the reports that you requested.

The first portion of your request involves "a listing showing the addresses of each building inspected for possible use as a shelter", the dates of such inspections and the ensuing reports. You also asked for the names of Department employees who prepared the reports, "had access" to them, as well as those who received copies. The second aspect of the request involves "inspection reports, worksheets, authorized expenditures concerning the shelter at 55 Hanson Place, Brooklyn". You also requested correspondence pertaining to that site between the Department of General Services and New York State.

In response to your request, Jay S. Gingold, the Records Access Officer for the Department, denied access to inspection reports, worksheets and "ancillary data" pursuant to §87(2)(g) of the Freedom of Information Law. He also indicated that similar materials have been requested through discovery proceedings in Federal District

Court. As such, Mr. Gingold wrote that he was advised by counsel "that it would be inappropriate to release records under the Freedom of Information Law when access has been denied through discovery procedures". Mr. Gingold also stated that there is no record reflective of an agreement between the Department of General Services and New York State concerning 55 Hanson Place.

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

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, it appears that the only ground for denial of relevance is that cited by Mr. Gingold, §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 and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances and based upon a review of the "sample" records that you enclosed, it would appear that much if not all of the records sought, to the extent that they exist, consist of "statistical or factual tabulations or data" that are available under §87(2)(g)(i).

It is emphaszied that §87(2)(g)(i) has been judicially interpreted to include factual information that appears not only in statistical or tabular form, but also in narrative form [see e.g., Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY wd 706, motion for leave to appeal denied (1979); Ingram v. Axelrod, App. Div., 456 NYS 2d 146, __ AD 2d __].

Third, although the records sought might be related to litigation, that alone would not in my opinion remove them from the scope of rights of access granted under the Freedom of Information Law. 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". Moreover, the Court of Appeals found that:

> "the standing of one who seeks access to records under the Freedom of Information Law is a member of the public, and is neither enhanced...nor restricted ...because he is also a litigant or a potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1981)].

In view of the judicial decisions cited above, although an applicant for records under the Freedom of Information Law might also be a litigant, that alone would not in my opinion affect rights of access. Further, while records sought via discovery proceedings might be deniable under applicable standards [see e.g., Civil Practice Law and Rules, §3101), the same standards would not in my view likely apply to rights of access or the capacity to deny access to records under the Freedom of Information Law. Therefore, assuming that the records sought were prepared in the ordinary course of business, the pendency of litigation might not have any bearing upon rights of access under the Freedom of Information Law.

Lastly, as indicated earlier, the first area of your request involves a list of buildings inspected and similar, related information. In this regard, it is noted that §89(3) of the Freedom of Information Law states in part that, as a general rule, an agency is not obligated to create a record in response to a request. Therefore, if, for example, no list reflective of the information sought exists, the Department of General Services would have no obligation to create such a list on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jay S. Gingold
Neil F. Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2971

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

June 30, 1983

Mr. Calvert Seegram
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Seegram:

I have received your letter of June 24, as well as the correspondence attached to it.

According to your letter and the materials, you submitted requests under the Freedom of Information Law on May 12 and June 6 to the New York City Department of Transportation. Since both letters were sent by certified mail, return receipt, and since you obtained receipts, it is clear that the letters reached the appropriate offices.

Apparently the only response that you received was an acknowledgment of your request by Samuel Azadian, the Department's records access officer, in which he indicated that it would take "a period of time to ascertain whether such documents do exist, and if they do, whether they qualify for inspection..." There was no indication concerning when your request would be granted or denied.

In terms of the records sought, you requested copies of New York City traffic regulations, the rules and regulations of the New York City Parking Violations Bureau, and the Parking Violations Bureau manual for hearing officers.

Based upon the information provided in your correspondence, I would like to offer the following comments.

First, with respect to the time limits for response 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 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 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 adminstrative 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, 108 Misc. 2d 536, 87 AD 2d 388, __ NY 2d __ (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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Third, assuming that the records sought exist, two of the grounds for denial could be relevant. However, neither could in my view be cited to withhold the records.

Perhaps most relevant is §87(2)(g), which states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. 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, rules and regulations would in my opinion clearly be reflective of "final agency policy" available under §87(2)(g)(iii). I believe that a hearing officers' manual would be available under §87(2)(g)(ii) as "instructions to staff that affect the public" or under §87(2)(g)(iii) as final agency policy.

The remaining ground for denial of possible significance would pertain only to the manual for hearing officers.

Specifically, §87(2)(e) states that an agency may withhold records that:

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

While it might be argued that such a manual was compiled for law enforcement purposes, the language quoted above permits an agency to withhold records reflective of other than routine criminal investigative techniques or procedures. In my view, it is unlikely that the contents of hearing officers manual would reveal any "criminal" investigative techniques or procedures; further, the techniques or procedures found in such a manual could likely be characterized as "routine".

In sum, to the extent that the records requested exist, I believe that they are accessible under the Freedom of Information Law.

In an effort to enhance compliance and expedite a response to your request, copies of this opinion will be sent to Commissioner Ameruso and Mr. Azadian.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Commissioner Ameruso
Samuel Azadian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-907
FOIL-AO-2972

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

July 5, 1983

Mr. Henry Wyatt
[redacted]

Dear Mr. Wyatt:

I have received your note of June 28 and the materials attached to it.

Having reviewed the materials, I would like to offer the following brief comments.

First, as you may be aware, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law. In turn, §87(1) requires each agency, in this instance the governing body of the City of Utica, to adopt regulations consistent with those of the Committee.

Second, the City's regulations appear to be based upon the regulations adopted by the Committee, as well as model regulations designed to assist agencies in complying. In my view, the only deficiency in the City's regulations involves the issue that you have raised. Specifically, although the procedures are in my view appropriate, no particular person has been designated as records access officer. I believe that, as indicated in the City's regulations, such a designation should be made.

Third, regarding a different but related subject, you sent a copy of a memorandum sent by Councilman Critelli to Mayor Pawlinga. One of the Councilman's proposals involves the establishment of a notice board to be used to comply with the notice requirements of the Open

Meetings Law. In my opinion, which is based upon §99 of the Open Meetings Law, the proposal has merit. The cited provision requires that notice of the time and place of meetings of all public bodies shall be given to the news media and "shall be conspicuously posted in one or more designated public locations..." Implementation of Councilman Critelli's proposal would likely serve to enhance compliance with public notice requirements in 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

cc: Mayor Pawlinga
Councilman Critelli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2923

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

July 6, 1983

Mr. Richard Duffee
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Duffee:

As you are aware, I have received your hand-delivered letter of June 23 in which you described a series of problems encountered with respect to the implementation of the Freedom of Information Law by the Peekskill School District.

Although you were recently successful in receiving records from the District, you described "five general points" concerning two years experience and effort in seeking to obtain records.

Your first point is that, in the Peekskill School District, requests made under the Freedom of Information Law "are handled by people who lack either the authority, the knowledge, or the will...to deliver the information requested. This can result in year-long run-arounds..." In this regard, as indicated in Peekskill on the evening of June 23, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations governing the procedural aspects of the Law. In turn, §87(1) requires the governing body of a public corporation, in this instance the School Board, to adopt regulations consistent with those of the Committee.

One of the aspects of the Committee's regulations involves the designation of one or more records access officers. Specifically, §1401.2(a) states in part 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, §1401.2(b) states in part that:

> "[T]he 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;
>
> (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..."

Based upon the provisions to which reference was made above, the School Board in my view is obligated to designate a person or persons as records access officer who are given the authority to respond appropriately to requests.

Closely related to the first point in your letter are the fourth and fifth, in which you indicated:

> "4) The central administration claims that some documents which refer to the system as a whole are nevertheless in the possession of individual building adminstrations and not available to the main office. Building administrators, however, claim the same documents are only available from the central administration. I know of no way to obtain such documents or even to tell who is telling the truth about them."

Your last remarks are that you have been able to find only one District official who has a "clear conception" of public rights of access and that requests are often "regarded as a nuisance and the fulfillment of them as a privilege".

Once again, assuming that a records access officer is designated, that person in my opinion has the responsibility of ensuring that records requested, regardless of their location within the District, are made available in accordance with the Freedom of Information Law. The fact that records sought might not be physically located at the central administrative offices is in my opinion irrelevant, for the records access officer, as indicated in the regulations quoted above, has "the duty of coordinating agency response to public requests for access to records."

It is noted, too, that the Freedom of Information Law is a statute that confers a right, rather than a privilege, on the part of the public. As stated by the state's highest court, the Court of Appeals:

> "[M]eeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift or, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Your remaining points deal with the "index of available information", which in your view is "standardized" and "not particularly applicable to this district", and your contention that statistical and explanatory materials regarding the standardized tests are often filed separately. As a consequence, obtaining one without the other may be all but meaningless.

The index to which you made reference pertains to the so-called "subject matter list". The provision governing the contents of such a list is §87(3)(c), which states that each agency shall maintain:

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

As such, an agency's subject matter list should make reference in reasonable detail to the types of records maintained by an agency, whether or not the records are available. It is also noted, however, that the subject matter list is not required to be an index that identifies each and every record of an agency. Therefore, one heading within a subject matter list might involve standardized testing materials; a more specific breakdown is likely not required.

Despite the lack of specificity required in a subject matter list, it is reemphasized that the designated records access officer is required to "Assist the requester in identifying requested records, if necessary" [§1401.2(b)(2)]. Therefore, if, for instance, statistical or explanatory materials regarding standardized tests are kept separately, I believe that the records access officer is obliged to locate the records sought and to provide access to them in accordance with the Freedom of Information Law.

In order to attempt to enhance compliance with the Freedom of Information Law and the regulations, copies of this opinion and those materials will be sent to the School Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2974

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

COMMITTEE MEMBERS

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GAIL S. SHAFFER
GILBERT P. SMITH, Chairman

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 6, 1983

Ms. Amy Rothstein
Staff Attorney
The Legal Aid Society
Criminal Appeals Bureau
15 Park Row - 19th Floor
New York, NY 10038

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Rothstein:

I have received your letter of June 23, as well as the correspondence attached to it.

According to the materials, you requested from the Department of Correctional Services on May 17 various records regarding the provision of medical services at the Comstock Correctional Facility. Among the eight areas of records requested, Donald W. Maloney, the Assistant Administrative Officer for the Department, granted access in relation to three areas of your request. However, he indicated that the remainder of the "material would be denied as it is considered to (sic) broad a request."

You have requested an advisory opinion regarding Mr. Maloney's denial. In this regard, I would like to offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to existing records. Stated differently, if, for example, information is sought that does not exist in the form of a record or records, an agency is not obliged to create a record in response to the request [see Freedom of Information Law, §89(3)]. Therefore, to the extent that the "lists" that you requested do not exist, the Department would not be required to create those records on your behalf.

Second, with regard to the breadth of your requests, it is noted that §88(6) of the Freedom of Information Law as originally enacted in 1974 required an applicant to request "identifiable" records. Even under that standard, due to the intent of the Law, it was held judicially that if an agency can determine the nature of the records sought, the applicant met his or her burden of seeking an "identifiable" record. Specifically, in a situation in which budget examiner's files regarding a particular agency were requested, it was found that:

> "[I]t is not necessary that the party requesting the information identify it down to the last detail. The language of the Law places part of such responsibility upon the public agency from whom the information is sought. The responsibility of the person requesting the records is that he provide sufficient information to permit the agency to accomplish this duty. The Budget Examiner's files on the Cable Television Commission, even though it might consist of forty individual folders as alleged by respondents, is sufficiently identifiable as to meet the requirements of the Law" [Dunlea v. Goldmark, 380 NYS 2d 496, 499; aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

Section 89(3) of the current Freedom of Information Law states in part that an applicant must submit a request for records "reasonably described". As such, the degree of detail required by an applicant seeking records is less stringent than that required under the original standard.

Although Mr. Maloney indicated that items 2 through 6 of your request were too broad, a review of the materials indicates that your requests were in several instances quite specific. For instance, in item 2, you requested:

> "[A]ll Division of Health Services forms 'HS-3a (May 1980)' generated since June 1, 1982, that contain information relating to Great Meadow inmates awaiting planned procedures. These documents are maintained by the Division's Utilization Review Coordinator after monthly receipt of the same

> from the Facility Health Services Directors. See P.P.G.M., Item # G-401. Individual inmate's names and numbers (the first two columns) may be deleted."

The nature of the forms sought was identified; the office maintaining the forms was specified; and the sequence by which the forms are transmitted was described. In view of the detail that you provided, your request in my opinion clearly "reasonably described" the records sought. Similar contentions could be made with respect to other aspects of your request that were considered "too broad" by Mr. Maloney.

Third, assuming that Mr. Maloney was serving in the capacity of records access officer, I believe that certain steps should have been taken in an effort to assist you in identifying the records sought. In this regard, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations governing the procedural implementation of the Law. In turn, §87(1) requires each agency to develop regulations consistent with those of the Committee. Although the Department's regulations make reference to the designation of a records access officer, they are not as detailed with respect to the duties of the designated records access officer as the regulations promulgated by the Committee. One aspect of the Committee's regulations states that:

> "[T]he records access officer is responsible for assuring that agency personnel...Assist the requester in identifying requested records, if necessary" [§1401.2(b)].

Therefore, rather than denying your request, I believe that Mr. Maloney likely should have attempted to assist you "in identifying requested records".

Fourth, while Mr. Maloney characterized his response to you with respect to items 2 through 6 as a denial, I do not believe that a denial occurred, for he merely indicated that the requests were too broad to either grant or deny access. In my opinion, a denial occurs when records sought are withheld on the basis of one or more of the grounds for denial listed in §87(2)(a) through (h) of the Freedom of Information Law, or due to a failure to respond to a request within the time limits specified in the Freedom of Information Law and the regulations.

Consequently, it is suggested that you might want to contact Mr. Maloney for the purpose of attempting to learn more about the nature of records maintained by the Department and to formulate a new request. In the alternative, since the records sought in items 2 through 6 were neither granted nor denied, you could consider Mr. Maloney's response a constructive denial of access [see regulations, §§1401.5(d) and 1401.7(c)] that may be appealed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald W. Maloney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2975

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

July 6, 1983

Mr. Daniel Pickens
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pickens:

I have received a copy of your "Application for Public Access to Records" submitted to the Town of Coeymans on which you raised several questions under the Freedom of Information Law.

Specifically, according to the application, you requested a copy of the "procedure for arrest and breathalyzer" used by the Town Police Department. In addition, you raised questions regarding rights of access to manuals regarding the use of a breathalyzer and police blotters, as well as the capacity to request records by mail.

In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, with respect to the procedures concerning arrests and the use of a breathalyzer, I believe that such records, to the extent that they exist, are available. Although two of the grounds for denial might be relevant, neither could in my view be cited with justification to deny access to the records in question.

The first ground for denial of potential significance is §87(2)(e), which permits an agency to 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..."

Although arrest and breathalyzer procedures are likely reflective of records compiled for law enforcement purposes and such records constitute "criminal investigative techniques or procedures", I believe that the procedures in question could be considered "routine". In my view, assuming that the procedures are routine, they should be made available.

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. 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, procedures developed by the Town regarding arrests and the use of a breathalyzer could likely be characterized as "intra-agency materials". However, I believe that they might also be considered "instructions to staff that affect the public" available under §87(2)(g)(ii), and/or as "final agency policy" available under §87(2)(g)(iii).

In short, since neither of the grounds for denial described above would be applicable to the procedures that you are seeking, I believe that they are available. Further, assuming that the records in question are accessible under the Freedom of Information Law, contrary to the assertion made by Captain Nieves, a court order would not be necessary to gain access to those records.

Manuals concerning use of a breathalyzer devised by the Department would in my opinion be available based upon the same reasoning as that described in the preceding paragraphs concerning procedures. If the manuals were prepared or sent by the manufacturer of the breathalyzer, it does not appear that any ground for denial would apply.

Third, with respect to rights of access to police blotters, it is noted that the phrase "police blotter" is not specifically defined in any provision of law of which I am aware. However, 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. It was also found that a police blotter is available under the Freedom of Information Law, for it contains no investigative information, but rather is merely a summary of events or occurrences [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

Therefore, assuming that the police blotter maintained by the Town Police Department is reflective of a log or diary of events reported by or to the Department, I believe that it is available.

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

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

Lastly, in an effort to enhance compliance with the Law, a copy of this opinion will be sent to Captain Nieves. In addition, copies of the Freedom of Information Law, the regulations promulgated by the Committee, an explanatory pamphlet and an article that I wrote for Emergency Services N.Y. will be sent to him.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Captain Nieves

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2976

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

July 7, 1983

John G. Groff
Village Attorney
Village of Horseheads
202 South Main Street
Horseheads, NY 14845

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Groff:

As you are aware, I have received your letter of June 29 in which you requested an advisory opinion under the Freedom of Information Law.

You wrote that, in conjunction with an earlier communication, I advised you that the Freedom of Information Law "requires the availability of public records at the rate of $.25 a page and suggested that the material could be made available to regular users via self-addressed, stamped envelopes".

It is also indicated in your letter that:

> "[T]he Village had previously adopted a policy of making the records available in the office at the legal rate and, in the event that the material was to be mailed, a nominal charge was imposed for postage and handling. It is [your] understanding that this procedure was not violative of the Act or any of the regulations."

As a general rule, I believe that an agency subject to the Freedom of Information Law, such as the Village of Horseheads, may charge up to twenty-five cents per photocopy, as well as the cost of postage. The difficulty that comes to mind regarding the policy of the Village involves the fee assessed for handling. In this regard, I have received correspondence from Alan M. Platteis,

who indicated that the "nominal charge" for postage and handling is $2.75. From my perspective, assuming that a request is made for a single sheet of paper, the so-called nominal charge of $2.75 is excessive.

Further, it is emphasized that the only fee to which reference is made under the Freedom of Information Law or the regulations promulgated by the Committee pertains to photocopying. It is noted, too, that §1401.8(a) of the regulations, which have the force and effect of law, provide that no fee may be assessed for a search for records, which in my view would be similar to "handling".

In short, it is my view that the Village may charge only for photocopying and the actual cost of postage. In addition, assuming that an applicant transmits the fees for photocopying with an enclosed stamped self-addressed envelope, the only fee that could in my opinion be imposed would be a fee for photocopying.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alan M. Platteis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2977

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

July 7, 1983

Mr. Alan M. Platteis
Claim Manager
The Hartford
Executive Office Building
33 West State Street
P.O. Box 1627
Binghamton, NY 13902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Platteis:

I have received your correspondence indicating that various police departments have imposed fees for police and accident reports that exceed twenty-five cents per photocopy.

In one instance, you enclosed correspondence indicating that the Village of Horseheads charges twenty-five cents per photocopy plus a fee of $2.75 to cover the cost of mailing and handling. As indicated in an opinion addressed to John Groff, Village Attorney for the Village of Horseheads, a copy of which is enclosed, it is my view that the only fees that may be charged involve photocopying and the actual cost of postage.

Another attachment to your letter concerns the Windsor Police Department, which apparently charges five dollars for a copy of an accident report. In this regard, I believe that §87(1)(b)(iii) of the Freedom of Information Law as amended restricts the fees for photocopying to twenty-five cents per photocopy, notwithstanding prior policy or provisions of a local law or ordinance, for example, that may have established fees in excess of twenty-five cents per photocopy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Groff
Windsor Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-910
FOIL-AO-2978

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

July 8, 1983

Mr. Bruce H. Vail
[redacted]

The staff of the Committee on Open Government 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 July 1 addressed to Ms. Baldasaro. Your inquiry concerns the status of the New York City Industrial Development Agency under both the Freedom of Information Law and the Open Meetings Law.

In my opinion, the records of the Industrial Development Agency are subject to the Freedom of Information Law, and the meetings of its Board of Directors fall within the requirements of the Open Meetings Law. To be more specific, I would like to provide the following comments.

First, the general provisions concerning industrial development agencies are found in Article 18-A of the General Municipal Law. Subdivision (2) of §856 of the General Municipal Law states that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation".

In terms of the Freedom of Information Law, the scope of the Law is determined in part by the definition of "agency". 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."

The coverage of the Open Meetings Law is similarly determined by the definition of "public body". Section 97(2) defines that phrase 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 the Freedom of Information Law includes municipal corporations, which are public corporations, and since §66 of the General Construction Law defines "public corporation" to include a public benefit corporation, an industrial development agency in my view is clearly an "agency" subject to the Freedom of Information Law and its board would constitute a "public body" subject to the Open Meetings Law.

It is also noted that §917 of the General Municipal Law deals specifically with the New York City Industrial Development Agency and makes reference to its powers and its composition.

Second, you have inquired with respect to minutes of meetings of the Board of Directors insofar as they relate to a loan to Bay Street Commercial, Ltd. In this regard, §101 of the Open Meetings Law pertains to minutes and requires that minutes of open meetings be made available within two weeks and that minutes reflective of action taken during an executive session must be made available in accordance with the Freedom of Information Law within one week. Therefore, the Board of Directors would be required to prepare minutes in accordance with the Open Meetings Law and subject to rights of access granted by the Freedom of Information Law.

Lastly, you asked about the "internal documents" concerning the loan in possession of the Industrial Development Agency. Without additional information, I could not provide specific direction. However, it is reiterated that the records in question would be available to the extent provided by the Freedom of Information Law.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, and an explanatory pamphlet dealing 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-911
FOIL-AO-2979

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

July 8, 1983

Ms. Janet H. Secor
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Secor:

I have received your letter of June 28 in which you described a series of difficulties arising under the Freedom of Information and Open Meetings Laws relative to the Williamsville Central School District and its Board of Education.

Your first area of inquiry concerns a petition submitted to the Board to which reference is made in minutes that you have enclosed. In brief, the minutes indicate that Counsel to the Board recommended that the Board adopt three proposals regarding propositions. One of those proposals involves notification to a voter representative, in this instance, you, of action taken by the Board. You wrote that you have not yet been given an official notification of the Board's action.

Having reviewed the minutes, I believe that a motion was made to support Counsel's recommendations, but that the motion was withdrawn and substituted. Unless I am mistaken, the substituted motion does not include the recommendation to provide the notification to which you referred. Further, the minutes indicate that further discussion on that subject would occur. As such, it appears that the Board took no action. In addition, it is noted that the use of the Freedom of Information Law is triggered by a request made under the Law. In this regard, it does not appear that any request for notification was made. Consequently, I do not believe that the Freedom of Information Law was clearly applicable to the situation.

The second area of inquiry pertains to an incident in which the Board of Education conducted an executive session, but "failed to notify the members of the audience upon reconvening the meeting". As a consequence, you wrote that people who had waited "to attend the complete meeting were denied this right". Without more specific information concerning the situation, I cannot provide specific comments. Nevertheless, I would like to offer the following general comments regarding the Open Meetings Law.

First, the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Second, as you are likely aware, a public body may conduct an executive session only to the extent that one or more of the topics appropriate for discussion in executive session are under discussion [see §100(1)(a) through (h)]. When a discussion during an executive session ends, presumably an open meeting is continued and members of the public in attendance should be so informed.

The third problem that you described concerns a request for information submitted to the President of the Board of Education, Mr. Ursitti, on March 18, 1982. A response dated June 15, 1982, was sent to you in which it was stated that:

> "[T]he delay in responding to your letter was a conscious decision on my part influenced by the fact that we at that time involved in the preparation of an subsequently the presentation to the public of figures for the 1982-83 budget, and in my view rehashing the 1980-81 budget might have served to create some confusion which I consider to be unnecessary."

Mr. Ursitti also suggested that:

> "...for future questions you might go to the School District Offices and raise such questions with assistant superintendent for business or directly with the superintendent, inasmuch as those individuals are closer to the accounting process which produces specific figures.

Based upon a review of your request for information and Mr. Ursitti's response, I would like to offer four points.

First, it is emphasized that the Freedom of Information Law is a statute that pertains to records and that enables members of the public to request records from government. In this regard, your letter of March 18 raises a series of questions regarding the District's audited financial statements. From my perspective, rather than requesting information by asking questions, it would have been more appropriate to request records reflective of the information sought. To provide guidance, I have enclosed a copy of a brochure that contains a sample letter of request.

Second, the Freedom of Information Law is applicable to existing records. Stated differently, §89(3) states that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if, for example, responses to your questions involved the creation of new tabulations, such steps would not have been required to be taken by the District under the Freedom of Information Law.

Third, in conjunction with Mr. Ursitti's comments, each agency by means of its regulations required to be promulgated under §87(1) of the Freedom of Information Law is required to designate one or more records access officers who have the duty of responding to requests. As such, it is suggested that requests for records made under the Freedom of Information Law be directed to a designated records access officer.

And fourth, as you intimated, 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 not 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 requested 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, the Open Meetings Law and an explanatory pamphlet dealing with both laws 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: Mr. Ursitti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2980

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

July 8, 1983

Mr. Kam Lui
83-A-0522
Clinton Correctional Facility
Box B
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lui:

I have received your letter of June 27 in which you requested informational materials and raised questions regarding access to medical records pertaining to you in possession of various hospitals and the Department of Correctional Services.

In this regard, I would like to offer the following comments.

First, the Freedom of Information Law is applicable to records in possession of agencies of state and local government in New York. As sich, it does not apply to records of a private hospital, for example [see Freedom of Information Law, definition of "agency", §86(3)] or a federal agency, such as the FBI.

Second, to the extent that the records sought are in the possession of public hospitals or the Department of Correctional Services, they are likely available under the Freedom of Information Law in part, but it is also likely that portions of those records may be withheld. For instance, medical records consisting of factual information, such as laboratory test results and similar materials are in my view available to the subject of the record; however, those portions consisting of opinion, advice, or recommendations need not in my view be made available under the Freedom of Information Law [see Freedom of Information Law, §87(2)(g)].

Third, a different provision of law generally applicable to medical records is §17 of the Public Health Law. In brief, that statute does not require that medical records be made directly available to a patient. Nevertheless, medical records of a hospital or physician are available upon request of the patient to a physician designated by the patient. Therefore, if you designate the physician of your choice to request medical records pertaining to you from a hospital, the hospital would release them to that physician.

Fourth, when making a request under the Freedom of Information Law, §89(3) of the Law requires that an applicant "reasonably describe" the records sought. Therefore, if you request medical records from the Department of Correctional Services, it is suggested that you provide as much detail as possible, including dates, descriptions of an illness or condition, file designation, your location at the time of an illness and similar information that might enable Department officials to locate the records sought.

Fifth, since you referred to the FBI in your letter, it is noted that the FBI is not subject to the New York Freedom of Information Law, but rather the federal Freedom of Information and Privacy Acts.

Lastly, 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 Law, regulations adopted under the Freedom of Information Law by the Department of Correctional Services, which make specific reference to inmate medical records, and a publication of the U.S. Department of Justice pertaining to the federal Freedom of Information and Privacy Acts.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2981

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

July 12, 1983

Mr. Richard R. Behrens
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Behrens:

I have received your letter of July 5 addressed to Senator Moynihan and myself.

You have referred to my earlier response to you of June 17 and asked that I review the materials sent to this office in June. In brief, the records access officer for the New York City Board of Education indicated that the records sought do not exist. It is your contention, however, that the Board "could not possibly run without the records which [you] have sought". As such, you have requested my "intervention" to determine whether records sought exist.

In this regard, I would like to offer the following comments.

First, the Committee on Open Government has the authority to advise; it does not have the authority to intervene, investigate or otherwise obtain records or information via discovery or subpoena, for example.

Second, having reviewed your requests, it is possible that the information sought does exist, but that it does not appear in the form of a record or records. As indicated in previous correspondence, §89(3) of the Freedom of Information Law states that an agency is not re-

quired to create a record in response to a request. It is likely that the information requested would have to be gleaned from a variety of records kept in separate locations. If that is so, the Board in my view would not be required to take information from several records for the purpose of creating a new record reflective of the information sought.

And third, you made reference to a particular employee, and that person's "rating in his tests". Having contacted the Board on your behalf, it is unclear which rating or test pertaining to the employee named are the subject of your request. Perhaps if additional information is supplied to the Board, a clear response to your request could be given.

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: Ellen Noto

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 2982

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

July 13, 1983

Mr. Louis Onorato
82-A-5144
Clinton Correctional Facility
Box B
Dannemora, NY 12929

Dear Mr. Onorato:

I have received your letter of July 3 in which you requested information and materials. Please note that the letter reached this office on July 12.

According to your letter, you are interested in obtaining copies of "arrest records, conviction records and commendation records of a New York City detective and a New York State Police officer..." As such, you have requested"the procedure and forms necessary to obtain such records under the Freedom of Information Law."

Enclosed 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 useful to you.

It is noted that there is no particular form that is required for the purpose of making a request. Section 89(3) of the Freedom of Information Law provides that a request made in writing for records "reasonably described" is sufficient. It is suggested, however, that when making a request, you provide as much detail as possible, including names, dates, file designations and similar information that might enable agency officials to locate the records sought.

Since your inquiry pertains to police officers, I would like to point out that many personnel records of police officers are confidential. Specifically, §50-a of the Civil Rights Law states that police officers' personnel records that are used to evaluate performance toward continued employment or promotion are confidential. Further, records exempted from disclosure under §50-a of the Civil Rights Law fall within §87(2)(a) of the Freedom of Information Law, which enables an agency to withhold records that are "specifically exempted from disclosure by state or federal statute".

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2983

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

July 13, 1983

William K. Maney
Village Attorney
Village of Johnson City
239 Main Street
Johnson City, NY 13790

Dear Mr. Maney:

Thank you for your thoughtful letter of July 7, in which you described events relating to various requests made under the Freedom of Information Law by Douglas Ritter.

You wrote that, at this juncture, certain records have been made available. Those withheld involve materials prepared for litigation. With respect to those materials, I would agree with your denial, for such records would in my view fall within the exemption from disclosure in §3101(d) of the Civil Practice Law and Rules and, therefore, §87(2)(a) of the Freedom of Information Law [see Fitzpatrick v. County of Nassau, 372 NYS 2d 905 (1975), 53 AD 2d 628 and Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234].

Once again, I thank you for your explanation of the situation. If I can be of assistance to you, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2984

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

July 13, 1983

Mr. John J. Sheehan
[redacted]

The staff of the Committee on Open Government 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 June 29 and the materials attached to it.

Your inquiry pertains to a request directed to the Division of State Police concerning an accident involving one car in which an individual was killed. Having submitted a request for the Division's investigation report regarding the accident, you were initially denied on the grounds that the records were compiled for law enforcement purposes and disclosure would interfere with law enforcement investigations and that disclosure would constitute an unwarranted invasion of personal privacy. On appeal it was indicated that the only ground for denial concerned an unwarranted invasion of personal privacy. However, in the determination on appeal by Chief Inspector Lecakes, it was indicated that "as an interested party" you could inspect the records at State Police Headquarters pursuant to §66-a of the Public Officers Law. When you submitted an ensuing request, Chief Inspector Lecakes indicated that there must have been a "misinterpretation" of his earlier letter to you and that the initial determination to deny had been upheld on appeal.

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

First, although I am not familiar with the records sought, it is my view questionable whether they could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. There are several interpretations of the federal Freedom of Information Act, which contains similar language regarding privacy, that indicate that the exception concerning the protection of privacy does not apply to records pertaining to a deceased person [see e.g., Sims v. CIA, 642 F. 2d 562 (1980); Providence Journal Co. v. FBI, 460 F. Sup. 778 reversed on other grounds 602 F. 2d 1010 (1979); Robertson v. Department of Defense, 402 F. Sup. 1342 (1975)]. If New York courts adopt the same position as that taken by federal courts under the federal Act, it would appear that §87(2)(b) could not be cited as a basis for withholding.

Second, assuming that the records sought would be accessible under §66-a of the Public Officers Law, I believe that copies should be made available upon payment of the appropriate fees for photocopying and postage.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Inspector Lecakes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2985

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

July 15, 1983

Mrs. Mary O. Furey
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Furey:

I have received your letter of July 7 and appreciate your kind words. Your inquiry pertains to rights of access to personnel records.

Since your question is of a general nature, the following remarks are also general. If you have questions regarding particular personnel records, perhaps more specific advice could be given.

First, as you are 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.

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.

Second, the Freedom of Information Law applies to all records of an agency, such as a school district [see definition of "record", §86(4), Freedom of Information Law]. Therefore, even though records might be found in personnel files, they are nonetheless subject to whatever rights of access might exist.

Third, there are generally two grounds for denial relevant to personnel records. The first 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].

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.

Lastly, a particular record that relates to personnel and is in my view clearly available is a payroll record required to be compiled under §87(3)(b) of the Freedom of Information Law. The cited provision states that:

> "[E]ach agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2986

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

July 15, 1983

Mr. Philip Confalone
[redacted]

Dear Mr. Confalone:

I have received your letter of July 9 in which you requested from this office records of the Town of Roxbury. Included with your letter is $15.00 to cover the cost of photocopying the materials sought.

Please be advised that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. The 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, such as the Town of Roxbury, to grant or deny access to records. Consequently, I am returning the money that you sent.

In an effort to assist you, however, I would like to offer the following comments.

First, the Freedom of Information Law is broad in its scope. 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."

Therefore, all records of the Town are subject to rights of access granted by the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. 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, with respect to your request for bills received and paid by the Town to its attorneys, although a town 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.

Fourth, bills sent to the Town by an appraisal firm and the individual named in your letter are in my view also available. Books of account, contracts, bills and similar records have long been accessible under the Freedom of Information Law, §51 of the General Municipal Law and §29 of the Town Law.

Fifth, with respect to your request for any appraisal and "any pertinent papers" regarding a particular parcel, rights of access would likely depend upon whether the parcel has been sold. If a sale has occurred, the records are likely available; if no sale has occurred, the appraisal could likely be withheld [see Freedom of Information Law, §87(2)(c) and Murray v. Troy Urban Renewal Agency, Sup. Ct., Rensselaer Cty. April 24, 1980, rev'd 84 AD 2d 612, 56 NY 2d 888 (1982)].

Lastly, you wrote that your request was sent to this office because your earlier requests of September 3 and October 10 were not answered by the Roxbury Town Supervisor, David A. Munsell.

In this regard, 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)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations to which reference was made earlier, and an explanatory pamphlet. Those materials and a copy of this letter will also be sent to Supervisor Munsell.

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

Sincerly,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Supervisor Munsell

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2987

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

July 15, 1983

Mr. William Arnold
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Arnold:

I have received your recent letter in which you requested an advisory opinion under the Freedom of Information Law. Your questions pertain to assessment information relating to the Town of Wheatfield.

The first area of inquiry concerns "field notes" made by an assessor when inspecting the property of a citizen of the Town. When you raised the issue of access to the assessor's notes at a meeting of the Town Board you were "told by the Town Attorney and the Town Assessor that they (his notes) are his personal notes and therefore, not subject to open copy and or review..." It was also stated that the records constituted the "Assessor's private material".

In short, I disagree, for I believe that the materials in question are subject to rights granted by the Freedom of Information Law for the following reasons.

First, it is emphasized that the Freedom of Information Law defines "record" broadly in §86(4) to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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 the notes in question are "kept" and "produced" by the assessor, they are in my view "records" that fall within the scope of the Freedom of Information Law. I would like to point out, too, that it has been contended that notes taken in the performance of one's official duties were "personal" or "private", but that a court held to the contrary under the Freedom of Information Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

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, the only ground for denial that I can envision as applicable to the notes 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, the notes could likely be characterized as "intra-agency" materials. However, to the extent that they contain statistical or factual information, for example, they would in my view be available under §87(2)(g)(i).

Fourth, the Freedom of Information Law preserves rights of access to records granted by other laws or by means of judicial interpretation. Section 89(6) 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, 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."

If the notes are similar to those described in the judicial determinations cited above, I believe that they would be available, notwithstanding any provision of the Freedom of Information Law to the contrary.

Your second area of inquiry concerns a request for records gathered by a firm that conducted a revaluation study by the Town. Specifically, you wrote that you were:

> "...informed that certain information gathered by the K.V.S. Information Systems, Inc., Buffalo, New York, the company hired to gather the data and determine the Full Market Value of our homes for assessment purposes, also was not available under the Freedom of Information Act. This statement was made even though all such information is or could be important when a person is trying to build facts to support their argument that their assessment is unfair. Since they must argue in front of the Assessor, the Town Assessment Review Board and later, if necessary, the Small Claims Court, all of whom would be privy to this information, it would seem most unfair to keep any information from the challenger in such cases."

You have asked whether "information of this nature can be kept from the public's view".

Once again, I direct your attention to the definition of "record" quoted earlier. Since the records were presumably "produced for" the Town, it appears that they are subject to rights of access granted by the Freedom of Information Law. Further, you intimated that the records would be in possession of the Town Assessment Review Board. If that is so, they are "kept" by the Town and fall within the definition of "record".

I would also like to direct your attention to Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)], in which the Court of Appeals rendered an expansive interpretation of the Freedom of Information Law. In that decision, which dealt with access to records in possession of a not-for-profit corporation engaged in a contractual relationship with a village, the Court granted access and, as one of the bases for disclosure, cited the statement of legislative intent appearing in §84 of the Freedom of Information Law:

> "[K]ey is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84)" (id. at 576).

The Court stated further:

> "[F]or the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely puntuates with explicitness what in any event is implicit".

It is also noted that the records sought in Kimball were apparently outside of the physical custody of the village when the request was made. Nevertheless, the Court of Appeals found that:

> "temporary possession in another does not necessarily oust a permanent possessor of the control which would make it subject to the responsibilities imposed by the Freedom of Information Law" (id. at 578).

In view of the foregoing, it is my view that the records developed by K.V.S. for the Town are subject to rights of access.

Your last area of inquiry concerns the steps that a citizen might take to ensure compliance with the Freedom of Information Law. In my view, perhaps the most appropriate initial step involves an attempt to educate officials of the specific requirements of the Law. To assist you in so doing, enclosed for your review are copies of the Freedom of Information Law, regulations that govern the procedural aspects of the Law and an explanatory pamphlet. The same materials, as well as a copy of this opinion, will be sent to the Town Board.

The Freedom of Information Law may be enforced by the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. It is noted that §89(4)(b) indicates that the burden of proof in such a proceeding is on the agency that has denied access to records. Further, §89(4)(c), a recent amendment to the Freedom of Information Law, permits a court to award reasonable attorney fees under certain conditions to a member of the public who "substantially prevails" in a legal challenge to a denial of access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2995

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

July 15, 1983

Mr. John Stone
82-A-1575
Box 51
Comstock, NY 12782-0051

Dear Mr. Stone:

I have received your letter of July 13 in which you requested copies of policies adopted by the Department of Correctional Services.

In this regard, it is emphasized that the Committee on Open Government 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, such as the Department of Correctional Services to grant or deny access to records.

Although this office does not maintain the records sought, I would like to offer the following brief remarks.

First, assuming that the departmental policies that you are seeking exist, I believe that they are available under the Freedom of Information Law. Section 87(2)(g)(iii) states that inter-agency or intra-agency materials consisting of "final agency policy" are accessible.

Second, it is suggested that you submit a request under the Freedom of Information Law, reasonably describing the records sought, to your 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 2989

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

August 4, 1983

Mr. Ronald Doty
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Doty:

I have received your letter of July 28 in which you requested records from this office. Specifically, you have asked for copies of records pertaining to you in relation to youthful offender status, correctional history, convictions, and statements and evaluations that concern you.

Please be advised that the Committee on Open Government 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.

In order to obtain records, requests should be directed to the agencies maintaining them. Further, it is emphasized that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when submitting a request, it is suggested that you supply as much detail as possible, including dates, file designations, index and docket numbers, descriptions of events and similar information that might enable agency officials to locate the records.

To provide you with further information, enclosed are copies of the Freedom of Information Law, regulations that govern its procedural implementation, and an explanatory pamphlet that may be useful to you. It is recommended that you review those materials closely prior to submitting 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:ss

Enclosures

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-2990

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

August 11, 1983

Mr. Alexander Rogers
[redacted]

The staff of the Committee on Open Government 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 July 13 and hope that you will accept my apologies for the delay in response.

Once again, your inquiry concerns requests directed to the Town of Deerfield, specifically its supervisor. According to your letter, no response to a request made on June 1 was given within the time limits prescribed by the Freedom of Information Law and the regulations promulgated by the Committee. In addition, you indicated that the means by which records are made available to you are inadequate.

In this regard, I would like to offer the following comments.

First, based upon information derived from previous correspondence, it appears that Town officials have on many occasions made efforts to fully comply with the Freedom of Information Law. I would conjecture that one of the problems is that the Town of Deerfield is relatively small and that its clerk does not maintain regular business hours. As a consequence, in some instances, records might not be readily available.

Second, with respect to the hours during which requests may be made, §1401.4(b) of the regulations promulgated by the Committee states that:

> "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 foregoing, it is suggested that you contact either the Town Clerk or the Town Supervisor for the purpose of arranging appointments to inspect and/or copy records.

Third, each agency is required to designate a records access officer. Although the Town Supervisor might have possession of certain records in which you are interested, it is possible that requests should nonetheless be directed to the designated records access officer.

And fourth, if no response to a request is given within five business days of its receipt, an applicant may consider that the request has been constructively denied and appeal to the governing body of the agency, in this instance the Town Board, or to the person or body designated by the Town Board 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

cc: Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2991

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

August 12, 1983

Mr. Henry West
83-A-0420 H-3-8
Clinton Correctional Facility
Box B
Dannemora, NY 12929

Dear Mr. West:

As you are aware, I have received your letter of July 12. I hope that you will accept my apologies for the delay in response.

You have requested from this office copies of police reports, minutes, criminal records, and similar information pertaining to you.

In this regard, it is noted that the Committee on Open Government 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. Nevertheless, I would like to offer the following suggestions.

First, to make a request under the Freedom of Information Law, such a request should be directed to the "records access officer" of the agency that maintains possession of the records sought. For instance, if a particular police department maintains records pertaining to you, a request should be directed to that department; similarly, if you are interested in obtaining records in possession of a district attorney, the request should be sent to the office of that district attorney.

Second, §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. Consequently, it is possible that a request for police reports pertaining to you without additional description would not reasonably describe the records sought. When making a request, it is suggested that you provide as much detail as possible, including names, dates, index and docket numbers, and similar information that would enable agency officials to locate the records.

To aid you in your efforts, enclosed are 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:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2992

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

August 12, 1983

Ms. Lucy Kopp
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kopp:

As you are aware, I have received your letter of July 13. I hope that you will accept my apologies for the delay in response.

You have requested information regarding the use of the Freedom of Information Law and whether it would apply to a bank. You also made reference to money of a relative that may be used improperly in relation to medicaid.

In this regard, I would like to offer the following comments.

First, the Freedom of Information Law is applicable to records of units of state and local government in New York. The scope of the Law is determined in part by the definition of "agency". Section 86(3) of the Law defines that term 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 such, the Freedom of Information Law in my opinion would not apply to a private corporation, such as a bank.

Second, since you referred to Medicaid, it is noted that records identifiable to recipients of public assistance are generally considered confidential under various provisions of the Social Services Law. However, regulations promulgated by the Department of Social Services indicate that, in many instances, a recipient of, or a person representing a recipient of public assistance may obtain from a social services agency records pertaining to that individual. Therefore, if, for example, you believe that a county social services department maintains records pertaining to your relative that might be of assistance to you, it is suggested that you contact that office for the purpose of requesting the records.

Lastly, to submit a request under the Freedom of Information Law, the request should be made in writing reasonably describing the records sought. Further, it should be directed to the "records access officer" of the agency that maintains the records.

To provide you with additional information, enclosed are copies of the Freedom of Information Law, regulations that govern its procedural implementation and an explanatory pamphlet on the subject that may be particularly useful to you.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2993

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

August 12, 1983

Mr. Alex Rodriguez
82-A-4894
Attica Correctional Facility
Box 149
Attica, NY 14011

Dear Mr. Rodriguez:

As you are aware, I have received your letter, which reached this office on July 18. I hope that you will accept my apologies for the delay in response.

Your letter consists of an appeal of a denial of access to records by the head clerk at the Attica Correctional Facility.

Please be advised that the Committee on Open Government does not render determinations on appeal following a denial of access to records by an agency. In this regard, §89(4)(a) of the Freedom of Information Law provides that an appeal should be directed to the head of an agency or a person designated by the head of the agency.

Under the circumstances, pursuant to §5.45 of the regulations of the Department of Correctional Services, an appeal should be sent to the Department's Counsel. As such, it is suggested that you submit an appeal to Counsel, Department of Correctional Services, Building 2, State Campus, Albany, NY 12226.

It is noted, too, that §89(4)(a) of the Freedom of Information Law permits an applicant to appeal within thirty days of a denial. Since that period will have elapsed by the time you receive this letter, I have contacted the Office of Counsel which will, under the circumstances, waive the thirty day time limit for the submission of an appeal.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 915
FOIL-AO- 2994

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

August 12, 1983

Alan J. Azzara
Azzara & Baram
210 Old Country Road
Mineola, NY 11501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Azzara:

As you are aware, I have received your letter of July 15 in which you requested advisory opinions under the Freedom of Information and Open Meetings Laws. I hope that you will accept my apologies for the delay in response.

According to your letter, you are a member of the Locust Valley Volunteer Fire Department. You indicated that the Board of Fire Commissioners of your Department was sued by one of its members. You and others in the Community are interested in knowing "just how much money the Board of Fire Commissioners paid in attorneys' fees in defending this suit and in prosecuting the appeal".

In conjunction with the foregoing, your question is whether, under the Freedom of Information Law, you have the right to inspect and copy "any attorneys' bills submitted to the Board of Fire Commissioners in connection with this lawsuit". You have specified that you are not interested in viewing "any correspondence, communications, or memoranda which could conceivably be construed as privileged information."

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

First, the Board of Fire Commissioners of a fire district is in my view an "agency" subject to the requirements of 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..." Since a district corporation is a public corporation (see General Construction Law, §166) and since the definition of "agency" in §86(3) of the Freedom of Information Law includes a "governmental entity performing a governmental function", such as a public corporation, the records of a fire district and its board of commissioners are in my view subject to the Freedom of Information Law.

Second, §86(4) of the Freedom of Information Law defines "record" expansively to include:

> "...any information kept, held, filed, produced or reprodcued 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, I believe that the bills in which you are interested constitute "records".

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.

Fourth, while a board of fire commissioners 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 in question 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" (see Civil Practice Law and Rules, §4503). Therefore, while some identifying details in the bills might justifiably be withheld, numbers indicating the amounts expended are in my view accessible under the Freedom of Information Law.

It is also noted that in a decision rendered under the Freedom of Information Law, it was held that checks indicating payment by a village to its attorney were available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., August 20, 1981].

Your second question involves meetings of the Board of Fire Commissioners and "whether or not it is permissible under the Law...to bring a portable tape recorder to these meetings and tape the proceedings".

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 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 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."

Due to 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."

In view of the opinions quoted above, I believe that you may use a portable tape recorder at an open meeting of a public body.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2995

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

August 12, 1983

Mr. John Bal
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bal:

As you are aware, I have received your letter of July 16. I hope that you will accept my apologies for the delay in response.

Your inquiry concerns a denial of your appeal by the Division of Parole. Under the circumstances, you have asked whether you can seek a "ruling or determination" from this office.

In this regard, the responsibilities of the Committee on Open Government involve providing advice under the Freedom of Information Law. This office does not have the authority to render a determination, a ruling or otherwise compel an agency, such as the Division of Parole, to grant or deny access to records.

At this juncture, it would appear that the only remaining step available to you would involve an effort to seek judicial review of the Division's determination by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. It is noted that §89(4)(b) of the Freedom of Information Law states that, in such a proceeding, the agency denying access has the burden of proving that the records withheld in fact fall within one or more of the grounds for denial listed in §87(2)(a) through (h) of the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2996

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

August 15, 1983

Mr. John E. Donovan
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Donovan:

I have received your letter of July 22 and hope that you will accept my apologies for the delay in response.

According to your letter:

> "[I]t is ordinary to write to the State Department of Education with a request and have them call the local school immediately to report that they have received a request from the writer asking for specific data. The school then makes it difficult on the children of the writer. Sometimes the local school replies to the writer by phone or letter prior to the State Education Department responding."

Since the State Education Department apparently discloses the nature of a request to the school district, your question is whether you "have rights of privacy when making an inquiry under the Freedom of Information Law".

In this regard, it is noted that the Freedom of Information Law is permissive. Stated differently, although the Law permits an agency to withhold records under certain circumstances, as a general rule, there is nothing in the Freedom of Information Law that requires an agency to withhold records or information. Therefore, there is nothing in the Freedom of Information Law or any other law of

which I am aware that would prohibit the State Education Department from contacting a school district when a request is made. Similarly, I know of no law that would confer a right to privacy with respect to a request made under the Freedom of Information Law.

You also wrote that:

> "[T]he State Ed. Department often takes three weeks or more to respond without any notice of anticipated delay. Sometimes they fail to respond."

In my view, the provisions of the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the law, require that responses to requests be given within prescribed periods. 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)].

I believe that 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2997

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

August 15, 1983

Mr. Bryan LaRose
81-D-85
Box B
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. LaRose:

I have received your letter of July 20 and apologize for the delay in response.

According to your letter, it is your understanding that the Freedom of Information Law enables you to "look into different parts" of records pertaining to you. In this regard, you indicated that there is a report of a charge pending against you in Worcester, Massachusetts. You have asked how the Freedom of Information Law may be used to seek and obtain the report.

Please be advised that the Freedom of Information Law of New York applies only to records in possession of units of state and local government in New York. As such, it would not apply to records in possession of a different state, such as Massachusetts. Further, although there is a federal Freedom of Information Act, it applies only to records in possession of federal agencies. Consequently, that provision would not apply to records of units of state and local government. It is noted, however, that virtually every state has enacted some sort of access law. Therefore, it is suggested that you might want to submit a request to the appropriate Massachusetts agency under its freedom of information law for the purpose of seeking to obtain the records in which you are interested.

Your second area of inquiry concerns criminal history information. 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.

Enclosed for your consideration are copies of the New York, 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2998

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

August 15, 1983

Mr. Henry Bilal
83-A-3596
T 219
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bilal:

I have received your letter of July 24 and hope that you will accept my apologies for the delay in response.

You have requested information concerning the Freedom of Information Law and asked whether you may assert rights granted by the Freedom of Information Law even though you are incarcerated.

In this regard, first, enclosed are copies of the Freedom of Information Law, regulations that govern its procedural implementation and an explanatory pamphlet on the subject that may be useful to you.

Second, the Freedom of Information Law does not distinguish among applicants for records. Further, it has been held 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]. Therefore, in my opinion, you generally have the same rights under the Freedom of Information Law as any member of the public.

Third, you asked how you might "go about obtaining information..." In brief, a request should be made in writing, reasonably describing the records sought. When requesting records, it is suggested that you include as much detail as possible, including names, dates, file designations, identification numbers and similar information that might enable agency officials to locate the records.

Fourth, it is noted that the Freedom of Information Law requires each agency to develop regulations in conformity with the Law and the Committee's regulations. The Department of Correctional Services has adopted regulations as required by the Freedom of Information Law. Enclosed is a copy of those regulations for your consideration.

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)]. Therefore, to the extent that records fall within one or more of the grounds for denial, they may be withheld. To become familiar with the bases for withholding, it is suggested that you closely review §87(2).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2999

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

August 15, 1983

Honorable Bernice Spreckman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Councilwoman Spreckman:

As you are aware, your letter addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information Law.

According to your letter, the City Manager of the City of Yonkers denied your request for a "computer printout of the June 30, 1983 trial balance of the City". It is your view that, as an elected official, you need the information to reach "correct decisions". You also contended that the denial deprived you of your rights under the "sunshine law".

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

First, it is noted that, as a general rule, an agency, such as the City of Yonkers, is not required to create a record in response to a request [see Freedom of Information Law, §89(3)]. Nevertheless, if, for example, the information in question can be taken from a computer tape without reprogramming, but rather by means of existing computer programs, the information in question would in my opinion be subject to rights of access granted by the Freedom of Information Law. On the other hand, if existing computer programs must be altered to obtain the information sought, such a step would in my view represent the equivalent of creating a new record, which, again, is not required by the Freedom of Information Law.

Second, 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."

In view of the breadth of the language quoted above, assuming that additional programming would not be necessary, it would appear that the information contained on a computer tape consisting of statistical or factual data would constitute a "record" that falls 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.

Fourth, under the circumstances, I believe that only one of the grounds for denial is relevant to the information 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 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.

While the information in question might appropriately be characterized as "intra-agency" material, it would appear that the materials consist solely of "statistical or factual tabulations or data" that are available under §87(2)(g)(i).

In view of the foregoing, assuming that the trial balance can be produced based upon existing computer programs, I believe that it would be available to any person 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: Dr. Sal J. Prezioso, City Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3000

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

August 15, 1983

Mr. E.J. Walker
MORLY PRESS
P.O. Box 3532
Erie, PA 16508

The staff of the Committee on Open Government 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 July 25 and hope that you will accept my apologies for the delay in response.

According to your letter and the correspondence attached to it, you have unsuccessfully requested from the Division of the Lottery "the names and addresses of all selling agents in the State of New York". Although letters were sent to both the public information office and the director of the Division, apparently you received only a brief response to your initial letter, in which it was stated that "[T]he policy of the New York State Lottery at this time is not to release the names and addresses of its ticket selling locations."

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

First, it is unclear whether your correspondence with the Division of the Lottery merely constituted inquiries to the Division or requests made under the Freedom of Information Law. If your letters were clearly requests for records made pursuant to the Freedom of Information Law, the responses may have been inadequate.

Second, assuming that your initial letter to the Division was a request made under the Freedom of Information Law, I do not believe that a denial based upon the "policy" of the Division was appropriate.

In brief, all records of an agency are available, except to the extent that records fall within one or more of the grounds for denial listed in §87(2) of the Freedom of Information Law. As such, when an agency denies access to records, it should in my view be based upon one or more of the grounds for denial appearing in the Law.

Third, notwithstanding the stated basis for the denial, it is possible that the records sought might justifiably be withheld. 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 turn, §89(2)(b) lists five examples of unwarranted invasions of personal privacy. One of those examples 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..."

In view of the language quoted above, if the lists of names and addresses in question would be used for commercial or fund-raising purposes, a denial may have been appropriate.

Fourth, since you did not receive the desired response from the Division, it is suggested that you might want to clearly submit a request under the Freedom of Information Law to Mr. George Yamin, the Division's Chief of Public Relations. Under §89(3) of the Law and the regulations promulgated by the Committee, an agency is required to respond to a request within prescribed time limits. Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate

the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of the receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. 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 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3001

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

August 16, 1983

Mr. Anthony R. La Salvia
Chairman
Committee for Equitable Assessments
Box 83 AA
Ancram, NY 12502

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. La Salvia:

I have received your letter of July 27 and hope that you will accept my apologies for the delay in response.

It is noted at the outset that in a second letter dated July 31, you referred to correspondence with the Taghkanic Town Attorney that you forgot to include with your earlier letter. However, that letter was never sent to this office. Despite the absence of that letter, I believe that your comments of July 29 coupled with your request addressed to the Town Clerk, a copy of which was sent to this office, provide sufficient information to enable me to advise.

It is emphasized at the outset that, 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 contain 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."

Based upon the judicial decisions cited above, I agree with the contention expressed by the Board of Equalization and Assessment that the records in which you are interested should be made available.

In terms of procedure, by submitting a request to the Town Clerk, it is likely that your first step was appropriate. In this regard, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law. In turn, §87(1) requires the governing body of a public corporation, in this instance, the Town of Taghkanic, to adopt regulations consistent with those of the Committee. One of the aspects of the required regulations concerns the designation of a "records access officer". Since §30 of the Town Law provides that the Town Clerk is the legal custodian of all Town records, it is likely that the Town Clerk is the records access officer. It is suggested, however, that you contact the Town Clerk to determine whether she has been so designated.

It is important to point out that both the Freedom of Information Law and the Committee's 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 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, if you have not received an appropriate response from the records access officer, it is suggested that you appeal to the Town Board or the person or body designated by the Town Board to render determinations on appeal following denials of access.

Enclosed is a copy of an explanatory pamphlet on the Freedom of Information Law that may be useful to you. In addition, in an effort to enhance compliance with the law, a copy of this opinion will be sent to the Town Clerk and the Town Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3002

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

August 16, 1983

Mr. Vincent Oliva
19698-053 11N
150 Park Row
New York, NY 10007

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Oliva:

I have received your letter of July 24 as well as the correspondence attached to it. Please accept my apologies for the delay in response.

Your inquiry concerns a request for all records pertaining to you directed to Donald J. Dilworth, Commissioner of the Suffolk County Police Department. The correspondence indicates that the request was received and acknowledged in writing on July 8. Although Commissioner Dilworth wrote that your request would be "processed", no estimate of the date on which a response would be given was stated. Your questions involve whether you must appeal in order to exhaust your administrative remedies or whether you may "go straight to Supreme Court with a[n] Article 78".

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

First, in my opinion, a proceeding cannot be initiated under Article 78 until one's administrative remedies have been exhausted. With respect to the time limits for a response to a request, §89(3) of the Freedom of Information Law states in 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..."

In conjunction with its responsibility to promulgate regulations concerning the procedural aspects of the Law [see §89(1)(b)(iii)], §1401.5(d) of the regulations promulgated by the Committee (21 NYCRR) 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."

Further, §1401.7(c) states 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."

Based upon the provisions quoted above, since no response concerning rights of access to the records sought has apparently been given, it appears that your request has been constructively denied. Therefore, in accordance with §89(4)(a) of the Freedom of Information Law and §1401.7(d) of the regulations, I believe that an appeal may be made.

I believe that the person designated to render a determination on appeal is David Gilmartin, County Attorney.

Second, although you contended that all of the records sought must be made available, it is possible in my opinion that several of the grounds for denial appearing in the Freedom of Information Law might be applicable to some of the records sought, at least in part.

For instance, while the records sought pertain to you, in many instances, they pertain to others as well. Since I am unaware of the nature or content of the record, no specific direction or advice can be given. However, it is possible disclosure of some of the records as they pertain to others might result in an unwarranted invasion personal privacy pursuant to §87(2)(b) of the Freedom of Information Law.

Similarly, although investigations pertaining to you may have ended, there may be ongoing investigations pertaining to some of the others named in your request. If that is so, it is possible one or more aspects of §87(2)(e) concerning records compiled for law enforcement purposes might be applicable as a basis for denial.

Several areas of your request involve inter-agency and intra-agency materials. Depending upon the contents of those materials, they may be accessible or deniable, in whole or in part [see §82(2)(g)].

Lastly, your request appears to be specific in many areas. However, the capacity of the Department to locate the records sought is likely dependent upon the means by which its records are filed. As such, it is questionable in my view whether some of the records sought could be located based upon the details that you provided.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-916
FOIL-AO-3003

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

August 17, 1983

The Honorable Norman J. Levy
Member of the Senate
30 South Ocean Avenue
Room 305
Freeport, NY 11520

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Senator Levy:

I have received your letter of August 2 and appreciate your interest in compliance with the Open Meetings Law. Please accept my apologies for the delay in response.

You have asked for my views with respect to a series of questions raised by three of your constituents. Most of the questions arise under or relate to the Open Meetings Law. Others involve provisions of the Education Law over which the Committee has no jurisdiction. Consequently, my responses will consist of legal advice rendered only in connection with the Open Meetings Law or, where appropriate, the Freedom of Information Law.

The first question involves the responsibilities of a board of education. In this regard, although the question does not fall within the scope of the Committee's jurisdiction, a review of the Education Law indicates that the duties of boards of education are described generally in §1709 of the Education Law.

The second question involves "what business should transpire during a public session", and whether "all questions broached by members of the community [must] be answered."

Here I direct your attention to §97(1) of the Open Meetings Law, which defines "meeting" to include any convening of a public body for the purpose of conducting public business. It is emphasized that the Court of Appeals, the state's highest court, has expansively interpreted the definition to include work sessions, agenda sessions and similar gatherings during which there is no intent to take action, but rather only an intent to discuss public business [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, any gathering of a quorum of a school board held for the purpose of conducting public business constitutes a "meeting" subject to the requirements of the Open Meetings Law in all respects.

The second part of the question involves public participation. While the Open Meetings Law permits the public to attend and listen to the deliberations of a public body, the Law is silent with regard to public participation. Consequently, it has been advised that a public body may permit public participation, but there is no requirement that members of the public be given an opportunity to speak at a meeting. However, in situations in which a board permits members of the public to speak, it has been recommended that the capacity to participate should be based upon reasonable rules that treat all members of the public in like manner.

The third question involves the circumstances under which a board of education may enter into an executive session, who is permitted to attend an executive session, and whether final decisions may be made during an executive session.

The Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings and deliberations of a public body must be held open to the public except to the extent that an executive or closed session may be convened. Paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the areas of discussion that may appropriately be considered during an executive session. Rather than listing the eight grounds for executive session, I have enclosed a copy of the Open Meetings Law.

With respect to attendance at an executive session, §100(2) states that:

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

Therefore, members of a school board and others authorized by the board may attend an executive session.

With regard to the capacity to make decisions during an executive session, as a general rule, a public body may take action, i.e., vote, during a properly convened executive session, unless the vote is to appropriate public monies. Nevertheless, various interpretations of the Education Law, §1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd __ NY 2d __ (1982)].

The fourth area of inquiry involves minutes and whether minutes of a public session are "binding" upon a board of education, whether minutes of executive sessions must be kept and whether approved minutes must be made available to the public.

With respect to whether the minutes are binding upon a board of education, it is suggested that an appropriate response could be provided by the Office of Counsel at the State Education Department.

With regard to minutes of executive sessions, as noted earlier, since a school board cannot generally take action during an executive session, and since §101(2) of the Open Meetings Law requires that minutes of executive session be prepared only when action is taken, as a general rule, there need not be minutes of executive sessions.

Approved minutes must in my view be made available under both the Open Meetings Law and the Freedom of Information Law. Section 101(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available

within two weeks of those meetings. Moreover, since action taken by a school board would be reflective of a final agency policy or determination, I believe that such records would also be accessible under §87(2)(g)(iii) of the Freedom of Information Law (see attached).

Since minutes of open meetings must be prepared and made available to the public within two weeks, it has been advised that such minutes, even though unapproved, must be made available within the requisite time limit. In situations in which minutes have not been approved within two weeks, it has been recommended that they be made available after having been marked as "draft", "non-final", or "unapproved", for instance. By so doing, the public can learn generally what transpired at a meeting; concurrently, a board of education is given a measure of protection by signifying that the minutes are subject to change.

I would also like to point out that §87(3)(a) of the Freedom of Information Law requires that each agency, including a school board, shall maintain:

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

Therefore, in any instance in which a board of education votes, a record must be prepared which indicates the manner in which each member voted.

The remaining questions involve the legality of action taken by a superintendent and a board of education, as well as rights of a teacher under the Taylor Law. Since those questions do not involve the statutes within the scope of the Committee's purview, it is suggested that a response should be sought from the Education Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3004

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

August 17, 1983

Mr. George Warwick
81-A-4939
Attica Correctional Facility
Box 149
Attica, NY 14011

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Warwick:

I have received your letter of August 13 concerning your capacity to gain access to files pertaining to you from the Department of Correctional Services and the Division of Parole. You also asked where you might obtain "a listing of what encompasses [your] full file".

In this regard, enclosed for your consideration are copies of the Freedom of Information Law, regulations of the Committee that govern the procedural aspects of the Law, and an explanatory pamphlet that may be useful to you.

In addition, enclosed is a copy of the regulations promulgated by the Department of Correctional Services concerning access to Department records. Please note that those regulations contain provisions that deal specifically with access to records by inmates.

With respect to a "listing" of records in your file, it is likely that no record exists which indicates each and every record pertaining to you. However, §87(3)(c) of the Freedom of Information Law 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."

Pursuant to the cited provision, the Department of Correctional Services has prepared a "master index" which identifies the categories of records in possession of the Department. Further, §5.13 of the Department's regulations indicate that the master index is available at each facility for inspection and copying.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3005

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

August 18, 1983

Mr. Martin E. Giles
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Giles:

As you are aware, your letter of August 2 addressed to the Attorney General has been forwarded to the Committee on Open Government (formerly the Committee on Public Access to Records). The Committee is responsible for advising with respect to the Freedom of Information Law.

Your letter concerns access to assessment records, fees for copies of those records, and the time limits for response to a request.

Specifically, your first question is:

> "[U]nder the Freedom of Information Act, can a citizen taxpayer obtain copies of past and present work sheets on farm assessments on his property? Also, what about other similar properties ... in order to make comparisons?"

It is noted at the outset that, 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 contain 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."

Based upon the Freedom of Information Law, the General Municipal Law, and the judicial decisions cited above, I believe that the worksheets to which you made reference that pertain to your property, or the property of others, should be made available to you.

Second, with respect to fees, the Freedom of Information Law requires that accessible records be made available for inspection and copying. If you merely seek to inspect records, no fee should in my opinion be assessed. If, however, copies of records are requested, the agency in possession of the records may charge up to twenty-five cents per photocopy [see Freedom of Information Law, §87(1)(b)(iii)].

Third, §89(3) of the Freedom of Information Law states that a request should be made in writing reasonably describing the records sought. Further, the cited provision 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 requested 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, 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.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3006

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

August 19, 1983

Mr. Larry Barnes
82-C-854
Attica Correctional Facility
Box 149
Attica, NY 14011

Dear Mr. Barnes:

I have received your letter of August 17 in which you requested from this office copies of records pertaining to you. According to your letter, the clerk at the Attica Correctional Facility indicated that you should "write to Albany" to obtain the records.

Please be advised that the Committee on Open Government 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 grant or deny access to records. However, I would like to offer the following comments and suggestions.

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to adopt regulations concerning the procedural aspects of the Law. In turn, §87(1) requires all agencies to promulgate regulations consistent with those of the Committee.

Second, the Department of Correctional Services has developed regulations under the Freedom of Information Law which make specific reference to requests by inmates for records pertaining to them. Enclosed is a copy of those regulations.

Third, §5.15 of the regulations indicates that a request for the records in question should be directed to the superintendent of the facility.

Lastly, it is noted that the Freedom of Information Law requires that a request "reasonably describe" the records sought [§89(3)]. Therefore, when making a request, it is suggested that you include as much detail as possible, such as dates, file designations, identification numbers and similar information so that agency officials can 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3007

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

August 19, 1983

Mrs. Marguerite Kronheim
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Kronheim:

I have received your letter of July 18 and hope that you will accept my apologies for the delay in response.

Enclosed with your letter is a copy of a request dated July 1 directed to the records access officer of the Town of Yorktown. As of the date of your letter, no response had been given. You have requested that this office advise the Town of its responsibilities under the Freedom of Information Law.

In this regard, I would like to offer the following comments.

First, the Freedom of Information Law is based upon 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, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government, which govern the procedure 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)].

As you requested, a copy of this advisory opinion will be sent to the records access officer and the Yorktown Town Board. In addition, the enclosed copies of the Freedom of Information Law, the regulations and an explanatory pamphlet will be sent to 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:jm

Encs.

cc: Records Access Officer
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3008

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

August 19, 1983

Mr. Merrill Trefzer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Trefzer:

I have received your letter of July 21. Please accept my apologies for the delay in response.

You have asked that I review a letter from Joseph A. Day, Assistant Superintendent of the Williamsville Central School District in conjunction with a question raised under the Freedom of Information Law. The question is whether a school district is "under a legal obligation to adopt a form for the request of school records." Mr. Day indicated that the District "has not adopted a form for the request of school records, but has merely asked that the request be in writing and that the records sought be clearly identified."

In my view, there is nothing in the Freedom of Information Law or the regulations promulgated by the Committee that would require an agency subject to the Freedom of Information Law, such as a school district, to adopt or prescribe a form to be completed when a request is made. The Committee has in fact consistently advised that a failure to complete a form adopted by an agency cannot alone constitute a valid basis for delaying or denying access to records. On the contrary, it has been suggested that, pursuant to §89(3) of the Freedom of Information Law, any request made in writing that "reasonably describes" the records sought should suffice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph A. Day

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3009

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

August 19, 1983

Mrs. Marie Courson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Courson:

I have received a copy of your letter of July 11, which, as you are aware, was apparently lost in the mail when it was initially sent to this office.

According to your letter, as a member of the Ballston Spa School District, you have attempted to request records of Foothills Council school districts pertaining to school attorneys. In this regard, you wrote that one superintendent indicated that "if [you] want the information [you] would have to come and see the records..." Another "insisted he can't release any information without the use of...school district forms." A third superintendent "called the Ballston Spa School District's superintendent to see if it was okay with him".

I would like to offer the following comments regarding the situations described in your letter.

First, it is noted that any person may seek records under the Freedom of Information Law. 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".

In this regard, one of the problems that may have been present involves a provision of the Education Law, §2116, which grants rights of access to school district records to qualified voters of the district. However, in determining the relationship between the cited provision of the Education Law and the Freedom of Information Law, it was held in Duncan v. Bradford Central School District that:

> "The Freedom of Information Law broadens the category of those to whom records are required to be made available beyond the disclosure required by Education Law §2116. Respondent's reading of §2116 as a restriction on the Freedom of Information Law is clearly erroneous. Petitioner and her attorney, as well as other persons, whether or not voters or in any way associated with the School District, are intended to be benefitted by Article 6" [90 Misc. 2d 282, 394 NYS 2d 362, 363 (1977)].

Therefore, I believe that you enjoy rights granted by the Freedom of Information Law with respect to the records of any agency, including the school districts in question.

Second, it has consistently been advised that a person should have the capacity to request and obtain records via the mail. Although the Freedom of Information Law and the regulations promulgated by the Committee are silent with respect to requests made by mail, a failure to mail accessible records upon payment of the appropriate fees would in my view violate the intent of the Freedom of Information Law. By means of example, people from all over the state request records from agencies in Albany. From my perspective, the Freedom of Information Law would become meaningless if a resident of Buffalo had to travel to Albany to inspect accessible records. Further, §89(3) of the Freedom of Information Law specifically refers to a requirement that agencies produce copies of records upon payment of the requisite fees. Consequently, in my view you should not have to travel to the offices of any school district to review records if you offer to pay the appropriate fees.

Third, with respect to the use of a form, §89(3) in my view merely requires that an applicant submit a request in writing that "reasonably describes" the records sought. As such, it has been advised that a failure to complete a form prescribed by an agency cannot validly constitute a basis for delaying or denying access to records.

Fourth, you wrote that one superintendent called another "to see if it was okay" to respond to your request. In my view, as indicated earlier, since accessible records should be made available to any person, there is nothing in the Law that would permit a response to be conditioned upon consent by a superintendent from another district.

Fifth, it appears that several of the school districts did not respond to your requests in a timely manner. It is noted in this regard 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 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)].

I hope that I 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: Superintendents of the Foothills
Council School Districts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3010

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

August 23, 1983

Mr. Kevin A. Seaman
Pelletreau & Pelletreau
20 Church Street
Box 110
Patchogue, NY 11772

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Seaman:

I have received your letter of August 4 as well as the correspondence attached to it. Please note that although you referred to a copy of your response to the District, that document was not included with your letter.

According to the correspondence, a resident of a school district that you represent requested the initial and final enrollment figures for each sixth grade class within a particular school for the past three years, the "disposition of the children that left the classes" and whether they moved out of the district, transferred to a private school or to a different teacher at the same school. She also asked "how many transfers were denied each year from each class because of lack of room in other classes."

You have sought my views regarding the request, and I would like to offer the following comments.

First, it is emphasized that the Freedom of Information Law is not an access to information law, but rather a law pertaining to existing records. In this regard, some aspects of the request were presented in the form of questions rather than an application for records.

Second, in a related vein, §89(3) of the Freedom of Information 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. If, for example, figures reflective of the total number of sixth grade students that transferred to a private school or to another teacher, or of the number of transfers denied for each class have not been prepared or tabulated, I do not believe that the District would be required to prepare or create those figures.

Third, on the other hand, if the information sought exists in the form of a record or records, much if not all of it would likely be available. For instance, although the enrollment figures requested would constitute "intra-agency materials", §87(2)(i) of the Freedom of Information Law states that "statistical or factual tabulations or data" found within those materials are accessible.

Assuming that the information sought exists, there may be a basis for withholding, depending upon its nature. In this regard, I direct your attention to the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which generally provides that educations records that are personally identifiable to a particular student are confidential, unless a parent consents to disclosure. Section 99.3 of the regulations promulgated under the Act defines "personally identifiable" to include "information which would make the student's identity easily traceable".

In the context of the request, existing records might refer to so few students that a student's identity would be "easily traceable". Under those circumstances, the record could in my view be withheld under the Act and, therefore, §87(2)(a) of the Freedom of Information Law pertaining to 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3011

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

August 23, 1983

Mr. Kevin A. Seaman
Pelletreau & Pelletreau
20 Church Street
Box 110
Patchogue, NY 11772

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Seaman:

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

The issue raised in your letter concerns "a request from a group of University Professors for a preschoolers' child census and enrollment analysis". You wrote that "the purpose of obtaining such census is to solicit pre-schoolers for a psychological study being undertaken by the State University at Stony Brook."

While I agree with your view that the information sought is similar to "directory information" as defined in §99.3 of the regulations promulgated under the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), commonly known as the Buckley Amendment, I do not believe that the regulations or the Buckley Amendment are applicable.

The same provision of the regulations defines "student" broadly, but states further that "[T]he term does not include any individual who has not been in attendance at an educational agency or institution." Since the preschoolers who are the subject of the request have not yet attended school, the records in my view fall outside the scope of the Buckley Amendment.

Since there is no specific direction in the Education Law of which I am aware that pertains specifically to the disclosure of census information (see Education Law, §§3240-3243), it appears that the Freedom of Information Law governs rights of access.

In this regard, one of the grounds for denial in the Freedom of Information Law, §87(2)(b), permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b) also lists five examples of unwarranted invasions of personal privacy. Although all of the information sought does not in my opinion fall within any of those five examples, I believe that the examples represent but five among conceivable dozens of unwarranted invasions of privacy. Further, when dealing with questions of privacy, subjective judgments must often be made. While one reasonable person might believe that disclosure of certain personal information would be innocuous, thereby resulting in a permissible invasion of privacy, an equally reasonable person might view disclosure of the same information as offensive, thereby resulting in an unwarranted invasion of personal privacy.

From my perspective, the information contained in the census records that you enclosed, such as home addresses, dates of birth and home telephone numbers could generally be withheld under §87(2)(b) of the Freedom of Information Law.

While, as indicated earlier, I do not believe that the information falls within the scope of the Buckley Amendment, perhaps the regulations could serve as a guide to appropriate action by the school district. Specifically, the regulations indicate that an educational agency cannot disclose directory information unless it has followed the procedure set forth in §99.37. That provision requires that public notice of the intent to disclose directory information be given to parents of students. The parents then may essentially veto disclosure of any item of directory information pertaining to their children.

Under the circumstances, it is likely that the parents of preschool children might not review a general public notice pertaining to directory information, because their children have not yet begun school. Therefore, it is suggested that, in an effort to accommodate the university professors and conourrently protect personal privacy, perhaps a notice could be sent to the parents of the children

who might be involved in the study. By so doing, the parents could determine individually to refuse or consent to disclosure based upon their own inclinations relative to personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3012

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

August 23, 1983

Ms. Joyce D. Long
Assistant County Attorney
County of Suffolk
Veterans Memorial Highway
Hauppauge, NY 11788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Long:

I have received your letter of August 4 and hope that you will accept my apologies for the delay in response.

According to your letter, Suffolk County "maintains vast amounts of information on computer tapes". Your questions deal with access to information contained on computer tapes and the fees that may be assessed when the information is requested.

The first question is whether the County may "charge the cost of computer time to a person requesting such printouts under FOIL in addition to the twenty-five cents per page".

In my view, depending upon the circumstances, the County may charge either twenty-five cents per photocopy or for computer time, but not both. Section 87(1)(b)(iii) of the Freedom of Information Law enables an agency, by means of rules and regulations, to establish:

> "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" (emphasis added).

Therefore, if a printout is produced in response to a request, I believe that the only fee that may be assessed would involve the actual cost of reproduction. Further, if, for example, a request is made for a copy of existing records, including existing printouts, the charge would be based upon a fee of twenty-five cents per photocopy.

Your second area of inquiry involves situations in which statistical information is intertwined with personal details that are clearly deniable. Since printouts may involve hundreds of pages, your question is whether:

> "[E]ven though we may not charge for searching the records, may there be a cost charge for preparing records of this sort for release, or could such required altering be considered 'creating a record' which is not required under FOIL?"

In this regard, as you are aware, §86(4) defines "record" broadly to mean "any information...in any physical form whatsoever including...computer tapes or discs". As such, a computer tape constitutes a "record" subject to rights of access granted by the Freedom of Information Law. However, §89(3) states that, as a general rule, an agency is not required to create a record in response to a request.

In the context of a request for information contained on a computer tape, if the request requires reprogramming, such a step would in my view represent the equivalent of creating a new record. If, on the other hand, the information can be produced without reprogramming, it would likely constitute a record subject to rights of access. By means of example, the Department of State licenses real estate brokers and maintains on a computer tape information pertaining to all licensees. Many requests have been made for a list of licenses within a particular county. Although the tape contains that information, it cannot be generated under existing programs. As such, it has been advised that, since reprogramming would be necessary to produce such a list, the list itself does not exist and need not be created.

Assuming that such a list has been prepared and contains the information sought, as well as social security numbers of licensees, a different response would in my opinion be required. If it is agreed that social security numbers could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)], the Department could delete those portions of an existing record to protect privacy. However, I do not believe that the agency could charge a fee for the time used in making the deletions.

Your last question concerns a request for duplication of a computer tape where the applicant has furnished his own tape for the transferral of data. It is your contention that you "could pass on the cost of that time to the requestor". In conjunction with §87(1)(b)(iii), I agree that you could charge a fee based upon computer time, i.e., the actual cost of reproduction.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3013

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

August 23, 1983

Mr. Richard Behrens
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Behrens:

I have received your letter of August 6 and the correspondence attached to it.

Once again, your inquiry concerns requests directed to the New York City Board of Education and action that might be taken by this office in relation to your requests.

In this regard, it is emphasized that the authority of the Committee on Open Government is advisory. The Freedom of Information Law, which in §89(1) describes the duties of the Committee, does not confer upon this office the power to compel an agency to grant or deny access to records.

If you believe that the Board has not complied with the Freedom of Information Law and you have exhausted your administrative remedies, §89(4)(b) of the Law provides that you may seek judicial review by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3014

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

August 23, 1983

Ms. Frieda Nelson
[redacted]

The staff of the Committee on Open Government 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 August 8 and hope that you will accept my apologies for the delay in response.

According to your letter, you are interested in obtaining records concerning "an investigation" relating to your former employment. You have asked to whom you should write to request the records.

In this regard, I would like to offer the following comments and suggestions.

First, the Freedom of Information Law includes within its scope records of units of state and local government in New York. Therefore, if, for example, you worked for a public school district, the district as well as its records would fall within the requirements of the Freedom of Information Law.

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural aspects of the Law. In turn, §87(1) requires each agency to develop regulations consistent with those of the Committee.

One facet of the regulations involves the designation of a "records access officer" by the head or governing body of the agency. The records access officer is responsible for coordinating an agency's response to requests for records. Therefore, it is suggested that you should address a request to the records access officer of the agency that maintains the records sought.

Third, it is noted that the Freedom of Information Law [see §89(3)] requires that a request "reasonably describe" the records sought. As such, although you need not identify a particular record when making a request, it is recommended that you provide as much detail as possible, including names, dates, descriptions of events, file designations or similar information in order to permit agency officials to locate the records.

Fourth, 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. Since I am not familiar with the nature of the investigation to which you referred, specific advice cannot be offered regarding the extent to which one or more of the grounds for denial might be applicable.

Lastly, to provide you with additional information, enclosed are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

NO.

3015

Clerical

Error

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3016

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

August 23, 1983

Mr. Norman Gilbert, Jr.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gilbert:

I have received your letter of August 12 in which you raised questions regarding the implementation of the Freedom of Information Law by the Village of Weedsport.

According to your letter, a legal notice was published on August 8 regarding the availability of the Village Treasurer's annual report. You indicated that you sought to examine the Treasurer's report on August 9 during the hours specified in the notice and to obtain copies of portions of the report in which you might have a particular interest. When you arrived, the Deputy Clerk informed you that the copier was out of order. You apparently stated that you would return in an hour and also requested an opportunity to examine "the list of all records kept in the Village office". Later that day, you obtained a copy of the Auditor's report, copied the subject matter list, which involved twenty-one items, and asked for a copy of the Treasurer's report. The Clerk indicated that the Treasurer's report would be available at twenty-five cents per page. Since the report consisted of more than one-hundred pages, you stated that you preferred to examine the report and then request copies of various aspects of it. However, you were informed that the Auditor had the report and that it would not be made available until "he's finished with it".

You have asked whether the "spirit or the letter" of the Freedom of Information Law has been violated. In this regard, I would like to offer the following comments.

First, it appears that the situation that you described as it pertains to the Treasurer's report falls within the scope of the Village Law, rather than the Freedom of Information Law. It is noted that the Freedom of Information Law, which deals with government records generally, states that an agency must respond within five business days of the receipt of a request made in writing that reasonably describes the records sought. Consequently, as a general rule, an agency would not be required to grant access to records instantly upon the receipt of a request. I believe that your request under the circumstances was made in conjunction with §4-408(e) of the Village Law, which requires that the treasurer file a report in the office of the clerk and that:

> "The board of trustees shall, within ten days, cause to be published in the official newspaper either a notice that the annual financial statement has been filed and is available for inspection or a summary of such statement in a form approved by the state comptroller, with an endorsement thereon that details thereof are on file in the office of the village clerk. The board of trustees shall audit, or cause to be audited by an officer or employee of the village or by a certified public accountant or a public accountant engaged for that purpose, such report and supporting records..."

Based upon the language quoted above, it would appear that the failure to have the report available for inspection involved a question of compliance with the Village Law rather than the Freedom of Information Law.

Second, with regard to the listing of records, the Freedom of Information Law states in §87(3)(c) that each agency, including a village, 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 "subject matter list" is not in my view intended to be a listing of each and every record of an agency. On the contrary, I believe that it is intended to constitute a list in reasonable detail by subject matter of the types of records maintained by an agency. Although a list indicating twenty-one types of records might not include reference to every category of records in possession of the Village, the subject matter list in my opinion need not be so detailed that every record of a village is included by reference.

Lastly, as you may be aware, no charge may be assessed under the Freedom of Information Law for the inspection of records. Consequently, I believe that you should have had the capacity to review the records sought and, thereafter, to select particular pages that you might want to have had photocopied 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3017

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

August 25, 1983

Mr. Lee W. Stemmer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Stemmer:

I have received your letter of August 11 and the correspondence attached to it.

According to the materials, you have been trying for approximately two months to obtain records of the Town Supervisor of the Town of Pompey. You indicated that a response to your request for access to records will be granted tonight, the evening of August 25. Although the controversy might be moot when this letter is received, you described a series of problems with respect to which I would like to offer the following comments.

First, while you may have initiated the process of requesting records two months ago, it is possible that your first request might have been unduly broad. As you are aware, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. In my view, if your request did not reasonably describe the records sought, the designated records access officer should have assisted you in identifying the records sought pursuant to §1401.2 of the regulations promulgated by the Committee.

Second, the Freedom of Information Law and the regulations, which govern the procedural aspects of the Law, 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 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 reciept 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, you indicated that the Town Board has not designated an appeals person or body. Here I direct your attention to §89(4)(a), which states that any person denied access may within thirty days appeal to the head or governing body of an agency or whomever is designated to render determinations on appeal. Further, §87(1) requires the governing body of a public corporation, in this instance the Town Board, to promulgate regulations consistent with those of the Committee. One aspect of the regulations requires the designation of an appeals person or body [see regulations, §1401.7(a)].

Lastly, in an effort to attempt to ensure procedural compliance with the Freedom of Information Law, a copy of this opinion, an explanatory pamphlet, regulations and model regulations will be sent to the Town Board. The same materials have been enclosed for your consideration.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3018

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

August 25, 1983

Bette Cuffari Farron
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Farron:

I have received your recent letter in which you described a series of problems in obtaining records under the Freedom of Information Law.

One area of your request involves information sought from the Livingston County Department of Social Services. You requested a variety of information regarding the County's foster care program, such as numbers of children voluntarily placed in foster care by parents, the numbers of children placed in foster care by the court, and similar related information. In addition, you attached a copy of a request directed to the Lima Substation of the New York State Police in which you requested "The NYS Police record of over time paid to State Police Officers since the State Police have been stationed in Lima..."

I would like to offer the following comments in conjunction with the situations that you described.

It is noted at the outset 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 is a vehicle under which any person may seek and obtain existing records. However, §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 conjunction with your requests directed to the County Department of Social Services, the question in my view would involve whether the information sought exists in the form of a record or records. From my perspective, if, for example, tabulations have not been created that reflect the information sought, the County would be under no obligation to review its records for the purpose of preparing totals in response to your requests. Similarly, while the State Police likely maintain records concerning the payment of overtime, a record indicating the total of overtime paid to State Police Officers since the Lima Sub-station has been in operation might not exist.

On the other hand, assuming that the information sought does exist in the form of a record or records, I believe that such records would be available under the Freedom of Information Law. In the case of the records regarding foster care, so long as the records could not identify particular individuals, it appears that numerical figures reflective of the information sought would be available. Similarly, to the extent that written policies and procedures that you requested exist, I believe that they, too, would be accessible.

The basis for those contentions is §87(2)(g) of the Freedom of Information Law, 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 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 the numerical figures exist, they would consist of "statistical or factual tabulations or data" available under §87(2)(g)(i). If the procedures and policies exist, I believe that they would be available under §87(2)(g)(iii), which grants access to "final agency policy or determinations".

The same rationale would be applicable to a figure representing the payment of overtime. Such a record could in my view be characterized as "intra-agency" material; however, it would be reflective of factual data available under §87(2)(g)(i).

With regard to the request sent to the State Police, I would like to point out that the request did not indicate a time period concerning the payment of overtime. It is possible that the substation has functioned for a period of years and, therefore, that the request might not have "reasonably described" the records sought in conjunction with §89(3) of the Freedom of Information Law. If that is so, it is suggested that you might want to submit a new request in which a time period regarding the payment of overtime is indicated.

As requested, enclosed are fifty copies of the pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Commissioner, Department of Social Services
New York State Police, Lima Substation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3019

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

August 26, 1983

Ms. Eleanor Derzanovich
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Derzanovich:

I have received your letter of August 15 in which you requested advice regarding the Freedom of Information Law.

According to your letter, you are interested in obtaining information from a public utility, a telephone company, concerning the bills for telephones used for political purposes.

In my opinion, the information sought fails outside the requirements of the Freedom of Information Law.

The scope of the Freedom of Information 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."

While a public utility might be regulated by government, it would not in my opinion be a governmental entity performing a government function. As a consequence, I do not believe that the telephone company or its records would be subject to rights of access granted by the Freedom of Information Law. Therefore, although you could request the records in question from the telephone company, there would not in my view be any legal obligation on the part of the telephone company to comply with the Freedom of Information Law or otherwise provide access to the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3020

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

August 26, 1983

Mr. George L. Bingham
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bingham:

I have received your letter of August 16 in which you requested assistance regarding the use of the Freedom of Information Law.

According to your letter, you are interested in obtaining a copy of a record kept at the home of the Town Clerk of the Town of Burlington. Although you were permitted to inspect the record, your request for a copy was refused. You indicated further that the Clerk "has no way of copying any documents, but could easily have done it without going very far to do so".

I would like to offer the following comments and suggestions concerning the situation.

First, it is emphasized that the Freedom of Information Law expansively defines "record" in §86(4) to include:

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

Due to the breadth of the language quoted above, a record kept by the Clerk in the performance of her official duties at her home in my view would fall within the requirements of the Freedom of Information Law.

Second, §89(3) of the Freedom of Information Law states in part that any person has the right to inspect an accessible record and further, 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..."

Third, I would like to point out 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 AD178 (1922)]. Therefore, if a record is available for inspection, it is in my opinion also available for copying.

Fourth, the regulations promulgated by the Committee under §89(1)(b)(iii) of the Freedom of Information Law, which govern the procedural aspects of the Law, make specific reference to fees for copies of requested records. In situations in which photocopying equipment is available, both the regulations and §87(1)(b)(iii) of the Law provide that an agency may charge up to twenty-five cents per photocopy, unless a statutes permit a higher fee to be assessed.

In addition, §1401.8(c)(2) of the regulations states that:

> "In agencies which do not have photocopying equipment, a transcript of the requested records shall be made upon request. Such transcripts may either be typed or handwritten. In such cases, the person requesting records may be charged for the clerical time involved in making the transcript."

Under the language quoted above, even though the Town might not have a photocopy machine in its offices, it would in my view nonetheless be required to prepare a transcript of the record upon payment of a fee for the clerical time used in its preparation. As stated earlier, an applicant may request that the agency certify to the correctness of

a copy or, in this instance, a transcript prepared in response to a request. It is also noted that §1401.8(a)(3) indicates that no fee may be assessed for a certification regarding the correctness of a copy.

Fifth, an alternative suggestion might involve an offer to pay for transportation and time used by the Clerk for traveling to a nearby photocopy machine. In addition, the cost of using the photocopy machine might be assessed. It is possible that such a step might be easier and more quickly accomplished than the preparation of a transcript, which although required, might be more costly and time consuming to both yourself and the Town.

Lastly, enclosed are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet on the subject. Copies of the same materials, as well as this opinion, will be sent to the Town Clerk and the Town Supervisor.

I hope that I 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 Clerk
Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3021

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

August 29, 1983

Steven G. Dworsky
Rensselaer County Legislature
85 23rd Street
Troy, New York 12180

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.</u>

Dear Mr. Dworsky:

I have received your letter of August 18 and the materials attached to it.

According to your letter, the Rensselaer County Charter requires that the head of a County department submit estimates of revenue and expenditure regarding the department for the ensuing year on or before August 1. The estimates become part of the tentative budget and final budget.

In this regard, on August 2, you requested a list of estimated revenues and expenditures submitted pursuant to the Charter by the Highway Department. Mr. John Casey, the Records Access Officer, denied your request on the basis of §87(2)(g) of the Freedom of Information Law as well as principles involving the "separation of powers". Following the denial, you appealed to County Executive Murphy, who responded on August 17 by granting your request, but stating that "[T]he information will be available after October 20, 1983".

You have requested an advisory opinion "as to whether the County Executive is entitled to withhold the information until October 20..."

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

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.

Further, although the records sought might be used in the deliberative process, which has not yet been completed, and the denial was based upon principles regarding the separation of powers, the Court of Appeals has held that records are available, unless they fall within one or more of the grounds for denial listed in the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979)]. Therefore, even though the records sought do not necessarily represent the outcome of the budget process, in my view, they are nonetheless subject to rights of access granted by the Freedom of Information Law.

Second, the only ground for denial of relevance in my opinion is §87(2)(g). Due to its structure and its judicial interpretation, however, that provision often grants broad rights of access. 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 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 sought consist of "statistical or factual tabulations or data" available under §87(2)(g)(i).

In a similar situation in which "budget worksheets" concerning a state agency were sought from the State Division of the Budget, it was held that the numerical figures, even though they may have been advisory and subject to change, were available [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)]. As stated by the Appellate Division in Dunlea, a decision rendered under the original Freedom of Information Law which granted access to "statistical or factual tabulations",

> "[I]t is readily apparent that the language 'statistical or factual' tabulation was meant to be something other than an expression of opinion or naked argument for or against a certain position. The present record contains the form used for work sheets and it apparently was designed to accomplish a statistical or factual presentation of data primarily in tabulation form. In view of the broad policy of public access expressed in section 85 the work sheets have not been shown by the appellants as being not a record made available in section 88" (54 AD 2d 446, 448).

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

> "The mere fact that the document is a part of the 'deliberative' process is irrelevant in New York State because section 88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is no statutory requirement that such data be limited to 'objective' information and there is no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed with no opinion by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible under the Freedom of Information Law as soon as they exist.

Although §5.03(a)(3) of the County Charter states that the tentative budget must be filed by the clerk of the legislature on or before October 20, there is nothing in the Charter or any other provision of law of which I am aware that would preclude disclosure of the estimates prior to that date. Therefore, if the information in question exists in the form of a record or records [see definition of "record", Freedom of Information Law, §86 (4)], I believe that it would subject to rights of access granted by the Law when it exists.

I hope that I 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 Executive Murphy
John Casey, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3022

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

August 29, 1983

Mr. Ronald Doty
2 M W 9
130 Plymouth Avenue So.
Rochester, NY 14614

The staff of the Committee of Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Doty:

I have received your letter of August 14, which involves the fees that may be assessed under the Freedom of Information Law.

According to your letter, you requested records from the Department of Correctional Services. Although the request was approved, you were informed that a fee of $7.50 would be assessed for thirty pages. Since you are indigent, it is your view that the fee is "unfair".

While I agree with your contention that an inspection of accessible records may be made at no charge, it appears that the records sought must be photocopied and sent to you. If that is so, the agency may in my view charge a fee in conjunction with §87(1)(b)(iii) of the Freedom of Information Law, which requires an agency to include in its regulations 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 statute."

Based upon the language quoted above, despite your status as an indigent person, I believe that the Department may charge up to twenty-five cents per photocopy when it makes records 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 923
FOIL-AO 3023

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

August 30, 1983

Ms. Jane Wiercioch
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Wiercioch:

I have received your letter of August 18, which concerns your capacity to obtain information from the Depew Union Free School District.

You referred to a series of issues, and I will attempt to address those pertaining to the Freedom of Information Law or the Open Meetings Law.

First, you indicated that on May 18, you requested copies of certain records. Mr. Raymond Morningstar, Assistant Superintendent, informed you that you would have to fill out the District's "Application for Public Access to Records". In my opinion, although an agency may require that a request be made in writing, an applicant is not required to complete a form prescribed by an agency. Section 89(3) of the Freedom of Information Law provides that an applicant should submit a request in writing for records "reasonably described"; the Law makes no reference to a form to be completed. As such, it has been consistently advised that any written request that reasonably describes the records sought should suffice.

Second, you wrote that Mr. Morningstar stated that you could "get the information desired for the sum of $.50 a copy..." In this regard, as you may be aware, the Freedom of Information Law limits the fees that may be assessed for photocopies to a maximum of twenty-five cents per photocopy.

Third, you made several reference to your unsuccessful attempts to gain access to records "pertaining to school finances, salaries, expenditures..." From my perspective, virtually all statistical or factual information concerning school finances or expenditures should likely be made available. 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. Since records regarding finances and expenditures would likely constitute "statistical or factual tabulations or data", I believe that they would be available under §87(2)(g)(i) of the Freedom of Information Law.

There are specific other provisions of law that may be cited for the purpose of obtaining the type of information that you want. For instance, §170.2 of the regulations promulgated by the Commissioner of Education sets forth rules regarding financial recordkeeping of 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."

Further, §1721 of the Education Law states that:

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

In view of the foregoing, it would appear that the District is required to maintain various types of records concerning its finances.

With respect to salaries, one of the few instances in the Freedom of Information Law in which an agency is required to prepare a record involves payroll information. Section 87(3)(b) of the Law states that each agency shall maintain:

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

Consequently, I believe that you have the right to learn of the salaries of every employee of the School District.

Fourth, you referred to a "special emergency meeting" held on July 19 "which was not posted or publicized in any of the three papers designated for legal notices..." Here I direct your attention to the Open Meetings Law. Section 99(1) pertains to 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) 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. Therefore, in my view, notice must be given to the news media and posted for the public prior to all meetings, whether regularly scheduled or otherwise.

If the emergency meeting to which you referred was convened under §2008 of the Education Law, I believe that a legal notice would likely have been required. However, to obtain more information concerning the requirements of the Education Law, it is suggested that you contact the State Education Department.

Fifth, you referred to a limitation of three minutes for the purpose of enabling members of the public to speak at meetings. In this regard, although the Open Meetings Law requires that meetings be conducted open to the public, the Law is silent with respect to public participation. Consequently, it has been advised that a public body is not required to permit members of the public to speak or participate at meetings. However, it has also been advised that if a public body chooses to permit public participation, it should do so based upon reasonable rules that treat all members of the public equally.

Lastly, you stated the belief that an "investigation" should be made regarding the District's policies. It is noted in this regard that the Committee on Open Government is authorized only to advise. The Committee does not have the authority to compel an agency to comply with either the Freedom of Information or the Open Meetings Laws. However, in an effort to enhance compliance, copies of this opinions, both laws, and an explanatory brochure on the subject will be sent to you, Mr. Morningstar and the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Raymond Morningstar
School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3024

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

August 30, 1983

Mr. Robert LeMoullec
News Director
WRKL
169 North Main Street
New City, NY 10956

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. LeMoullec:

I have received your letter of August 23 in which you requested assistance concerning the use of the Freedom of Information Law.

According to your letter, you have encountered difficulty in obtaining "local police logs". In this regard, I would like to offer the following comments regarding police blotters specifically, as well as law enforcement records in general.

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 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. 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 is not entirely clear, it is likely that many 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 [see Freedom of Information Law, §89(6)].

Third, with regard to the current 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 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 purpose and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;

> ii. deprive a person or a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

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 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 placed in jeopardy.

Also of possible relevance in terms of a basis for withholding 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 unless a different ground for denial is applicable.

Fourth, 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)].

Enclosed for your consideration 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:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3025

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

August 30, 1983

Jim Callaghan
Editor
Staten Island Register
2100 Clove Road
Staten Island, NY 10305

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Callaghan:

I have received your letter of August 16 in which you requested an advisory opinion, as well as the correspondence attached to it.

The correspondence consists of requests directed to the Office of the Staten Island Borough President and the ensuing responses by Pauline Gold, Records Access Officer, and Ralph J. Lamberti, Appeals Officer.

Having reviewed the correspondence and contacted Ms. Gold on your behalf, I would like to offer the following comments.

It is noted at the outset that Mr. Lamberti's determination on appeal was apparently based upon a judicial decision rendered under the original Freedom of Information Law. Specifically, Mr. Lamberti wrote that:

> "the information requested by you does not fall within the scope of information required to be disclosed under the law. In Sheehan v. City of Binghamton, 59 A.D. 2d 808 (3d Dept 1977,)

> the court stated that Article 6 of the Public Officers Law does not make all records of government generally available, but provides instead that only certain designated categories are available. The categories of information intended by the legislature to be available to the public are stated in the Article itself."

Sheehan, supra, was decided in 1977, when the Freedom of Information Law granted access to particular categories of records to the exclusion of all others. Nevertheless, a new Freedom of Information Law that reversed the presumption of the original statute became effective on January 1, 1978. The current Freedom of Information Law is clearly 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.

Mr. Lamberti also wrote that the information sought "does not fall within the 'decision making process' of the Borough President's office" and was deniable on that basis. However, the Court of Appeals has indicated that all records of an agency are subject to rights of access and that all records are available, unless one or more of the grounds for denial may appropriately be asserted [see e.g., Doolan v. BOCES, 48 NY 2d 341 (1979)].

With respect to the records requested on July 7 and July 11, based upon a lenghty discussion with Ms. Gold, it was indicated that your requests for both the subject matter list and a payroll listing will be honored.

Ms. Gold indicated that several areas of your request involve records that either do not exist or that are maintained by other agencies. For instance, while job descriptions for employees exist, they are maintained by the New York City Department of Personnel rather than the Office of the Borough President. Ms. Gold offered to obtain the books containing job descriptions if you remain interested in reviewing those records. She stated that there are no records of incoming or outgoing calls made by the Deputy Borough President and that there is no record of long-distance calls because the Office is not billed in that manner. Similarly, there is apparently no petty cash fund and the records requested in items one to four in your letter of July 11 are kept at the City Department of General Services. Ms. Gold informed me that there are no written

vacation schedules for staff. Similarly, the Office of the Borough President does not maintain a list of employees who use parking permits issued by the Bureau of Ferries. Ms. Gold, however, stated that the Bureau of Ferries might maintain such a list.

With regard to calendar and appointment books of the Borough President, those records are kept by means of a loose-leaf notebook. However, it appears that they are kept prospectively. Stated differently, when an appointment is scheduled for a month in advance, a notation to that effect is made. However, I am led to believe that the notation is discarded soon after the event takes place.

Ms. Gold also told me that there are no mileage records per se, but that gasoline usage slips are completed which indicate mileage. Those slips can be made available to you.

Item twelve of your request concerning correspondence with officials of various companies apparently involve records sent to the Office of the Borough President rather than materials transmitted by the Borough President to those firms. Without greater knowledge of the contents of those materials, I could not provide advice other than suggesting that they would be available unless one or more of the grounds for denial might apply.

You requested information regarding a named employee and a leave of absence. Ms. Gold indicated that she was unaware of any leave but that records would be searched if you could provide a particular time period during which the leave might have occurred.

Lastly, your final request of July 7 involves "The correspondence file for the Borough President and Deputy Borough President from Jan. 1, 1980 through June 30, 1983". In this regard, it is noted that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Under the circumstances, due to the breadth of your request, it is likely that you did not "reasonably describe" the records. It is suggested that you submit another request providing additional details, such as dates, file designations, descriptions of events and similar information that might 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

cc: Pauline Gold
Ralph Lamberti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3026

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

August 31, 1983

Douglas Jesse Hunt, Esq.
Town Attorney
Town of Marbletown
Route 209, P.O. Box 205
Stone Ridge, NY 12484

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hunt:

As you are aware, your letter of August 15 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information Law.

You raised the following question in your letter:

> "[M]ay a police agency, having taken a written sworn statement during a criminal investigation, from a prospective witness who is represented by counsel, refuse to give a copy of that statement to the witness or the counsel of the witness?"

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

First, §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, a written statement of a witness would in my view clearly constitute 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Third, although a witness statement might be withheld if requested by a third party, it is likely available to the person who made the statement.

One of the grounds for denial, §87(2)(b), permits an agency to withhold records the disclosure of which would result in "an unwarranted invasion of personal privacy". While the cited provision might appropriately be asserted in the event of a request by a third party, §89(2)(c) states that:

> "[U]nless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
>
> ii. when the person to whom a record pertains consents in writing to disclousre;
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Therefore, unless a different basis for withholding could be justified, the person who gave the statement, or his attorney after having obtained consent from his client, would in my view have a right to obtain a copy of the statement.

The only other ground for denial of possible significance in my view would be §87(2)(e). That 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 disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Again, if, for example, a third party requested the statement, it is possible that disclosure could "interfere" with the investigation or perhaps identify a confidential source. In either of those situations, a denial could likely be justified. However, since a witness presumably is aware of the nature of his own statement, it is difficult to envision how the harmful effects of disclosure described in §87(2)(e) would arise.

In sum, if none of the grounds for denial appearing in the Freedom of Information Law could appropriately be asserted, it appears that a copy of a statement by a witness would be accessible to him or his counsel.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-924
FOIL-AO-3027

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

August 31, 1983

Mr. Robert M. Dearing
Buffalo News
Tonawanda Bureau
3491 Delaware Avenue
Kenmore, NY 14217

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dearing:

I have received your letter of August 25 in which you requested an advisory opinion.

According to your letter, you are interested in attending "meetings of the community advisory board that will be considering the sex education curriculum in the Kenmore - Town of Tonawanda school district". You wrote, however, that the Superintendent, John E. Helfrich, has indicated that you cannot attend those meetings.

You also raised a question regarding rights of access to a "draft curriculum guide prior to its approval by the school board". Dr. Helfrich has apparently contended that the draft curriculum does not become public until after the Board has acted upon it.

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

First, if the Community Advisory Board was created by the School District or its Board of Education, for example, I believe that it is a "public body" required to comply with the Open Meetings Law. In this regard, it is noted that there was substantial controversy under the Open Meetings Law as originally enacted regarding the

status of committees, subcommittees and similar advisory bodies that have only the capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 97(2) of the Law now 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."

The original definition referred to entities that "transact" public business; the current definition refers to entities that "conduct" public business. Moreover, there was no reference in the original definition to committees or subcommittees, for example.

Based upon the changes in the Law, the specific language of the current definition of "public body" and its judicial interpretation, I believe that an advisory body designated by the district or its board of education would constitute a "public body" subject to the Open Meetings Law.

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, the Community Advisory Board, under the circumstances, would be an entity consisting of at least two members. Second, even though there may have been no specific direction that it must act by means of a quorum, §41 of the General Construction Law has long required that any entity consisting of three or more public officers or persons can perform their duties only by means of a quorum, a majority of its total membership. Third, the Board in question clearly conducts public business and performs a governmental function for a public corporation, in this instance, a school district. As such, I believe that all the conditions required to find that the entity in question is a public body can be met.

I would also like to point out that a recent decision of the Appellate Division indicates that advisory committees, including a committee designated by the executive head of a municipality, are considered to be public bodies subject to the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1980)].

Second, §105(2) of the Open Meetings Law states that:

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

Here I direct your attention to §414 of the Education Law, which describes the permitted uses of a "schoolhouse and grounds" belonging to a school district, and which might be considered less restrictive with respect to public access than the Open Meetings Law. Among the uses permitted, according to §414(1)(c) is:

> "[F]or holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainments and uses shall be non-exclusive and shall be open to the general public."

Under the language quoted above, even if the Advisory Board is not a public body subject to the Open Meetings Law, if it is engaged in a function "pertaining to the welfare of the community", it would appear that its meetings held on school property "shall be open to the general public".

Third, assuming that the Community Advisory Board is a "public body" subject to the Open Meetings Law, it is required to conduct its business in public, unless and until one or more of the grounds for executive session may be asserted to exclude the public. The grounds for executive session appear in paragraphs (a) through (h) of §100(1). Based upon a review of those provisions, I do not believe that a discussion of the curriculum of a school district would fall within any ground for executive session. If that is so, the discussion of the curriculum by the Advisory Board would in my view be required to occur in public at an open meeting.

Fourth, with respect to a record reflective of the draft curriculum, such a record might in my view be accessible or deniable, depending upon the process by which it is reviewed and adopted or rejected.

The only ground for denial of relevance under 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..."

Under the circumstances, a proposal would likely constitute advice or a recommendation to the Board of Education. As such, it might be deniable.

However, once again assuming that the Community Advisory Board is subject to the Open Meetings Law, and if the proposal is prepared during one or more open meetings, its contents would effectively be disclosed at open meetings. Further, if the Board of Education itself discusses the Advisory Board's recommendation during an open meeting, the contents of the recommendation would also effectively be disclosed.

Lastly, I would like to point out that the decision cited earlier, Syracuse United Neighbors, supra, found that advisory boards subject to the Open Meetings Law are required to prepare minutes. If the Advisory Board is subject to the Open Meetings Law and conducts its business in public, minutes would have to be prepared pursuant to §101(1) of the Open Meetings Law. That provision states that:

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

As such, even though the recommendation of the Community Advisory Board might not be final, for it would not at that stage have been approved by the Board of Education, it might nonetheless be contained in minutes required to be prepared by the Advisory 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: Dr. John E. Helfrich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-925
FOIL-AO-3028

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

August 31, 1983

Mr. Charles J. Theophil
[redacted]

The staff of the Committee on Open Government 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 August 26, in which you raised questions regarding proceedings conducted by the New York City Tax Commission.

According to your letter, you were informed by Phyllis Davies, Records Access Officer for the Tax Commission, that minutes are not taken at proceedings of the Tax Commission and that transcripts are not prepared. Further, you made reference to records examined by Tax Commissioners at your hearing that were "relied upon for their decision". Upon request for those records, you indicated that the records were not made available.

You have asked whether the failure to take minutes constitutes a violation of the Open Meetings Law and whether the failure to provide you with copies of the records to which you referred constitutes a violation of the Freedom of Information Law.

First, with respect to the hearing, it is noted that there is often a distinction between a meeting of a public body during which an entity deliberates toward a decision, and a hearing during which a member of the public is given an opportunity to speak. Under the circumstances, it is possible that the proceeding in question was not a "meeting" subject to the Open Meetings Law, even though members of the public had a right to attend.

Second, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 101(1) 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."

It does not appear that those who conducted the hearing made motions, proposals or resolutions. I would conjecture, however, that any determination made was made available to you.

With respect to your request under the Freedom of Information Law, I have contacted Ms. Davies of the Tax Commission on your behalf. She informed me that the records examined and relied upon by the Tax Commissioners involved materials that you submitted prior to the hearing. Ms. Davies indicated that she responded to your request to that effect.

In sum, if my understanding of the situation is accurate, it does not appear that a violation of either the Open Meetings Law or the Freedom of Information Law occurred.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3029

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

September 1, 1983

Mr. Thomas Santiago
83-A-4355
Box 307
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Santiago:

I have received your recent letter in which you referred to unsuccessful efforts to challenge the contents of criminal history records pertaining to you.

According to your letter, some five months ago you submitted a statement of challenge in accordance with the appropriate regulations to the Division of Criminal Justice Services. To date, however, your challenge and appeal remain unanswered.

Having reviewed the regulations promulgated by the Division regarding the right to challenge, §6050.1(e) states in part that:

> "DCJS shall act upon challenges filed pursuant to subdivision (d) of this section within a reasonable time after receipt of all required documentation in support of the challenger's claim."

Whether a "reasonable time" has been determined judicially is unknown to me. However, it is suggested that you attempt to determine whether you have provided the required documentation in order that you may initiate a new challenge or appeal.

You referred to other types of records and the capacity to obtain them through "subpoena duces tecum pursuant to Freedom of Information Act". In this regard, it is emphasized that the Freedom of Information Law is a vehicle different from the subpoena or other types of discovery devices. The Freedom of Information Law is a statute dealing with access to records generally and the rights of any member of the public to seek access to records. The use of a subpoena is conditioned upon specific circumstances and the terms of particular statutes, such as Article 240 of the Criminal Procedure Law.

If you are interested in seeking records under the Freedom of Information Law, requests should be directed to the agencies that maintain them. For instance, if records are kept by a police department, a request should be directed to the records access officer of that department.

Further, §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Consequently, when making a request, as much detail as possible should be provided, such as names, dates, identification numbers, and similar information that will enable agency officials to locate the records sought.

Lastly, under the circumstances, it is suggested that you contact a representative of Prisoners' Legal Services or a similar legal aid group. I would conjecture that a representative of such a group could provide you with appropriate advice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3030

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

September 1, 1983

Mr. R. Becker
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Becker:

I have received your letter which is dated June 23, but which reached this office on August 26.

You indicated that you have unsuccessfully requested records from the Kings Park State Hospital regarding your "past standing as Food Service Worker".

In this regard, I would like to offer the following comments and suggestions.

First, since you did not state when you were employed by the Kings Park State Hospital, I would like to point out that the Freedom of Information Law pertains to existing records. Section 89(3) 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, the records sought have been discarded, the agency would not be obliged under the Freedom of Information Law to create a record on your behalf.

Second, with respect to existing records, 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.

Third, I would conjecture that the majority of existing records pertaining to you were prepared by the Hospital and its personnel. If that is so, it is likely that one of the grounds for denial may be particularly relevant. Specifically, §87(2)(g) of the Freedom of Information 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. 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.

As such, intra-agency materials consisting of statistical or factual information pertaining to you would in my view generally be available. Contrarily, those portions of the records reflective of advice, opinion, recommendation and similar information could likely be withheld.

Fourth, §89(3) of the Law requires that an applicant request records "reasonably described". Therefore, when making a request, it is suggested that you include as much detail as possible so that agency officials can locate the records sought.

Fifth, in the event of a denial, §89(4)(a) permits you to appeal to the head of the agency or whomever is designated to render determinations on appeal.

Lastly, enclosed for your review 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 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3031

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

September 1, 1983

Mr. Francis D. McCabe
NYS Public Employees Federation
100 Rutger Street
Utica, New York 13501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McCabe:

I have received your letter of August 24 and the correspondence attached to it.

According to the materials, you submitted requests under the Freedom of Information Law to Frederick J. Coons, Principal Economist for the Department of Labor. One of the requests involved "records or portions thereof pertaining to the names and occupational title of people who wrote the New York State, Department of Labor publications: Hiring Specifications and County Profiles". A second aspect of the request concerned the performance evaluations and rating forms concerning employees who wrote the two publications. Another request dealt with performance evaluations and rating forms "for all economists in the Upstate Area..."

With respect to each of the requests, Mr. Coons denied access on the ground that disclosure would result in an unwarranted invasion of personal privacy. Moreover, although you requested that, in the event of a denial, you be informed of the person to whom an appeal should be sent, Mr. Coons wrote that he did "not know to whom an appeal of this denial should be directed" and, therefore, was unable to supply you with that information.

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

First, the Freedom of Information Law pertains to existing records. Section 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, records do not exist indicating the names and titles of those who wrote the publications in question, the Department of Labor would not be obligated to create new records on your behalf.

Second, assuming that records indicating the names and titles of those who prepared the publication do exist, those records would in my opinion be available.

It is noted in this regard that one of the few instances in the Law in which an agency must prepare a record involves payroll information. Specifically, §87(3)(b) requires that each agency shall maintain:

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

Therefore, any person may review a listing of agency employees which includes their names and titles.

Moreover, while §87(2)(b) permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy", it has been held in various contexts that public employees enjoy a lesser degree of privacy than members of the public generally. The Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are available, for disclosure of such records would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); 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].

Since the preparation of publications is relevant to the performance of the official duties of the employees in question, it is my view that disclosure of the names and titles would result in a permissible rather than an unwarranted invasion of personal privacy.

Third, with regard to the performance evaluations and ratings, I believe that some aspects of the forms are available, while others might justifiably be withheld. In addition to provisions regarding the protection of privacy, relevant is §87(2)(g) of the Freedom of Information Law. The cited provision 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. 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.

If the forms are similar to those with which I am familiar, certain aspects involve statements of opinion, recommendation or advice regarding the performance of particular employees. Those aspects of an evaluation form could in my view be withheld under §87(2)(g).

However, the final rating in my opinion would likely be available, assuming that any appeals have been exhausted and that the rating is reflective of a final determination. If a rating constitutes the final determination, I believe that it would be available under §87(2)(g)(iii), particularly if monetary awards were made based upon ratings.

Fourth, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations regarding the procedural implementation of the Law. In turn, §87(1) requires each agency to develop its own regulations in conformity with those promulgated by the Committee.

One aspect of the regulations involves the designation of one or more "records access officers" who are responsible for coordinating an agency's response to requests for records [see regulations §1401.2(a)]. The regulations also provide that an appeals person or body be designated and that a denial of access to records should indicate the name, title, public office address and office telephone number of the appeals officer. Based upon the correspondence, it does not appear that Mr. Coons is a designated records access officer. Further, I believe that Mr. Coons should have attempted to learn the identity of the person to whom a denial could have been appealed.

Lastly, it is suggested that you attempt to learn the identity of the Department's records access officer or submit a new request addressed to the records access officer of the Department of Labor.

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: Frederick J. Coons
Victor Stewart, Director
Public Information Office

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3032

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

September 6, 1983

Jon H. Hammer
Burns, Hammer & Burns
220 East 42nd Street
New York, NY 10017

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hammer:

I have received your letter of August 25 and the attached application for public access to records.

Your letter and the application indicated that you requested an "appointment book record or other record reflecting callers to the Office of the Supervisor, Town of Greenburgh on Town related business..." (emphasis yours). Due to the nature of the request, you specified in the application that your request included reference to "discussions with Town Attorney with respect to litigation where outside counsel is present" (emphasis yours) in conjunction with a variety of matters. On August 17, you received notification that your request was denied based upon "confidential disclosure", "CPLR 4503", and §87(2)(g) of the Freedom of Information Law. It is your contention that the appointment book record of the Town Supervisor does not involve confidential disclosures, that the provisions of the Civil Practice Law and Rules, §4503, concerning the attorney-client privilege would not be applicable, for you specified that such records would pertain to situations "where outside cousel is present". In addition, you indicated that you "cannot possibly conceive of how such documents are inter-agency or intra-agency materials.

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

First, as you are aware, §86(4) of the Freedom of Information Law defines "record" broadly to mean:

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

In view of the breadth of the definition, I believe that an "appointment book record" kept by a Town Supervisor concerning Town related business would constitute a "record" subject to rights of access.

It is noted, too, that the courts have construed the definition of record as broadly as its language indicates. For instance, in determination that records concerning a lottery run by a volunteer fire company are subject to the Freedom of Information Law, the Court of Appeals 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 nongovernmental activities, especially where both are carred on by the same person or persons" [Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)].

Similarly, in a situation in which it was contended that handwritten notes that were later used in preparation of minutes were "personal" rather than records subject to the Freedom of Information Law, it was found that the notes fell within the scope of rights of access granted by the Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

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 of more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Further, 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 more of the grounds for denial. As such, a single record or page, for example, might be accessible and deniable in part. Moreover, the fact that a portion of a record might justifiably be denied would not render the entire record deniable. On the contrary, I believe that deniable portions could be deleted, while the remainder would be available.

In this regard, the initial basis for denial offered by the Town Clerk involves an assertion that the records involve a "confidential disclosure". In my opinion, based upon judicial interpretations of the Freedom of Information Law, an assertion of confidentiality without more cannot be justified. In short, it has been found that records must be made available, unless one or more of the grounds for denial listed in §87(2) of the Freedom of Information Law may appropriately be asserted [see Doolan v. BOCES, 48 NY 2d 341, at 347 (1979); Westchester Rockland Newspapers, supra]. Consequently, I do not believe that an assertion of "confidential disclosure" without any statutory citation could be justified as a basis for withholding.

The second basis for withholding involves §4503 of the Civil Practice Law and Rules (CPLR). Again, that provision involves communications between an attorney and a client. While I believe that a municipal official, such as a town supervisor, may engage in a privileged relationship with the attorney [see Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 758 (1968), aff'd 17 App. Div. 2d 932; People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)], the mere presence of an attorney does not in

my view automatically result in a proper assertion of a privileged relationship or communication. In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "[I]n general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

In view of the foregoing, to the extent that the appointment book contains reference to communications between the Town Supervisor and a town attorney, who is present for the purpose of providing legal advice and acting in his or her capacity as an attorney, I believe that such information would fall within the privilege envisioned by §4503 of the CPLR. To that extent, the information could in my view 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". However, if an attorney was present but if that attorney was not acting in his capacity as legal counsel to the Town Supervisor, or if a third party was present who did not maintain a privileged relationship with the Supervisor, a privileged communication would not in my view have been made, and §4503 of the CPLR could not in my opinion be asserted. As such, I do not believe that §4503 of the Civil Practice Law and Rules or §87(2)(a) of the Freedom of Information Law could justifiably be cited to withhold records containing such references.

The final ground for withholding offered by the Town Clerk was §87(2)(g) of the Public Officers Law. That provision of the Freedom of Information 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. 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, while an "appointment book record" or similar document might be characterized as "intra-agency materials", its contents would in my view constitute "factual" data required to be made available under §87(2)(g)(i). Consequently, I do not believe that §87(2)(g) could serve as a basis for withholding.

In sum, based upon my understanding of the situation as described in your letter, the grounds for denial cited by the Town Clerk in response to your request could not be justified. Further, it appears that the material that you requested from the appointment books would be available, for none of the grounds for denial in the Freedom of Information Law in my view would be applicable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Susan Tolchin
Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3033

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

September 6, 1983

Jules O. Pagano, Chairman
Unemployment Insurance Appeal Board
Department of Labor
Two World Trade Center
New York, NY 10047

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Chairman Pagano:

I have received your thoughtful letter of August 18 in which you raised a series of questions regarding the ramifications of the decision recently rendered by the Court of Appeals in Herald Company v. Weisenberg.

While I appreciate having an opportunity to comment, I hope that you will understand that many of the ensuing remarks will be based upon conjecture. From my perspective, Herald represents a landmark decision that made new law. Further, in all honesty, I felt that the outcome would have been different.

It is noted that I have long been aware of §537 of the Labor Law, which, in brief, requires that records submitted by employers and employees in conjunction with claims for unemployment insurance benefits be kept confidential. Efforts have been made to research the legislative intent of the statute. In the only judicial decision that I could locate that pertains to the intent of §537, which had been §524 of the Labor Law, it was found that:

> "...section 524 of the Labor Law prohibits the use of such records in the courts unless the Industrial Commissioner is a party to the action or proceeding. While the act does not disclose the object of the Legislature, it undoubtedly was to prevent exposure to public gaze of the names of applicants who are receiving benefits under the auspices of the statute and under which the employer bears the burden. This is a reasonable objective" [Andrews v. Cacchio, 35 NYS 2d 259, 260; 264 App. Div. 791 (1942)].

Although Andrews, supra, was decided in 1942, there is no decision of which I am aware that indicates a different intent than that quoted above. Moreover, the Andrews decision has been cited as recently as 1982 [see Clegg v. Bon Temps., Ltd., 452 NYS 2d 825 (1982)].

The only item of legislative history regarding what had been §524 involves a memorandum to Counsel to the Governor regarding Chapter 117 of the Laws of 1936 in which it was stated that §524 "makes formal changes in order to comply with the provisions of the federal Social Security Act".

Due to the clear intent to protect personal privacy, the decision might give rise to a series of unforeseen disclosures via proceedings conducted under the Labor Law as well as other statutes.

Your first area of inquiry involves a portion of the decision in which it was stated that:

> "[I]n light of the failure of either the Legislature or the Commissioner to provide for closing unemployment compensation hearings, it would be inappropriate to read into section 537 a blanket order of closure."

The initial question raised is whether an amendment to rules, "with appropriate safeguards not to restrict Freedom of the Press" would justify existing practices and procedures. In my view, the Court appears to have inferred that the adoption of reasonable rules could be promulgated regarding closure.

I wonder whether the decision would have been the same if rules had been promulgated which required that all such proceedings be closed to third parties. The question in my opinion under the circumstance would have involved whether the rules were reasonable and whether the Commissioner had the statutory authority to promulgate a rule of such breadth. Section 21(11) of the Labor Law confers upon the Commissioner the authority to "issue such regulations governing any provision of this chapter as he finds necessary and proper". Similarly, §622 of the Labor Law permits the Board to establish "suitable rules" regarding hearings.

Would regulations completely closing the hearings be legal based upon the Commissioner's or the Board's rule-making capacity, or, in view of the decision, would regulations be valid and reasonable only if the presumption of openness is maintained? I would conjecture that such rules would be valid only if they give effect to the decision, i.e., only if they are based upon a presumption of openness.

With respect to records relating to hearings, other than those subject to the confidentiality requirements imposed by §537, I direct your attention to the Freedom of Information Law (see attached).

It is noted initially that §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 definition, all of the records are subject to rights of access.

Further, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more ground for denial appearing in §87(2)(a) through (h) of the Law.

Two of the grounds for denial may be relevant to the types of records used or generated.

One is §87(2)(b), which provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". As I explained to Tim Coughlin of your office, questions regarding privacy often involve the making of subjective judgments. One reasonable person might consider that disclosure of a particular item of personal information would be innocuous, thereby resulting in a permissible invasion of personal privacy; yet an equally reasonable person might feel that disclosure of the same information would be offensive, thereby resulting in an unwarranted invasion of personal privacy.

The Law provides some guidance in §89(2)(b), which lists five examples of unwarranted invasions of personal privacy. Particularly relevant under the circumstances might be the first two such examples, which involve:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

The remaining ground for denial of possible significance is §87(2)(g). That provision 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..."

I am unaware of the nature of records that may be generated by or between agencies; however, those portions of inter-agency or intra-agency materials reflective of advice, impression, opinion, recommendation and the like could in my view be withheld.

It is noted, too, that the Freedom of Information Law does not generally distinguish among applicants for records. As stated in Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NY 2d 165], records accessible under the Law should be "equally available to any person, without regard to status or interest". Therefore, if, for example, neither §537 nor a ground for denial in the Freedom of Information Law could justifiably be asserted, any person might have a right to certain records. As a consequence, the Board's rules limiting access to the parties and their representatives might be reviewed and reconsidered. Further, in my opinion, although the controversy may have been initiated by the news media, I do not believe that the decision confers a special right upon the news media. As stated in the first sentence of the decision, the hearing is "presumed to be open, and may not be closed to the public", unless there is a compelling reason to do so (emphasis added).

Again, with regard to the hearings and the records used or introduced, other than those subject to §537, I would conjecture that the thrust of the Court's decision is based upon analogies to or principles involving judicial proceedings, which are generally open to the public. Further, when evidence or exhibits are introduced, they become part of the court record and are generally available (see e.g., Judiciary Law, §255).

Based upon the decision, assuming that a hearing could be viewed in a manner similar to a judicial proceeding, transcripts of testimony taken or exhibits introduced during an open hearing might remain "open" to anyone. If there is niether an objection to openness nor a compelling reason to close the hearing, it might be contended that the parties waived the capacity to protect their privacy, should a request for the record be made at a later date.

While the Court did not "catalogue" the "compelling reasons" for closing a hearing, the decision did provide examples (e.g., alcoholism, mental illness, etc.) of the types of information or situations that might result in a proper closure of a portion of a hearing. Further, although the Freedom of Information Law, like §537 of the Labor Law, pertains to records, perhaps the guidelines regarding unwarranted invasions of personal privacy could be useful in developing flexible parameters regarding closure.

A potential problem in terms of requests made subsequent to a hearing might involve situations in which no member of the public or the news media is present at a hearing. If only the parties are present and there is no concern for the disclosure of personal details, it is suggested that the hearing be conducted as if the news media were present. That may be the only way in which records may be withheld following a hearing.

Perhaps at the start of a hearing, the hearing officer could refer to its presumption of openness and indicate that anyone may attend, unless there are compelling reasons for closure. It might also be stated that, despite the absence of third parties, objections to public disclosure, based upon a showing of "good cause" or "compelling reasons", should be made during the course of the hearing by either party. By so doing, the parties' disclosure of embarrassing or intimate details of peoples' lives might in part be shielded from later disclosures. Moreover, assuming the news media or other third parties are not present, it would appear unlikely that any ensuing challenge to closure could be appropriately asserted.

You raised questions regarding materials in a file other than a transcript or an exhibit and that are not introduced at a hearing. All I can suggest is that, if the materials were submitted by an employer or an employee, the confidentiality requirements of §537 would appear to apply. If they do not fall within §537, the Freedom of Information Law would likely apply. As such some materials might be available, while others might appropriately be withheld.

Whether such documents should be kept by the Board or returned to a local office is unknown to me. The question in my view is whether the initial transfer involves a change not only in physical custody of the records, but also legal custody.

With respect to the retention of records generally, I direct your attention to §186 of the State Finance Law. In brief, the cited provision prohibits a state agency from discarding or destroying records unless it receives consent from the Commissioner of General Services. In addition, it is noted that the Office of General Services works with agencies in developing schedules for the orderly and routine retention and disposal of records. If such schedules do not exist, it is suggested that your staff contact the Bureau of Records Management in Albany at 457-3171.

You raised a series of questions concerning access to a cassette recording of a hearing when no transcript is prepared. In this regard, based upon the definition of "record" quoted earlier, I believe that a cassette recording would constitute a "record" subject to rights of access granted by the Freedom of Information Law. Again, in view of the Court of Appeals decision, unless certain aspects of a hearing are closed, it would appear that the hearing would presumptively be open and, therefore, that a recording or transcript would be available to the public. Further, assuming that the contents of a cassette are available, I believe that a person could listen to it or request a copy for a fee based upon the actual cost of reproduction [see Freedom of Information Law, §87(1)(b)(iii)].

Since I assume that the Board has legal custody of a cassette transcript, I believe that it would be responsible for insuring the integrity of those records.

If a recording has been made, but no transcript exists, the Board would not in my view be required to create a transcript in response to a request by a non-party. In this regard, §89(3) of the Freedom of Information Law states in part that, as a general rule, an agency is not required to create or prepare a record. As such, an applicant might be able to record accessible portions of a cassette; however, I do not believe that the Board would be obliged to create a transcript.

You referred to the purchase of transcripts. Attached for your consideration is a copy of an advisory opinion prepared several years ago that questioned the legality of the practice that permits hearing stenographers to prerare and charge for transcripts independently as private contractors. Aside from those comments, if a transcript is requested, the applicant would in my view be responsible for bearing the cost of its preparation.

Several of your remaining questions are largely procedural. For instance, while the Board has offices in New York City, hearings are conducted in various offices in the state. Having described your current practice, I am unaware of any need to change it. In short, if records are kept in New York City, for example, they may be inspected there. If a person seeks copies, they could be sent anywhere upon payment of the appropriate fees.

You wrote that the Board has permitted a party "to remove a transcript from the office in order to make a photocopy", for the Board maintains a duplicate. You have asked whether the practice may continued under the Freedom of Information Law. In my opinion, the Freedom of Information Law does not deal directly with the situation; therefore, nor would it prohibit continuation of the practice.

In terms of locating records, you asked whether you are "required to use an identification system other than case number" and whether you may "discontinue the cross index of claimant names" You also asked whether the index now used must be expanded. From my perspective, so long as the Board's records access officer assists the applicant in identifying the records sought, your systems likely need not be changed or expanded to comply with the Freedom of Information Law.

It is noted that a new provision of the State Administrative Procedure Act may relate to your questions involving indexing. While I do not believe that the Board is subject to the Act, it might be worthwhile that you review Chapter 504 of the Laws of 1983. The amendment to the Act states in part that:

> "(a) Each agency shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the agency in adjudicatory proceedings. Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying. Each decision, determination and order shall be indexed within sixty days after having been rendered.

> (b) An agency may delete from any such index, decision, determination or order any information that, if disclosed, would constitute an unwarranted invasion of personal privacy...Information which would reveal confidential material protected by federal or state statute, shall be deleted from any such index, decision, determination or order."

While the amendment quoted above might not apply to the Board, perhaps it could serve as a guide. Other agencies' procedures might also be reviewed for the purpose of comparing or gaining their experience.

Lastly, based upon the Court of Appeals decision, if a hearing is presumptively open and may be closed only upon a showing of good cause, it would appear that, at the very least, the names of the parties would have to be disclosed. Similarly, since §537 of the Labor Law does not apparently include determinations, those records would likely be available, unless portions could justifiably be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Although the foregoing does not deal with your questions in the order in which they were raised, I hope that I have touched upon all of them. Further, as indicated at the outset, the decision by the Court of Appeals in my view may have broken new legal ground. As such, it is reemphasized that my comments are solely advisory.

I hope that I have been of some 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3034

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

September 7, 1983

Ms. Lucy Kopp
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kopp:

I have received your letter of August 26 which involves records pertaining to the estate of a deceased uncle.

According to your letter, records relevant to the situation may be in possession of a variety of agencies, including the Little Falls Hospital, the Herkimer County Department of Social Services, and the State Department of Social Services.

Since you are familiar with the situation and the records sought, it is suggested that you submit written requests under the Freedom of Information Law to those agencies.

It is emphasized that the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". Therefore, when submitting a request, it is suggested that you include as much detail as possible including names, dates, identification numbers, descriptions of events and similar information in order that agency officials might be able to locate the records sought.

Requests should be sent to the "records access officer" for each of the agencies that you feel would maintain records in which you are interested. Enclosed is another copy of an explanatory pamphlet, which contains a sample letter of request. It is recommended that you use the form of the sample request letter to the extent appropriate.

While I do not have the addresses of either the Little Falls Hospital or the Herkimer County Department of Social Services, the following address should be used to request records from the State Department of Social Services:

Records Access Officer
Public Information Office
NYS Department of Social Services
40 North Pearl Street
Albany, NY 12243

In addition, since your inquiry involves the practices of an attorney, it is suggested that you contact the grievance committee of the Herkimer County Bar Association and the Appellate Division, Fourth Department, for the purpose of learning of the method of filing a grievance against an attorney. The Appellate Division, Fourth Department is located at:

501 Hall of Justice
Civic Center Plaza
Rochester, NY 14614

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3035

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

September 12, 1983

Mr. Ronald F. Rizzo
20536-053
P.O. Box 1000
Unit 2-A
Otisville, NY 10963

Dear Mr. Rizzo:

I have received your letter of September 7 in which you appealed to this office a denial of a request for records submitted to the Suffolk County Police Department.

Please be advised that the Committee on Open Government does not render determinations on appeal. On the contrary, §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."

With respect to Suffolk County, the designated appeals officer is the County Attorney. As such, it is suggested that you may appeal the denial by writing to:

County Attorney
Dennison Building
Veterans Memorial Highway
Hauppauge, NY 11788

With regard to your request for access to "judicial information" concerning Article 78 of the Civil Practice Law and Rules, enclosed are copies of §§7801 through 7804 of the Civil Practice Law and Rules.

It is noted that the burden of proof in an Article 78 proceeding is generally on the petitioner, the person who challenges a determination made by an agency. However, §89(4)(b) of the Freedom of Information Law specifies that the burden of proof in a proceeding brought under that statute is on the agency that denied access to records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3036

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

September 14, 1983

Mr. Henry H. Bilal
83-A-3596 K-210
354 Hunter Street
Ossining, NY 10562

Dear Mr. Bilal:

I have received your recent letter in which you requested birth and marriage records regarding particular individuals.

Please be advised that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. Consequently, this office does not maintain 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.

In addition, it is noted that rights of access to birth and marriage records are not governed by the Freedom of Information Law. In the case of birth records, §4173 of the Public Health Law is applicable; in the case of marriage records, §20-a of the Domestic Relations Law governs rights of access. Access to marriage and birth records is administered by the Commissioner of Health.

I would also like to point out that the Public Health Law indicates that birth records are available by means of a court order or to the subject of a birth record who is eighteen years of age or older. Consequently, birth records are generally not available to the public.

With respect to marriage records, the cited provision of the Domestic Relations Law states that such records are available upon a showing of judicial or other proper purposes.

If you would like to submit a request for birth or marriage records, it is suggested that you write to:

NYS Department of Health
Office of Biostatistics and Vital Records
Empire State Plaza
Corning Tower
Albany, New York 12237

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3037

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

September 14, 1983

Mr. Harold Brady
75-A-2737
Drawer B
Stormville, NY 12582

Dear Mr. Brady:

I have received your letter of September 9 in which you raised questions regarding the initiation of a lawsuit under Article 78 of the Civil Practice Law and Rules. You also referred to an unanswered request for records sent to the Division of Parole.

With respect to the initiation of a lawsuit, since your questions involve the Civil Practice Law and Rules rather than the Freedom of Information Law, I cannot provide specific direction. It is suggested that you review the provisions found within Article 78.

With regard to your request to the Division of Parole, which apparently reached the Division on August 12, the failure to respond in my view constitutes a constructive denial of access. Consequently, I believe that you may appeal the denial to the head of the agency pursuant to §89(4)(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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3038

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

September 15, 1983

Ms. Doris Louise Fox
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Fox:

I have received your letter of September 11 concerning your capacity to review and correct "computerized information" pertaining to you.

In this regard, I would like to offer the following comments.

First, the statute that generally deals with access to records of government in New York is the Freedom of Information Law. That law includes within its scope records of state agencies, as well as units of local government.

The Freedom of Information Law defines the term "record" broadly to include:

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

As such, computer tapes and discs, for example, constitute "records" subject to rights of access.

It is noted, however, that, as a general rule, the Freedom of Information Law does not require an agency to create a record in response to a request [see Freedom of Information Law, §89(3)]. Therefore, in the case of information stored in a computer, if reprogramming would be necessary to gain access to a particular item of information, such a step would in my view represent the equivalent of creating a record. On the other hand, if information can be obtained under existing programs, it would be subject to existing rights of access.

With respect to those rights, 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.

To seek records under the Freedom of Information Law, a request should be made in writing and directed to the "records access officer" of the agency that maintains the records sought. The Law requires that a request "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you provide as much detail as possible, such as names, dates, identification numbers, descriptions of events and similar information that would enable agency officials to locate the records sought.

I would like to point out that there is no central computer bank that stores all government information pertaining to you. Consequently, as indicated earlier, requests should be directed to the agencies that you believe would maintain records pertaining to you.

Second, neither the Freedom of Information Law nor any other provision of law generally enables you to seek to correct or amend records. However, a new law, the Personal Privacy Protection Law will enhance individuals' rights of access to records pertaining to them and permit a person to attempt to correct information about him or her. The Personal Privacy Protection Law, which becomes effective on September 1, 1984, will apply only to state agencies; it would not apply to records of units of local government, such as New York City.

Third, if you are interested in information pertaining to you in possession of federal agencies, the federal Privacy Act would likely be applicable. In brief, the Privacy Act grants access to records to the subjects of the records and permits individuals to seek to amend records pertaining to them.

To provide you with additional information, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects of the Law, an explanatory pamphlet that contains a sample letter of request, the Personal Privacy Protection Law, and a publication of the U.S. Justice Department entitled "Your Right to Federal Records", which contains the text of the federal Privacy Act.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3039

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

September 22, 1983

Mr. Larry Barnes
82-C-854
Box 149
Attica, NY 14011

The staff of the Committee on Open Government 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 recent letter in which you referred to a portion of your record indicating an escape charge. Since no such charge has been made, you have requested assistance in "straightening out" the matter.

It is noted at the outset that the Freedom of Information Law grants broad rights of access to records, but that it does not deal with the capacity of a person to attempt to correct a record that may be inaccurate.

Nevertheless, the regulations of the Department of Correctional Services concerning Department records contain provisions that permit an inmate to challenge the accuracy of information found within his personal history or correctional supervision history records.

Section 5.50 of the regulations states that an inmate may dispute the accuracy of the record by conveying "such dispute to the custodian of the record or the designee of the custodian reviewing the record with him". In this instance, it appears that the dispute would be brought to the attention of Mr. Swan. Section 5.52 indicates that, if the information is not corrected and you continue to dispute the accuracy of the information following an investigation and determination, you may appeal to the Inspector General at the Department's main office in Albany.

Enclosed is a copy of the regulations cited earlier. It is suggested that you carefully review §§5.50 to 5.54.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Mr. Swan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3040

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

September 22, 1983

Mr. Marvin Datz
[redacted]

The staff of the Committee on Open Government 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 letter of September 3 in which you described problems encountered in relation to requests for records sent to the Department of Labor.

According to your letter, the Department "has used as a pretext for the denial of access to information, files, records...Section 537 of the Labor Law". You have requested an advisory opinion regarding the impact of §537 of the Labor Law "on the orderly processing of informational requests for access to records by the Labor Department".

In this regard, I would like to offer the following comments.

First, §537 of the Labor Law, entitled "Disclosures prohibited", states in subdivision (1) that:

> "[I]nformation 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 provisions 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."

The extent to which the records sought may have been "acquired from employers or employees" pursuant to Article 18 of the Labor Law cannot be determined on the basis of a review of the requests attached to your letter. However, information that falls within the scope of §537, as indicated above, cannot be disclosed. Further, the Freedom of Information Law would not alter rights of access to records considered confidential under the Labor Law, for §87(2) of the Freedom of Information Law permits an agency to withhold records that "are specifically exempted from disclosure by state or federal statute".

If the records sought were not "acquired from employers or employees" pursuant to Article 18 of the Labor Law, I believe that those records would be subject to the Freedom of Information Law. This is not to suggest that all such records would be available, but rather that they would be available except to the extent that one or more of the grounds for denial appearing in §87(2) would apply.

Second, since you have been denied access on appeal, your remaining remedy would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. In the alternative, you might want to resubmit your requests, for a decision rendered recently by the Court of Appeals appears to have clarified the scope of §537 (see attached, Herald Co. v. Weisenberg, ___ NY 2d ___, July 7, 1983).

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3041

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

September 22, 1983

Mr. James Switzer
Records Access Officer
Wayne Central School District
Ontario Center, NY 14520

Dear Mr. Switzer:

Thank you for sending your updated "subject matter listing" prepared pursuant to §87(3)(c) of the Freedom of Information Law. Your continuned interest in complying with the Law is much appreciated.

As you are aware, the cited provision 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 this regard, you have asked that I review your subject matter list for the purpose of providing suggestions for its improvement.

Having studied the list, in all honesty, I do not believe that I can offer any criticism or recommendation concerning its current status. While I am not completely familiar with the types of records maintained by school districts, it appears that your list is complete and prepared in compliance with the Freedom of Information Law, for it describes in reasonable detail the types of records maintained by the District. I would conjecture, too, that the list serves as a useful tool not only for members of the public who might seek records, but also for District officials seeking records in the performance of their duties.

Once again, I appreciate your efforts in complying with the Freedom of Information Law. If I can be of assistance, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3042

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

September 22, 1983

Mr. Norman Gilbert, Jr.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gilbert:

I have received your letter of August 31 in which you raised questions in relation to an advisory opinion rendered on your behalf on August 23.

Specifically, you wrote that you are "confused by an apparent contradiction in the wording" of my earlier opinion. While alluding to the "subject matter list", which refers in part to "all records in the possession of an agency", I wrote that a village might have a list "in which some records are not included".

Once again, the Freedom of Information Law as it pertains to the subject matter list states that each agency shall maintain:

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

In my view, the language quoted above requires that a subject matter list refer to the types of records maintained by an agency, "by subject matter", rather than each and every record maintained by the agency.

By means of example, perhaps a reference in a subject matter list involves "personnel records". That reference would indicate a category of records maintained by an agency, but it would not allude to every record contained in personnel files, such as W-2 forms, health insurance claims, performance evaluations, payroll information and the like.

It is noted that the Committee's regualtions require that the "subject matter list shall be sufficiently detailed to permit identification of the category of the record sought" [see attached regulations, §1401.6(b)]. The inclusion of "personnel records" within a subject matter list would likely enable an applicant to identify records within that category, such as those cited in the preceding paragraph as examples of personnel records.

To provide further clarification, another reference in a subject matter list might pertain to "contract information", for instance. Under that heading, there might be a variety of records, such as bid specifications, bids, letters to and from prospective bidders, contracts, evaluations of performance by a contractor, and similar related information. The category of "contract information" would represent the "subject matter" of a group of records maintained by an agency. Nevertheless, I do not believe that the requirements concerning a subject matter list would compel an agency to include reference in that list to every record relating to contracts.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3043

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

September 22, 1983

Eduardo Nieves
Police Captain
Town of Coeymans Police Department
Russell Avenue
Ravena, New York 12143

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Captain Nieves:

I have received your letter of August 30 as well as the materials attached to it. Your qinuriy concerns requests made under the Freedom of Information Law and directed to the Town of Coeymans Police Department.

In an application made on August 19, the applicant requested:

> "Copy of all training certificates held by Mr. Nieves & Mr. Van Kampen. Copy of DWI rights warning. Procedure: For transport, initial test with portable breathalyzer".

For the reasons expressed in an advisory opinion on July 6, a copy of which was sent to you, I believe that the "DWI rights warning" and procedures regarding the use of a breathalyzer are available, to the extent that such records exist.

With respect to the training certificates, as you indicated in your letter, it is possible that §50-a of the Civil Rights Law might be applicable. 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."

Further, the Freedom of Information Law would not alter rights of access to records considered confidential under §50-a of the Civil Rights Law, for §87(2)(a) of the Freedom of Information Law enables an agency to deny access to records that "are specifically exempted from disclosure by state or federal statute".

Therefore, if the training certificates are considered to be "personnel records", and if they are "used to evaluate performance toward continued employment or promotion", they would in my view be confidential. If, however, the persons to whom the records relate, yourself and Officer Van Kampen, "consent to disclosure in writing", the records could be made available.

It is also noted that, in some instances, the receipt of a training certificate might appear in a news article. If any such public notices have appeared with respect to those certificates, the officers in my view likely waived confidentiality with respect to those certificates. Under such circumstances, copies of the certificates would in my view be available to the applicant. Since you referred to the possible alteration or amendment of a certificate by a recipient of a photocopy, it is suggested that if you maintain custody of an original document and if your office makes a photocopy of that document, it is difficult to envision the means by which a certificate might be altered.

In an earlier application, the same individual requested a "listing of all DWI arrests from 1 Apr. 82 - 1 Apr. 83 made by Mr. Nieves by: age - time & place - cause for stop - type veh. - residence - bac (name not required)". In response, you wrote that there is "no existing listing".

From my perspective, if no list containing the information sought exists, your response was appropriate. Section 89(3) of the Freedom of Information 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 the list requested does not exist, you would not in my opinion be obligated to create such a list on behalf of the applicant.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel Pickens

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3044

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

September 22, 1983

Charles E. Doyle, P.C.
Doyle Building
1010 Park Street
P.O. Box 150
Peekskill, NY 10566

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Doyle:

I have received your letter of September 2 and appreciate your interest in complying with the Freedom of Information Law.

In your capacity as Town Attorney for the Town of Philipstown, you have raised a series of questions regarding fees that may be assessed for searching for records and making them available.

As you indicated in your letter, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge up to twenty-five cents per photocopy. Further, the regulations promulgated by the Committee indicate that no fee may be assessed for the inspection of records or searching for records.

In this regard, you asked whether the Town may "establish a scheduled of fees, other than .25 per copy or per page" for items, such as certifications by a building inspector, which must be prepared. Section 89(3) of the Freedom of Information Law states in part that, as a general rule, an agency is not required to create or prepare a

new record in response to a request. If I understand the situation, records that do not exist at the time of a request might be prepared on behalf of an individual. If that is so, I do not believe that the provisions in the Freedom of Information Law regarding fees for copying would be applicable. As such, it appears that the Town could establish fees for the services involved in preparing a new record separate from the fees that may be assessed under the Freedom of Information Law.

The second question is whether the Town may "charge a fee (for example $3.00) to make copies of Certificates of Occupancy or other items to persons requesting same by mail". In my view, the Town may charge in accordance with the Freedom of Information Law for photocopies, as well as the cost of postage. If, for example, mailing a copy of a record costs the Town twenty-cents, the Town could in my opinion charge for the photocopies plus twenty cents.

Your third and fourth questions involve situations in which a Town employee or employees engage in a significant amount of time investigating or researching an issue in order to provide an accurate response, and whether a fee might be charged for the time spent in investigation or research. In my view, the only fee that may be charged under the Freedom of Information Law and the regulations is a fee for photocopying. As such, I do not believe that any additional fee may be charged for time spent in investigating or researching records.

Lastly, with respect to the Committee's index to written advisory opinions, the Committee does not have the resources to publish the opinions in bound volumes. As such, if after reviewing the index, there are opinions of particular interest, please identify them by number and I will be pleased to forward them to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3045

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

September 22, 1983

Mr. William Hibsher
Teitelbaum & Hiller, P.C.
Twenty-First Floor
1140 Avenue of the Americas
New York, NY 10036

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hibsher:

I have received your letter of August 31, which reached this office on September 8.

According to your letter and the correspondence attached to it, you represent an individual who served as a consultant physician for the Bureau of Disability Determinations at the Department of Social Services. You wrote that you have, over the course of nearly a year, sought to obtain the personnel record of your client. However, to date, no response to your requests has been provided.

In this regard, I would like to offer the following comments and suggestions.

First, I have contacted the Department of Social Services on your behalf. Apparently, the staff of the Bureau of Disability Determinations does not generally respond to requests made under the Freedom of Information Law. I believe that the Bureau and its staff should in any case have forwarded your request to the Department's designated records access officer. However, I was informed that your request can be answered by Ms. Elizabeth Lyon. Ms. Lyon's address is Department of Social Services, 16th Floor, 40 North Pearl Street, Albany, NY 12243.

Second, since your request involves personnel records, it is likely that some of the records or certain aspects of them might generally 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), 89(2)(b)]. However, §89(2)(c) states that, unless a different basis for withholding may be cited, "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when the person to whom a record pertains consents in writing to disclosure". Therefore, when making a request, it is suggested that you include a written statement signed by your client authorizing you to obtain records that would otherwise be accessible only to him.

Third, having read your earlier requests, they are somewhat open-ended. It is noted in this regard that §89(3) of the Freedom of Information Law states in part that an applicant must request records "reasonably described". While your request might have reasonably described the records sought, it is suggested that you provide additional detail, such as dates or location of employment, titles held and similar information that would enable Department 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3046

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

September 22, 1983

Ms. Christine M. Menge
Montgomery County Clerk
Fonda, NY 12068

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Menge:

I have received your letter of September 15 in which you requested an advisory opinion.

Specifically, you have asked whether "approved Pistol Permits" must be made available "to anyone who requests copies of them".

In this regard, I direct your attention to §400.00 of the Penal Law, which is entitled "[L]icenses to carry, possess, repair and dispose of firearms". Subdivision (5) of the cited provision states in relevant part that:

> "[T]he application for any license, if granted, shall be a public record."

Based upon the language quoted above, I believe that an approved pistol license application is a "public record" accessible to any person.

It is noted, too, that the Court of Appeals, the state's highest court, has held that §400.00(5) of the Penal Law grants access to approved applications, notwithstanding any of the grounds for denial of access appearing in the Freedom of Information Law [see Kwitny v. McGuire, 443 NYS 2d 867, aff'd 77 AD 2d 839, aff'd 53 NY 2d 968 (1981)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3047

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

September 22, 1983

Mr. Calvin Wilson
82-A-4204
Box 307
Beacon, NY 12508

The staff of the Committee on Open Government 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 August 31. Please accept my apologies for the delay in response.

According to your letter, having received a copy of your rap sheet, you believe that it contains erroneous information. In this regard, I would like to offer the following comments.

First, the Freedom of Information Law pertains to rights of access to records. Nothing in that statute provides a right on the part of an individual to seek to amend or correct a record that may be inaccurate.

Second, assuming that you obtained the rap sheet from the New York State Division of Criminal Justice Services, you have the right to challenge the accuracy of the records pursuant to regulations adopted by the Division. Enclosed is a copy of the relevant regulations, 9 NYCRR §6050.1.

If the rap sheet was furnished to you by a federal agency, it is suggested that you write to the agency to request the procedures under which the accuracy of the rap sheet may be challenged.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3048

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

September 23, 1983

Mr. Harvey M. Elentuck
[redacted]

The staff of the Committee on Open Government 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 9 concerning your requests made under the Freedom of Information Law to various offices.

In this regard, I would like to offer the following remarks.

First, apparently a request is pending with respect to teacher evaluation reports, letters of reprimand, letters of complaint and similar records found within personnel files. You cited the case of Blecher v. Board of Education, City of New York [Sup. Ct., Kings Cty., NYLJ, Oct. 25, 1979], which granted access to a variety of records analogous to those that you are seeking. Without specific knowledge of the records considered in Blecher, supra, it is difficult to provide advice based upon or in conjunction with that decision.

From my perspective, rights of access can in many instance be determined only on the basis of the contents of the records sought. I believe that a letter of reprimand regarding a public employee is generally accessible, for it constitutes a final agency determination available under §87(2)(g)(iii) of the Freedom of Information Law. Further, based upon judicial interpretations of the Freedom

of Information Law, disclosure would likely result in a permissible, rather than an unwarranted invasion of personal privacy, for such a determination is relevant to the performance of the official duties of the employee [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Ct., March 25, 1981].

An evaluation may in my view be accessible or deniable, perhaps in part, depending upon the stage of an evaluation process and the nature of the evaluation itself. If an evaluation is reflective of a final rating, it might be viewed as a final determination in much the same manner as a letter of reprimand. However, if comments within an evaluation are reflective of opinion, suggestion or recommendation, for example, and those comments are not final, but rather are used to assist a final decision maker, it is possible that an evaluation or portions thereof might be deniable [see e.g., McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion)].

With regard to letters of complaint, it has been advised that the substance of a complaint is available, but that identifying details pertaining to the complainant might be withheld or deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Moreover, in the context of complaints against teachers, there may be instances in which students could be identified. In such cases, the provisions of the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) would in my view likely prohibit disclosure in part or perhaps in toto.

As such, it is reiterated that rights of access to records found within personal files may in many situations be dependent upon the specific contents of the records.

Second, with regard to your requests sent to the Middle Island School District, I recall receiving some correspondence from the District. However, to ascertain whether District officials have forwarded copies of appeals to this office, the approximate dates of your appeals would be needed. Hundreds of appeals are received and filed chronologically. Consequently, an approximate date of an appeal would be helpful in terms of an attempt to locate them.

If an agency fails to comply with the Law, short of the initiation of a lawsuit, you may seek the assistance of this office. It is noted that many items of your previous correspondence have been rather lengthy. In the future, when submitting a request to an agency or seeking assistance from an agency, it is suggested that your communications be short and to the point.

Third, while written opinions prepared by this office are indexed, there are no synopses of advice rendered by telephone. Further, with regard to the Board of Education, I have had numerous conversations over a period of years with many officials. In my view, those individuals attempt to respond in good faith to requests made under the Freedom of Information Law.

Lastly, enclosed are several of the pamphlets that you requested, as well as the latest indices to advisory opinions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3049

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

September 26, 1983

Ralph A. Nappi
Counsel
Port Washington Police District
Port Washington, NY 11050

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nappi:

I have received your letter of September 13 in which you raised questions under the Freedom of Information Law.

Specifically, in conjunction with requests for copies of complaints made to the Port Washington Police Department, which provide the name of the complainant, you asked for interpretations of the Freedom of Information Law regarding:

> "(a) Matters which will imperil the public safety if disclosed;
>
> (b) Any matter which may disclosue the identity of a law enforcement agency or informer."

It is noted at the outset that there appears to be a degree of confusion, for the language cited in (a) and (b) in your letter involve two of the grounds for entry into executive session that appear in §100(1) of the Open Meetings Law. That statute pertains to the conduct of public business at a meeting of a public body. Further, those standards are somewhat different from the grounds for denial of access to records that appear in the Freedom of Information Law.

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 of more of the grounds for denial appearing in paragraphs (a) through (h) of the Law.

Under the circumstances, it is possible that three of the grounds for denial may be relevant with respect to the records in question.

The first ground for denial of possible significance is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Depending upon the circumstances, it is in my view conceivable that the identity of a complainant might be deleted from a record on the basis of §87(2)(b).

A second 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."

In conjunction with the language quoted above, if, for example, the Police Department prepares a record in response to a complaint, that record might be compiled for law enforcement purposes. Further, depending upon the nature of the event to which the complaint relates, it is possible that such a record might if disclosed interfere with an investigation or identify a confidential source. In either of those situations, the identity of the complainant and perhaps the complaint itself might justifiably be withheld.

The third ground for denial that may be relevant is §87(2)(f), which enables an agency to withhold records or portions thereof that:

> "if disclosed would endanger the life or safety of any person..."

Again, depending upon the nature of the event that precipitated a complaint, it is in my view possible that disclosure of a complainant's identity might endanger that person's life or safety.

In sum, there is no specific rule or provision of law of which I am aware that could be cited in every instance to compel or prohibit disclosure of a record indicating the identity of a complainant. However, perhaps the grounds for denial of access described in the preceding paragraphs can be reviewed to provide guidance.

Enclosed for your consideration is a copy of a summary of judicial decisions rendered under the Freedom of Information Law, several of which may be relevant to your inquiry. In addition, enclosed is an index to advisory opinions rendered under the Freedom of Information Law. If after reviewing the index you find that there are opinions of particular interest, please identify them by number or key phrase and I will be happy to send them to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 932
FOIL-AO- 3050

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

September 27, 1983

Mr. Leonard J. Hansel
Ms. Charlotte Hansel
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. and Ms. Hansel:

I have received your letter of September 12 in which you raised a series of questions under the Freedom of Information and Open Meetings Laws.

The first series of questions concerns meetings of town boards and their committees in conjunction with posting requirements. In this regard, I direct your attention to §99 of the Open Meetings Law. Subdivision (1) of §99 pertains to meetings scheduled at least a week in advance and requires that notice of the time and place of such meetings be given to the news media (at least two) and posted for the public in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision (2) of §99 pertains to 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. As such, notice must be given to the news media and to the public by means of posting prior to all meetings.

It is noted, too, that §97(2) of the Open Meetings Law includes committees, subcommittees and similar bodies within the definition of "public body". Therefore, the notice requirements described in the preceding paragraph are applicable to governing bodies, such as town boards, as well as committees and similar bodies.

In a related area, you asked whether notice should be posted with respect to meetings that represent a continuation of subject matter previously discussed. From my perspective, as a general matter, if a meeting is adjourned on one date and other meetings are scheduled to continue discussions of issues considered at an earlier meeting, each successive meeting should be preceded by notice given in accordance with §99.

The next question is whether meetings may be held during which the public is not permitted to speak, "even though the subject matter involves the person and/or his property." I would like to point out that the Open Meetings Law is silent with respect to public participation. Although the Law permits members of the public to attend and listen to the deliberations of public bodies, there is nothing in the Law that confers a right on the public to speak or otherwise participate at a meeting. Consequently, a public body need not permit members of the public to speak at meetings. However, if a public body chooses to do so, all members of the public should in my view have an equal opportunity to speak or otherwise participate.

You have asked whether minutes should be taken with respect to all meetings. Here I direct your attention to §101 of the Open Meetings Law. Subdivision (1) of the cited provision concerns minutes of open meetings and states that:

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

Therefore, in any meeting during which motions, proposals, resolutions are offered or during which votes are taken, I believe that minutes must be prepared.

The next question is whether a town clerk may:

> "...during normal working hours, for any reason refuse information about meetings, studies, surveys and etc., pertaining to a person's property owned in said township, or the adjoining property?"

Your question arises in this instance under the Freedom of Information Law. Here I would like to point out that the Freedom of Information Law, §89(1)(b)(iii), requires the Committee to adopt general regulations concerning the procedural aspects of the Law. In turn, §87(1) requires the governing body of a town to adopt regulations consistent with those of the Committee and the Freedom of Information Law. Enclosed for your consideration is a copy of the Committee's regulations, which in §1401.4(a) state that:

> "[E]ach agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

It is noted, however, that agency officials are not required to respond immediately to requests. Section 89(3) of the Freedom of Information Law states that an agency must respond to a request within five business days of its receipt. Therefore, while requests may be made during regular business hours, an agency need not in my opinion respond to or fulfill a request at the time when the request is made.

Lastly, you have asked whether most towns "have local representatives for 'open meetings Laws and Freedom of Information Act'". The Committee is the only agency involved in an advisory role under the two laws. However, in conjunction with the enclosed regulations, each agency, including a town, is required to designate one or more "records access officers" for the purpose of coordinating the agency's response to requests for records.

As requested, enclosed are five copies of the pamphlet entitled "The Freedom of Information and Open Meetings Laws...Opening the Door".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3051

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

September 29, 1983

Mr. Howard Grund
Daily Freeman
79 Hurley Avenue
Kingston, NY 12401

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grund:

I have received your letter of August 22 and appreciate your kind words. Please note that the letter reached this office on September 16. As such, I hope that you will accept my apologies and understand the delay in response.

According to your letter, you have attempted to gain access to records regarding lawsuits filed against the Village of Rhinebeck. After conferring with various Village officials, you wrote that you were "turned down by the village's special attorney regarding the suits". Although you were able to obtain copies of records from other sources, you have asked whether records regarding the suits should be made available. In this regard, I would like to offer the following comments.

First, it is emphasized 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."

Consequently, any document in possession of a municipality regarding lawsuits in my opinion 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Third, from my perspective, although some records pertaining to lawsuits initiated against a municipality might be denied with justification, others in my view should be made available, for no ground for denial would apply.

For instance, if an attorney for a village prepares a legal memorandum or other legal papers that have been disclosed to nobody other than the client, i.e., the village board of trustees, such records would in my view be confidential, for they would fall within the scope of the attorney-client privilege under §4503 of the Civil Practice Law and Rules, or they might be considered material prepared for litigation exempt from disclosure under §3101(d) of the Civil Practice Law and Rules. However, when such papers are filed with a court or served upon an adversary, the confidentiality that might have existed in my view would be removed. At that point, I believe that motion papers, answers and the like would become available, for disclosures would have been made to persons other than the client.

In the case of materials sent to or served upon a municipality by a legal adversary, in short, I cannot envision any ground for denial that could justifiably be asserted. While such materials might be prepared for litigation, since they are transmitted to a village by a party that is not a client, but rather an adversary, once again, I do not believe that any ground for denial would apply. Therefore, a summons and complaint served against a village, a notice of claim, an order to show cause or similar documentation served upon a municipality by a legal adversary would in my opinion be available from the municipality.

It is noted, too, that although the courts and court records are not subject to the Freedom of Information Law [see definitionsof "agency", §86(3), and "judiciary", §86(1)], many court records are nonetheless accessible to the public under various statutes. For example, §255 of the Judiciary Law states that:

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

From my perspective, if records pertaining to a lawsuit must be made available by a court clerk, the same records in possession of a municipality would be accessible from that municipality.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Rhinebeck

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3052

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

October 3, 1983

Mr. R. Becker
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Becker:

I have received your letter of September 8, which reached this office on September 16.

According to your letter, various requests for records pertaining to you and your eligibility for job placement have been "ignored" by three state agencies. In this regard, I would like to offer the following comments.

First, I have reviewed my earlier letter addressed to you on September 1, which discusses rights of access granted by the Freedom of Information Law and several of the procedural steps that may be used under the Law. It is suggested that you reconsider that earlier opinion as a basis for taking additional steps.

Second, with my earlier letter, a copy of an explanatory brochure was sent to you. That brochure contains sample letters of request and appeal. It is recommended that you review those samples for the purpose of submitting new requests and/or appeals.

Third, under 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". When submitting a request, as indicated in the sample letter, it should be directed to the "records access officer".

Fourth, 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 if 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 of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" decnied [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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3053

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

October 3, 1983

Mary Burns Verlaque, Director
St. Lawrence County Planning Board
Courthouse
Canton, New York 13617

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Verlaque:

I have received your letter of September 19 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, the St. Lawrence County Planning Board receives various materials from staff prior to its monthly meetings. Among the materials are staff recommendations "regarding the Board's position". You indicated that the Planning Board is "able to accept or reject the staff's recommendation and final action must be taken by the full Board". It is your contention that the recommendations constitute "intra-agency materials" that need not be made available.

I agree with your contention. In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, as you indicated, the ground for denial of particular relevance under the circumstances 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..."

Although certain aspects of inter-agency or intra-agency materials must be made available, I believe that those portions of the materials consisting of advice, recommendation, suggestion, opinion and the like may justifiably be withheld under §87(2)(g).

Further, in a situation somewhat similar to that described in your letter, recommendations made by an advisory hearing panel and directed to the Chancellor of the New York City Board of Education were found to be deniable. In the decision it was held that:

> "The hearing panel documents or report sought are not final agency determinations or policy. Rather, they are predecisional materials, prepared to assist an agency decision maker (here, the Chancellor) in arriving at his decision. Only the latter has the legal authority to decide whether the rating should stand. The panel's recommendations and reasoning are not binding upon him and there is no evidence that he adopts its reasoning as his own when he adopts its conclusion" [McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd with no opinion)].

Based upon the language quoted above as well as §87(2)(g) of the Freedom of Information Law, once again, I believe that staff recommendations may be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3054

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

October 4, 1983

Mr. Sidney Meilman
[redacted]

Dear Mr. Meilman:

Since sending a response to you on September 14 regarding requests made under the Freedom of Information Law for records of the Town of Eastchester, I have received copies of a letter and a certification sent to you by the Town Clerk.

In brief, Mr. Eaton, Town Clerk, indicated that the records previously made available to you represented the only documentation in possession of the Town that fell within the scope of your request.

It is noted in this regard that the Freedom of Information Law applies to "agency" records. As such, if the information sought is not maintained by the Town, the Freedom of Information Law would not in my opinion be applicable.

I would also like to point out that §89(3) of the Freedom of Information Law states that, as a general rule, an agency is not required to create or prepare a record in response to a request.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: John Waters Eaton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3055

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

October 4, 1983

Mr. Peter Shipley
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Shipley:

I have received your recent letter and the materials attached to it.

Your inquiry has apparently been precipitated by a request for a "subject matter list" from the State University College at New Paltz. In this regard, in a letter addressed to you on September 7 by Harry R. Gianneschi, Vice President for Development and Public Affairs and the designated records access officer, "The College has never had the personnel and financial resources needed to develop and maintain..." a subject matter list. As such, Mr. Gianneschi wrote that he "must therefore deny your request for this information".

In my opinion, the Freedom of Information Law requires that such a list be maintained and made available for the following reasons, notwithstanding the considerations described by Mr. Gianneschi.

First, as a general rule, the Freedom of Information Law pertains to existing records and does not oblige an agency to create a record in response to a request. Nevertheless, §89(3) of the Freedom of Information Law states in part that:

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

Subdivision (3) of §87 states that:

> "[E]ach agency shall maintain:
>
> (c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article" (emphasis added).

Based upon the language quoted above, an agency in my opinion does not have discretion to determine whether or not it should prepare a subject matter list, for the statute requires that such a list must be maintained.

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to "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". In turn, §87(1) of the Freedom of Information Law requires each agency to adopt regulations consistent with the Law and the Committee's regulations.

One aspect of the regulations of the Committee describes the duties of a records access officer. In conjunction with your inquiry, §1401.2(b)(1) of the regulations provides that "The records access officer is responsible for assuring the agency personnel...maintain an up-to-date subject matter list." Further, §1401.6 states 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."

Lastly, with respect to Mr. Gianneschi's contentions regarding a lack of resources, the courts have dealt with similar situations and arguments. In one instance, it was found that a shortage of manpower would not constitute a valid ground for failing to comply with a request, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law" [United Federation of Teachers v. New York City Heath and Hospitals Corporation, 428 NYS 2d 823 (1980)]. Moreover, as stated by the Court of Appeals, "[M]eeting the public's legitimate right of access to information is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Harry R. Gianneschi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3056

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

October 5, 1983

Mrs. Mary Ives
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Ives:

I have received your letter of September 14 and the materials attached to it, which reached this office on September 28.

According to the attachments, you indicated by means of a letter to the Town Clerk of the Town of Worcester on August 30 that you would seek to inspect various records of the Town on September 12. In response to those letters, the Town Clerk wrote that, under the rules and regulations established by the Town of Worcester, "you will need to make application on the appropriate form". It is apparently your view that the response represents a "delaying tactic" that is inconsistent with the intent of the Freedom of Information Law.

I agree with your contention for the following reasons.

First, there is nothing in the Freedom of Information Law that indicates that an applicant for records must complete a form prescribed by an agency. Section 89(3) of the Freedom of Information Law merely states that a request be made in writing for records "reasonably described". Based upon the cited provision of the Freedom of Information Law, it has consistently been advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for either delaying or denying access to records. On the contrary, it has been suggested that any request made in writing that reasonably describes the records should be sufficient.

Second, it is noted that the Freedom of Information Law is applicable to records of all agencies of New York. As a consequence, any requirement that a specific form be completed would, as you indicated, result in unnecessary delays. For instance, if you were to request records from a state agency in Albany, I can envision no good reason for writing to the agency in Albany, requesting the form, having the form sent to you in Worcester, and finally, completing the form and returning it to Albany. In short, such a procedure would simply involve an inordinate amount of time.

Lastly, since you enclosed a copy of the application used by the Town of Worcester, I would like to point out that the form was likely prepared when the Freedom of Information Law was originally enacted in 1974. Due to changes in the Law, effective January 1, 1978, various aspects of the form in my opinion are no longer appropriate.

Enclosed 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. In addition, copies of this opinion and the same materials will be sent to the Town Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3057

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

October 5, 1983

Mr. Marvin Datz
[redacted]

Dear Mr. Datz:

I have received your letter of September 19 in which you complained with respect to the implementation of the Freedom of Information Law by the New York City Department of Employment.

As you suggested, I have contacted Ms. Ann McNamara on your behalf in order to become more familiar with the facts surrounding your complaint and the nature of the information sought.

In this regard, Ms. McNamara informed me that you have made a series of requests over a lengthy period and that the Department has provided to you virtually all records in its possession relative to your complaint. She informed me further that the information most recently sought does not exist in the form of a record or records.

As you may be aware, §89(3) of the Freedom of Information Law states that, as a general rule, an agency is not required to create or prepare a record in response to a request. Consequently, if the information sought from the Department of Employment does not exist, Department officials do not in my view have any obligation to prepare new records on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3958

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

October 5, 1983

Ms. Mary McMickle
Stop DWI Coordinator
County of Ulster
244 Fair Street
Box 1800
Kingston, NY 12401

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. McMickle:

I have received your letter of September 21. Your question is whether a judge or a court clerk may "refuse to allow a reasonable request to go through the court records/files to obtain the attached information for data collection".

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

First, it is noted that the Freedom of Information Law does not apply to the courts or court records. That statute includes within its scope records of an "agency", which is defined in §86(3) of the Freedom of Information Law, and which specifically excludes the "judiciary". In turn, §86(1) defines "judiciary" to mean the courts of the state.

Second, although the Freedom of Information Law does not include court records, there are various provisions of law that grant broad rights of access to such records. For instance, §255 of the Judiciary Law (see attached) provides, in brief, that a court clerk is required to grant access to records in his possession. Perhaps of greater relevance in the context of your request is §2019-a of the Uniform Justice Court Act. That statute (see attached) states in part that:

> "[T]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public and shall be and remain the property of the village or town of the residence of such justice..."

Therefore, it would appear that much if not all of the information that you seek would likely be available from a court under one of the provisions cited earlier.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-932
FOIL-AO-3059

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

October 6, 1983

Ms. Judy Patrick
Schenectady Gazette
332-334 State Street
Schenectady, NY 12301

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Patrick:

I have received your letter of September 26, which reached this office on October 5, and the materials attached to it.

You have requested an advisory opinion under the Freedom of Information Law concerning a denial of a request by the Amsterdam Industrial Development Agency for "records regarding the expenditure of §238,303 for 'economic development' in 1982". Specifically, in connection with the expenditures, your letter to the Amsterdam Industrial Development Agency (hereafter "AIDA") involved a request for vouchers and checks and minutes of meetings at which the expenditures were discussed. Following your appeal, AIDA determined that "such denial is in accordance with Public Officer's Law, Article 6, Section 87, Subsection 2, Paragraphs b & d."

In this regard, I would like to offer the following comments.

First, §856(2) of the General Municipal Law states that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation." Therefore, it is clear in my view that an industrial development agency is an "agency" subject to the Freedom of Information Law [see Freedom of Information Law, §86(3)], as well as a "public body" subject to the Open Meetings Law [see Open Meetings Law, §97(2); also subdivision (3) of Gneral Municipal Law, §856].

Second, the Freedom of Information Law applies to all records of an agency. Further, §86(4) of that statute 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."

Therefore, to the extent that the information sought exists in the form of a record or records, the Freedom of Information Law would govern rights of access.

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) though (h) of the Law.

Fourth, neither of the two grounds for denial cited by AIDA could in my view justify a denial of access to the records sought.

Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Mr. Bray alluded to §87(2)(b) based on the contention that "disclosure of information regarding particular private companies would result in an unwarranted invasion of their privacy".

I believe that reliance upon the privacy provisions of the Freedom of Information Law by AIDA is misplaced and improper, for those provisions in my view are intended to be applicable to records that identify people, rather than corporate entities.

Section 87(2)(d) of the Freedom of Information Law 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, neither records prepared by AIDA regarding the expenditures in question, nor vouchers, checks contracts or similar records could be characterized as "trade secrets". Similarly, I do not believe that AIDA regulates commercial enterprise. As such, §87(2)(d) could not in my view justifiably be asserted to withhold the records sought.

Fifth, §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 the records sought, nothing in the Freedom of Information Law could be cited to deny access to those records.

Under the circumstances, of potential significance is §51 of the General Municipal Law. That 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 any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state or any body corporate or other unit of local government in this state which possesses the power to levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments or for which taxes or benefit assessments upon real estate may be required pursuant to law to be levied, including the Albany port district commission, are hereby declared to be public records, and shall be open during all regular business hours."

Assuming that §51 of the General Municipal Law applies to the records sought, I believe that virtually all of them would be accessible.

Lastly, since the denial included minutes of meetings, I direct your attention to the Open Meetings Law. As indicated earlier, an industrial development agency is in my view a public body required to comply with that statute.

Section 101 of the Open Meetings Law requires that minutes must be prepared and made available within specified time periods.

I hope that I 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: Henry Bray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3060

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

October 6, 1983

Mr. Carl Tronolone
Assistant Corporation Counsel
City of Buffalo
Department of Law
City Hall
Buffalo, NY 14202

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tronolone:

I have received your letter of September 22 and the materials attached to it.

According to your letter, the International Union of Operating Engineers requested the "names and addresses of individual employees listed on the payroll records of two companies that had performed a contract for the City of Buffalo". You referred to a determination rendered pursuant to an appeal made under the Freedom of Information Law on August 24, which upheld an initial denial. In that determination, it was specified that the City provided to the Union the payroll records of two companies, which indicate the trade of employees, and the amounts paid. The only item apparently withheld was a list of names and addresses of the employees.

The applicant for the records in question included a copy of judicial decision rendered in 1980 that dealt with similar subject matter (Hopkins v. Hennessey, Sup. Ct., Erie Cty., Dec. 23, 1980), in which it was found that the names and addresses of the employees of government contractors were accessible under the Freedom of Information Law.

Your question is whether in my view the denial was appropriate.

Due to distinctions between the instant situation and the facts described in Hopkins, supra, as well as changes in the Law, it appears that a denial of the names and addresses of employees of contractors could properly have been asserted.

In this regard, I would like to offer the following comments.

First, as you are 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.

The only ground for denial under the circumstances 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". The cited provision refers to §89(2), which provides additional guidance regarding the nature of an unwarranted invasion of personal privacy.

Second, as indicated in Hopkins, the examples of unwarranted invasions of personal privacy listed in §89(2)(b) represent by five among myriad potential unwarranted invasions of personal privacy. Therefore, even if none of the examples provided in §89(2)(b) would squarely apply to the request for the records, disclosure might nonetheless result in an unwarranted invasion of personal privacy.

Moreover, it is conceivable in my view that two of the examples might be applicable. Specifically, §89(2)(b) states that an unwarranted invasion of personal privacy includes, but shall not be limited to:

> "iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;
>
> iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it..."

While the purpose for which the list of names and addresses is sought is not completely clear, it might have been requested for commercial purposes, in which case a denial would likely be justified.

It is noted, too, that the court in Hopkins indicated that "petitioner does not articulate any particular reason for his wish to inspect the payroll records, he is not required to do so under article 6 of the Public Officers Law."

In general, I concur with that statement, for the Freedom of Information Law does not distinguish among applicants for records, and it has been held that accessible records should be made equally available to any person, regardless of status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. However, §89(2)(b)(iii) represents what might be characterized as an internal conflict in the Freedom of Information Law, for it specifically refers to the purpose for which a request is made for a list of names and addresses. In one judicial determination involving such a list, it was found that an agency could inquire as to the purpose for a request, stating that:

> [U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents' denials of petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgment for that of the respondents" [Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980)].

As such, there is one precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses.

Further, the payroll listing sought in Hopkins, as well as the instant situation, does not involve the identities of public employess, but rather employees of private corporations. While a payroll record that identifies public employees is in my view clearly available to any person [see Freedom of Information Law, §87(3)(b); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976)] the level of accountability required of government employees may differ from that required of employees of private concerns whose identities appear in government records.

With respect to §89(2)(b)(iv), one aspect of that provision pertains to relevance to the work of an agency. In Hopkins, the contractual relationship involved a state agency, which apparently was obliged to comply with various requirements imposed by the federal law. Under those circumstances, perhaps the records determined to be available were indeed relevant to the work of the agency. Nevertheless, the federal requirements present in Hopkins may not be present with respect to the contracts involved in the instant controversy. If that is so, and if, for example, state law requires only an indication that prevailing wages have been paid, the "relevant" information reflective of the wages paid has already been made available. Further, so long as compliance with that standard has been met, the names and addresses of the employees to whom wages were paid may be irrelevant to the work of the agency.

Third, in Hopkins, the court stated that:

> "[T]he petitioner in the instant case argues that if the public is entitled to view the payroll records of government employees, then logically it should also be entitled to know the name, address and salary of the employees of companies that are parties to government contracts."

I do not fully agree with the language quoted above, for a variety of statutes indicate that public employees bear responsibilities that may not be imposed upon employees outside of government. As indicated earlier, any person could seek and review the payroll record of the City of Buffalo, for example, pursuant to §87(3)(b) of the Freedom of Information Law. If, however, a request for similar information is directed to a private corporation, the Freedom of Information Law would not apply, for the corporation is not an "agency" subject to the Freedom of Information Law. Judicial interpretations of the Freedom of Information Law and other provisions tend to indicate that public employees have "less" privacy than others, for they are required to be more accountable than others [see e.g., Gannett, supra, Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); 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].

It is also important to point out that the Freedom of Information Law has undergone amendments designed to enable an agency to protect personal privacy. For instance, the Freedom of Information Law as enacted in 1974 made reference to a payroll record containing names and addresses. The Law did not specify which address, home or business, should be included [see original Freedom of Information Law, §88(1)(g)]. One among a series of amendments effective in 1978 pertains to payroll information and specifies that the payroll record required to be maintained under §87(3)(b) contain the "public office address" of agency employees, rather than the home address.

In addition, most recently, a new §89(7) was added to the Freedom of Information Law (Chapter 783 of the Laws of 1983). That provision, which became effective immediately, states in part that nothing in the Freedom of Information Law "shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system".

If the home address of a public employee need not be disclosed, it is difficult to envision how the home addree of an employee of a private firm could be required to be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stuart M. Pohl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3061

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

October 7, 1983

Mr. Warren M. Gould
La Penna & Tuckman, P.C.
271 North Avenue
New Rochelle, NY 10801

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gould:

I have received your letter of September 30 in which you requested an advisory opinion under the Freedom of Information Law.

Your question is whether the New York City Police Department, the New York City Department of Corrections and the Port Authority of New York and New Jersey are "subject to or exempt from" the Freedom of Information Law.

In this regard, 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 provides that the term "agency" includes:

> "...any state or muncipal 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 language quoted above includes municipal departments, the New York City Police Department and the Department of Corrections are in my view clearly "agencies" required to comply with the Freedom of Information Law.

With respect to the Port Authority of New York and New Jersey, it is questionable in my opinion whether the Port Authority is an "agency" subject to the provisions of the New York Freedom of Information Law. The Port Authority is a bi-state entity; its jurisdiction and functions extend beyond the borders of New York. Since New York generally cannot impose its legislative enactments beyond its borders, it has been suggested that the Port Authority and its records likely fall beyond the scope of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3062

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

October 7, 1983

Mr. Marshall Nadan
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nadan:

I have received your letter of September 23 concerning a denial of access to medical records by Dr. Robert Lindsay of the Helen Hayes Hospital.

According to a letter addressed to you by Dr. Lindsay in response to a request, he wrote that:

> "[I]t is not the Department's policy to provide family members with copies of their relative's chart. However, should you care to have a physician of your choice request a copy of the record, this will be supplied promptly to ensure continuity of care for your mother."

It is your contention that Dr. Lindsay failed to comply with the Freedom of Information Law, for he neglected to cite any exception in the Freedom of Information Law upon which the denial was based and did not inform you of the identity of the person to whom an appeal should be directed.

In this regard, I would like to offer the following comments.

First, I agree with your contention regarding the basis for the denial, for an assertion that "policy" precludes disclosure would in my view be inconsistent with the Freedom of Information Law. As you are 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.

Therefore, the only bases for withholding are those found in §87(2) of the Freedom of Information Law. As a consequence, a denial based upon "policy" without more is in my opinion inappropriate.

Second, as you may be aware, the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law, state in §1401.7(b) that:

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

As such, I believe that Dr. Lindsay should have informed you of your right to appeal the denial and indicated the name, address and telephone number of the person to whom an appeal could have been directed.

For future reference, the appeals officer for the Health Department is Peter Slocum, Director of Public Information, NYS Department of Health, Empire State Plaza, Corning Tower, Albany, NY 12237.

Lastly, despite the insufficiency of Dr. Lindsay's response, it is possible that he alluded to a better vehicle for seeking the release of medical records. Specifically, I direct your attention to §17 of the Public Health Law, which states in part that:

> "[U]pon the written request of any competent patient, parent or guardian of an infant, committee for an incompetent, or conservator of a conservatee, an examing, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physicial or hospital..."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Robert Lindsay
Peter Slocum

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3063

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

October 11, 1983

Thomas B. Hayner
County Attorney
County of Schenectady
County Office Building
620 State Street
Schenectady, NY 12307

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hayner:

I have received your letter of September 26 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a request recently made under the Freedom of Information Law, a copy of which is attached to your letter. The records sought involve materials regarding the Schenectady County Jail. As such, you indicated that you are "concerned that the information sought is confidential", that if revealed "the public safety may be impaired", and also that various reports requested are the subject of litigation.

It is noted at the outset that the request in several instances refers to specific aspects of the regulations promulgated by the State Commission of Correction (9 NYCRR, Part 7000 et seq.]. For instance, the first aspect of the request involves:

> "[A] copy of the department's 'policies and facility standardized operating procedures' of the Schenectady County Jail, as recommended by Executive Law, Title IX, State Commission of Correction, Sub-title AA, Part 7017. Section 7017.1."

The cited provision is entitled "Personnel standards" and requires, in brief, that personel employed in a County Jail must complete various training programs and requirements. The only reference to a specific record is found in §7017.1(e), which states that:

> "Preferably, a manual of department policies and facility standardized operating procedures should be prepared and a numbered copy furnished to each employee who should be required to acknowledge receipt of same, in writing."

The second aspect of the request involves policies and procedures "designed to insure safety security and supervision at the Schenectady County Jail" required pursuant to §7002.9 of the regulations of the Commission of Correction. The cited provision details the types of information to be contained within facility rules and states that:

> "Each local correctional facility shall prepare and distribute to all prisoners, upon admission, a writting copy of facility rules and information."

From my perspective, since the rules promulgated by the facility pursuant to §7002.9 must be available to prisoners, they would be available to the applicant.

The third area of the request involves "procedures for the control and use of all keys" developed in conjunction with §7003.9. That provision is entitled "Key control" and requires the chief administrative officer of the county jail to "establish written procedures for the control and use of all keys in a local correctional facility.

The last area of the request involves:

> "[A] copy of each of the incident reports which have been filed by the Schenectady County Sheriff's office, with the Commission of Correction, for every death, every attempted suicide, every assault or injury on an inmate or employee, every inmate disturbance, and every escape and attempted escape, over the past ten years."

In my opinion, except with respect to item two of the request, which involves rules distributed to inmates, rights of access granted by the Freedom of Information Law would largely be dependent upon potentially harmful effects of disclosure.

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.

There are likely four grounds for denial of potential significance regarding the records sought.

As you indicated in your letter, many of the records sought involve "intra-agency directives". In this regard, §87(2)(g) of the Freedom of Information Law states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. 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.

Consequently, it would appear that §87(2)(g) could not justifiably be cited as a basis for denial with respect to policies and procedures established by officials at the County Jail, for those records would constitute final agency policies available under §87(2)(g)(iii).

Section 87(2)(g) might nonetheless be cited with respect to portions of incident reports sent to the Commission of Correction. As indicated earlier, while some aspects of inter-agency or intra-agency materials are available, others consisting of advice, opinion, suggestion impression and the like may in my view justifiably be withheld. Therefore, to the extent that the incident reports contain those types of commentaries, I believe that they may be withheld.

A second ground for denial of potential significance is §87(2)(e). That 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 disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Under the circumstances, it does not appear that the policies could be withheld under the language quoted above. It is possible that the policies and procedures might have been compiled not for law enforcement purposes, but rather in the ordinary course of business. Moreover, it would appear that the policies and procedures established by officials at the Jail might constitute routine criminal investigative techniques and procedures. If those assumptions are accurate, the policies and procedures could not in my opinion likely be withheld under §87(2)(e).

Section 87(2)(e) might, however, apply with respect to some of the incident reports, for they may have been compiled for law enforcement purposes. To the extent that reports were indeed compiled for law enforcement purposes, and to the extent that one or more of the harmful effects of disclosure described in §87(2)(e) would arise, the incident reports could in my view be withheld.

It is emphasized that the application of §87(2)(e) as a basis for withholding is dependent in great measure on the specific contents of the reports. Further, it is noted that in a proceeding brought against the Commission of Correction under the Freedom of Information Law, it was found that the Commission in response to a request for incident reports was required to review the reports to determine the extent, if any, to which the grounds for denial listed in §87(2) of the Freedom of Information Law could appropriately be asserted [Zanger v. Chinlund, 430 NY 2d 1002 (1980)].

A third ground for denial that might be applicable with respect to the policies and procedures, and perhaps with respect to some aspects of the incident reports 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".

In the case of procedures regarding jail keys, for example, if the procedures would enable an inmate to evade security measures, §87(2)(f) could likely be asserted in that and similar contexts.

The final ground of potential significance would in my view be applicable only to incident reports. Specifically, §87(2)(b) enables an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". The incident reports might contain reference to medical information regarding inmates requiring hospitalization; they might identify witnesses and their statements relative to particular events. Under those and similar circumstances, it is possible that names and other identifying details may justifiably be withheld or deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Finally, you mentioned that some of the incident reports relate to litigation. From my perspective, if records consist of materials prepared for litigation, they would be confidential pursuant to §3101(d) of the Civil Practice Law and Rules (CPLR) and, therefore, deniable under §87(2)(a) of the Freedom of Information Law. It is noted, however, that §3101(d) of the CPLR cannot in my opinion be cited unless the materials were prepared solely for litigation. In a case in which a report concerning a suicide in a city jail was prepared for multiple purposes, one of which involved ensuing litigation, it was found that §3101(d) of the CPLR could not be cited as a basis for denial [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234]. Consequently, even though some of the reports pertain to litigation, they might not be deniable on that basis alone.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3064

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

October 11, 1983

Ms. Agnes F. Palazzetti
Buffalo Evening News
Buffalo, NY 14240

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Palazzetti:

I have received your letter of September 27 and the materials attached to it.

According to your letter and the enclosed news articles, an internal audit was performed regarding the operation of a radio station by the State University at Buffalo. Having requested a copy of the completed audit, you were denied access by John T. Thurston, Records Access Officer, who wrote that:

> "The report is an intra-agency document which is not statistical or factual tabulation or data. It contains no instructions to staff that affect the public. It also contains no final agency policy or determination."

Although an appeal was sent to Richard Gillman, Appeals Officer for the State University, no determination has apparently yet been rendered.

Your questions involve rights of access to the audit and the steps that might be taken if the records are withheld on appeal.

In this regard, I would like to offer the following comments.

First, it is noted that the Freedom of Information Law as originally enacted was restrictive in terms of rights of access, for it made available only categories of records so specified in the Law. One of those categories of accessible records included "internal or external audits and statistical or factual tabulations made by or for the agency" [see original Freedom of Information Law, §88(1)(d)]. Effective January 1, 1978, a new Freedom of Information Law reversed the presumption of the original statute. The current 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 current Freedom of Information Law is in my view clearly intended to preserve rights of access previously granted and to expand rights of access in conjunction with the standards found in §87(2) of the Law. As such, it is my view that records accessible under the original statute, such as internal audits, remain available under the amended Freedom of Information Law.

Second, as indicated in Mr. Thurston's denial, there appears to be but one ground for denial of relevance. Specifically, §87(2)(g) provides that an agency may withhold records that:

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

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.

Although I have not viewed the audit in question, under the circumstances, it would appear that the record is available in part, if not in toto.

One of the areas of intra-agency materials that is accessible under the Law involves "statistical or factual tabulations or data". It is important to note that the original Law referred to "statistical or factual tabulations". Section 87(2)(g)(i), however, refers to statistical or factual "data", even if it does not appear in tabular form. Therefore, if, for instance, the report contains factual information appearing in a narrative rather than tabular form, it would in my view be accessible.

Based upon the news article of September 15, 1983, enclosed with your letter, it also appears that the internal audit is reflective of a final determination. It is noted that the article contains statements by the Public Affairs Director for the University, who was quoted to the effect that findings and conclusions were reached. On that basis, it would appear that the audit represents a final determination that is accessible pursuant to §87(2)(g)(iii).

Lastly, should Mr. Gillman withhold the audit following your appeal, a review of the determination would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. It is emphasized that the burden of proof in such a proceeding brought under the Freedom of Information Law differs from the burden generally required of a petitioner in proceedings initiated under Article 78. In general, in an Article 78 proceeding, a member of the public, a petitioner, has the burden of proving that the agency acted unreasonably. Nevertheless, §89(4)(b) of the Freedom of Information Law states that the agency maintains the burden of proving that the records withheld in fact fall within one or more of the grounds for denial. Moreover, as you may be aware, an amendment to the Freedom of Information Law that became effective in 1982 provides a court with discretionary authority to award reasonable attorney fees under certain conditions to a petitioner who substantially prevails in a challenge to a denial of access to records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John T. Thurston
Richard Gillman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 938
FOIL-AO- 3065

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

October 12, 1983

Mr. Charles Hager
Chairman
St. Lawrence County
Environmental Management Council
Courthouse
Canton, New York 13617

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hager:

I have received your letter of September 27 in which you raised a series of questions regarding the Freedom of Information Law.

According to your letter, the St. Lawrence County Environmental Management Council recently received a request "for routine access to all materials provided to members of the Council by staff and/or committees at the time that these materials are made available to Council members (i.e.: 10 days before Council meetings)." As a consequence of the request, the Council agreed that a policy regarding access to records should be developed.

In this regard, your first question involves "who is given the responsibility for promulgation of guidelines under Section 87.1."

As you may be aware, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government (formerly the Committee on Public Access to Records) to promulgate regulations dealing with specified aspects of the Law. It is emphasized that the regulations deal solely with the procedural aspects of the Law; they do not deal with substance, i.e., the extent to which records are acccessible or deniable. In conjunction with the general regulations promulgated by the Committee, §87(1)(a) states that:

> "[W]ithin sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

As such, the governing body of the public corporation, in this instance, the St. Lawrence County Legislature, should have adopted the appropriate regulations applicable to all agencies in County government within sixty days of January 1, 1978, the effective date of the current Freedom of Information Law. Assuming that the County Legislature indeed promulgated uniform regulations, the Council is subject to those regulations, and there would be no need or capacity to adopt additional regulations or guidelines.

The remaining question involves rights of access to "materials prepared by staff or committees for distribution to Council members prior to each meeting". It is apparently your view that those materials generally need not be made available, except to the extent that they consist of "statistical or factual tabulations of data".

I would like to offer several comments regarding the issue.

First, as you intimated, certain aspects of inter-agency and intra-agency materials may generally be withheld. 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. 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.

It is unclear whether your statement regarding "statistical or factual tabulations of data" represents an interpretation or a typographical error. In either event, the language of §87(2)(g)(i) requires that statistical or factual information found within inter-agency or intra-agency materials be made available, whether it appears in tabular form or narrative format. However, those portions of inter-agency or intra-agency materials consisting of advice, recommendation or opinion, for example, may in my view be withheld or deleted.

Second, you alluded to materials prepared by committees. Here I direct your attention to the Open Meetings Law. Of possible relevance to your question is the inclusion of committees within the requirements of the Open Meetings Law. Section 97(2) of the Law defines "public body" to include:

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

Based upon the language quoted above, a committee designated by the Council or the County Legislature, for instance, would in my view clearly be subject to the Open Meetings Law. Therefore, it is possible that material prepared by committees for presentation before the Council might have been developed in the course of open meetings during which any person could have been present. Further, the materials might be referenced in minutes of those committees. In those situations, there might be no valid reason for withholding such materials prior to a meeting of the Council.

Lastly, it is noted that the Freedom of Information Law is permissive. Stated differently, as a general rule, an agency may withhold certain records in accordance with grounds for denial listed in §87(2) of the Law; nevertheless, there is no requirement that such materials must be withheld. Therefore, while analyses or recommendations might justifiably be withheld, it may be desireable in some instances to disclose prior to a meeting. In those cases, the materials may be disclosed, for there would be no provision that would prohibit 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3066

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

October 12, 1983

Mr. Vincent Tomasulo
83-A-1732 E-5-13
Box B
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tomasulo:

I have received your letter of October 4 in which you requested assistance regarding the use of the Freedom of Information Law.

Specifically, you have asked whom you may contact for the purpose of requesting records at a number of New York State and New York City agencies. In this regard, although I am unable to provide names of specific individuals to whom the requests should be directed at each agency, I would like to offer the following comments and suggestions.

First, pursuant to §1401.2 of 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. A records access officer is responsible for coordinating an agency's response to requests for records. As such, when making a request, it is suggested that you direct it to the records access officer at the agency that you believe maintains the records in which you are interested. Further, to ensure that your request is forwarded to the appropriate office, it is suggested that you write "Freedom of Information Request" on the outside of the envelope.

Second, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". Consequently, when making a request, it is recommended that you provide as much detail as possible, such as names, dates, file designations, identification numbers, descriptions of events and similar information that will enable agency officials to locate the records sought.

Lastly, as you requested, enclosed are copies of the Freedom of Information Law, the regulations to which reference was made earlier, and an explanatory pamphlet that may be particularly useful to you, for it contains a sample letter of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 939
FOIL-AO- 3067

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

October 13, 1983

Ms. Barbara Wyatt
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Wyatt:

I have received your letter of October 7 as well as various materials attached to it or forwarded separately.

Your inquiry concerns "Non-Compliance of the Freedom of Information and Open Meetings Laws, City of Utica". In conjunction with the attachments to your letter, you have requested an opinion from this office.

Based upon a review of the materials, it appears that three issues have been raised. One involves the subject matter list required to be prepared by the City of Utica; the second pertains to the posting of notice of meetings; and the third involves a request for a list of "the 9th year entitlement of approved applicants, names, addresses, and approved dollar amounts" in relation to a housing revitalization grant program.

In this regard, I would like to offer the following comments.

It is noted at the outset that, on your behalf and in an effort to assist you, I have contacted various officials of the City of Utica.

With regard to the subject matter list, Joseph Talarico, the City's Records Access Officer, informed me that he is in the process of preparing an updated and complete subject matter list. Although he is currently awaiting information from various City agencies, he indicated that the list will likely be completed and available by October 19.

Mr. Talarico also informed me that bulletin boards have been ordered to be placed in City Hall for the purpose of posting notices of meetings in compliance with §99 of the Open Meetings Law. Mr. Talarico pointed out that notices of meetings are currently posted in the lobby of City Hall. From my perspective, if notice of the time and place of meetings is posted in accordance with the requirements imposed by §99 of the Open Meetings Law, the posting of notice in the lobby is likely reflective of compliance with those requirements. The use of bulletin boards would in my view serve to enhance compliance.

The remaining issue involves a request for the identities, addresses, and amounts of grants made under a federal housing rehabilitation program. Attached to your letter are news articles containing the names and addresses of people who were approved for grants by the City from 1978 through 1982-1983, which was apparently the eighth year entitlement. Your request involves the same information in conjunction with the "9th year entitlement".

In my opinion, although the City disclosed personal information regarding grants in the past, a review of the Freedom of Information Law indicates that the names and addresses of grant recipients might justifiably have been withheld.

As a general matter, 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.

Relevant under the circumstances is §87(2)(b) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view seek to enable government to prevent disclosures concerning the personal details of individuals' lives. As such, the central question involves the extent in which disclosure would constitute an unwarranted as opposed to a permissible invasion of personal privacy.

From my perspective, a disclosure that permits the public to determine the general income level of a participant in the program would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law). In another area, §136 of the Social Service Law requires that records identifying applicants for or recipients of public assistance be kept confidential. As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted invasion of personal privacy".

It is emphasized that when dealing with privacy, attempts to balance interests and subjective judgments must of necessity be made. Therefore, although I might believe that disclosure of particular information would be offensive and result in an unwarranted invasion of personal privacy, another person might feel that disclosure would be innocuous, thereby resultingin a permissible invasion of personal privacy. In short, I do not feel that there are specific rules that one may follow in determining issues relative to personal privacy. However, based upon the Freedom of Information Law and the direction provided by other laws, such as the Tax Law and the Social Services Law, it would appear that the records reflective of the identities of individuals who receive grants under the program in question could justifiably be withheld.

Lastly, although the information that you are now seeking has been disclosed in the past, previous disclosures would not in my opinion establish a right to analogous information now. In dealing with a similar situation

involving the disclosure of records over a period of years that were denied due to privacy considerations when the Freedom of Information Law became effective, it was held that "neither the state nor its agencies may be estopped by acts done in prior years" [Person - Wolinski Associates v. Nyquist, 377 NYS 2d 897, 899]. Therefore, if indeed disclosure of the identities of persons receiving grants would constitute an unwarranted invasion of personal privacy, disclosure of the same information regarding grants awarded in previous years would not in my view require that this year's information be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles Brown
Joseph Talarico

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3068

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

October 13, 1983

Mr. Armando Guzman
75-B-1413
Great Meadow Correctional Facility
P.O. Box 51
Comstock, New York 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Guzman:

I have received your letter of October 6 in which you requested advice regarding access to records.

Your first area of inquiry involves requests directed to the clerk of a court in January and September. According to your letter, neither of those requests has been answered.

In this regard, it is emphasized that the Freedom of Information Law does not include within its scope the courts or court records. The Freedom of Information Law applies to records of an "agency", which 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."

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

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

As such, records of a court clerk in my view fall outside the requirements of the Freedom of Information Law.

It is noted, however, that various provisions grant broad rights of access to court records. One such provision is §255 of the Judiciary Law, a copy of which is enclosed.

You also referred in your letter to a pre-sentence report. Relevant under the circumstances is §390.50 of the Criminal Procedure Law concerning pre-sentence 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 conjunction 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 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 not 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 pre-sentence report may be made available only be a court, and only under the circumstances described in §390.50.

Lastly, you asked whether medical records may generally be obtained on your behalf by your attorney. In this regard, enclosed is a copy of the regulations regarding access to records promulgated by the Department of Correctional Services. Section 5.24 of those regulations describes the circumstances in which medical records kept at a Department facility may be disclosed. In addition, the statute generally dealing with access to medical records is §17 of the Public Health Law (see enclosed). In brief, that provision states that a physician may request and obtain medical records on behalf of a competent patient.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3069

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

October 13, 1983

Mr. Armando Guzman
75-B-1413
Great Meadow Correctional Facility
P.O. Box 51
Comstock, New York 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Guzman:

I have received your letter of October 6 in which you requested advice regarding access to records.

Your first area of inquiry involves requests directed to the clerk of a court in January and September. According to your letter, neither of those requests has been answered.

In this regard, it is emphasized that the Freedom of Information Law does not include within its scope the courts or court records. The Freedom of Information Law applies to records of an "agency", which 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."

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

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

As such, records of a court clerk in my view fall outside the requirements of the Freedom of Information Law.

It is noted, however, that various provisions grant broad rights of access to court records. One such provision is §255 of the Judiciary Law, a copy of which is enclosed.

You also referred in your letter to a pre-sentence report. Relevant under the circumstances is §390.50 of the Criminal Procedure Law concerning pre-sentence 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 conjunction 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 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 not 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 pre-sentence report may be made available only be a court, and only under the circumstances described in §390.50.

Lastly, you asked whether medical records may generally be obtained on your behalf by your attorney. In this regard, enclosed is a copy of the regulations regarding access to records promulgated by the Department of Correctional Services. Section 5.24 of those regulations describes the circumstances in which medical records kept at a Department facility may be disclosed. In addition, the statute generally dealing with access to medical records is §17 of the Public Health Law (see enclosed). In brief, that provision states that a physician may request and obtain medical records on behalf of a competent patient.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3020

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

October 17, 1983

Mr. Armando Guzman
75-B-1413
Great Meadow Correctional Facility
P.O. Box 51
Comstock, New York 12821-0051

Dear Mr. Guzman:

I have received your letter of October 11, to which you attached four "appeals" regarding denials of access to records.

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

First, although the Freedom of Information Law, §89(4)(a), requires that agencies in receipt of appeals forward to the Committee compies of appeals and the ensuing determinations, the Committee does not have the authority to render a determination on appeal or otherwise compel an agency to grant or deny access to records. It is suggested that you review §89(4) of the Freedom of Information Law, a copy of which is enclosed.

Second, I refer to my earlier letter to you dated October 13, in which it was explained that court records fall outside the scope of the Freedom of Information Law. That opinion also referred to §390.50 of the Criminal Procedure Law, which deals specifically with access to pre-sentence reports. As such, several of the issues raised in your most recent correspondence need not be addressed here. It is noted, too, that the opinion of the Committee that you cited, advisory opinion no. 1085, deals with a different set of facts and also indicates that access to pre-sentence reports is governed by the Criminal Procedure Law.

Lastly, one of the "appeals" apparently dealt with records in possession of a unit of the Office of Mental Health. It is important to point out in this regard that patient records of that agency are generally confidential pursuant to §33.13 of the Mental Hygiene Law. Enclosed for your review is a copy of that statute, which specifies and limits the conditions under which such records may be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3071

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

October 17, 1983

Mr. Dave Miller
Scenic Hudson, Inc.
9 Vassar Street
Poughkeepsie, NY 12601

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Miller:

I have received your letter of October 3 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the correspondence attached to it, Scenic Hudson, Inc. unsuccessfully requested various records regarding road salting practices from the New York State Thruway Authority. I have received a copy of a determination on appeal by James A. Martin, Executive Director of the Authority, who upheld the denial, stating that:

> "1. The Rules and Regulations of the New York State Thruway Authority provide that information will not be available if it relates to litigation pending or threatened [21NYCRR107.3(a)(5)].
>
> "2. The Authority does not keep records in a fashion that would enable us to respond to your specific requests. [See Public Officers Law §89 (3)]."

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

First, I have reviewed the rules and regulations cited by Mr. Martin. It is noted at the outset that the regulations were apparently adopted in 1974 pursuant to the Freedom of Information Law as originally enacted. That statute, however, was repealed and replaced by the current Freedom of Information Law, which became effective on January 1, 1978. As such, I believe that the regulations promulgated by the Thruway Authority in conjunction with the Freedom of Information Law are out of date and, in some instances, deficient.

Second, the provision of the regulations specifically cited by Mr. Martin, 21 NYCRR §107.3(a)(5), states that "information not available" includes records "relating to litigation, pending or threatened". In my opinion, the quoted provision of the regulations is overbroad.

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, as indicated by the Court of Appeals, unless records sought fall within one or more of the eight grounds for denial listed in §87(2), records are available [see Doolan v. BOCES, 48 NY 2d 341 (1979)]. In addition, it has been held that regulations restricting access are void to the extent that they conflict with rights of access granted by the Freedom of Information Law [see Morris v. Martin, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405].

Further, the fact that records may relate to litigation, "pending or threatened", would not in my view necessarily remove them from the scope of rights of access. If, for example, records sought constitute material prepared for litigation or attorney work product, I would agree that such materials may justifiably be withheld, for §3101 of the Civil Practice Law and Rules (CPLR) would require confidentiality. Under such circumstances, the records would in my opinion be specifically exempted from disclosure by statute and deniable under §87(2)(a) of the Freedom of Information Law. Nevertheless, if records were prepared in the ordinary course of business, but relate to or are involved in litigation, I do not believe that either §3101 of the CPLR or §87(2)(a) of the Freedom of Information Law could justifiably be cited to withhold those records [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d

165]. It is noted, too, that it has been held that records prepared for multiple purposes, one of which might involve litigation, could not be withheld on the basis of §3101(d) of the CPLR [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234].

In view of the foregoing, I do not believe that the provision of the regulations cited by Mr. Martin is in accord with the Freedom of Information Law or its judicial interpretation. Consequently, I do not believe that it could be cited as a basis for withholding in every instance in which records relate to litigation.

Third, based upon Mr. Martin's response, it appears that the information sought might not exist in the form of a record or records. By means of example, one of the areas of your request involved the "amount and dates of road salting" for particular years. In view of Mr. Martin's response, it appears that the Thruway Authority might not maintain records specifically indicating the information sought. Here I would like to point out that §89(3) of the Freedom of Information Law states in relevant part that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if the information sought does not exist in the form of a record or records, the Thruway Authority would not in my view be obligated to create a record on your behalf in response to a request.

Lastly, Mr. Martin referred to various salt supply contracts awarded during particular years. Perhaps a review of those contracts and related records would enable you to gain access to much of the information in which you are interested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James A. Martin
David Alexander

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3072

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

October 17, 1983

Condello, Ryan & Piscitelli
308 State Street
Albany, NY 12210

Dear Sirs:

I have received your letter of October 14 in which you requested copies of materials prepared for government agencies "to facilitate their compliance with the Freedom of Information Law". You indicated further that you are particularly interested "in an interpretation of the statutory requirement that agencies subject to the provisions of the law maintain a log of available documents".

Enclosed for your consideration are copies of the regulations promulgated by the Committee that govern the procedural aspects of the Freedom of Information Law, model regulations designed to assist agencies in developing appropriate regulations, an explanatory brochure dealing with the Freedom of Information Law, and a memorandum entitled "Problems and Solutions" sent to state agencies at the end of 1977 which sought to distinguish the provisions of the Freedom of Information Law as originally enacted and the amended Law that became effective on January 1, 1978.

As you may be aware, the Committee also responds to inquiries by means of the preparation of written advisory opinions on an ongoing basis. Enclosed for your consideration are copies of various advisory opinions regarding requirements pertaining to the subject matter list.

In addition, there are two judicial decisions that deal with the degree of specificity required of a subject matter list. They are D'Alessandro v. Unemployment Insurance Appeal Board [56 AD 2d 962] and Wattenmaker v. NYS Employees' Retirement System [464 NYS 2d 52, ___ AD 2d ___ (1983)].

Lastly, your letter refers to "a log of available documents". It is noted in this regard that §88(4) of the original Freedom of Information Law required the creation of a subject matter list that referred to accessible records only. Nevertheless, the current provision, §87(3)(c) requires that each agency maintain:

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

Therefore, an appropriate subject matter list must in my view make reference by category to all records of an agency, rather than only those determined to be available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3073

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

October 17, 1983

Mr. John B. Schamel
National Education Association
of New York
Elmira Service Center
Mark Twain Building #200
Elmira, New York 14901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schamel:

I have received your letter of October 6 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the correspondence attached to it, on June 27 you requested various "records or portions thereof" regarding the identities of contractors and subcontractors who performed construction work at specified schools within the Addison Central School District for a particular time period, letters of intent filed by contractors involved in the removal of asbestos from those schools, documents indicating that workmen had been properly instructed in the removal of asvestos, the names of haulers and copies of permits to haul asbestos from the schools, the names of disposal sites and the method of disposal of asbestos, the dates asbestos was removed from the schools, EPA survey reports, records indicating screening for asbestos, air monitoring reports, and contracts and subcontracts regarding the work described above performed at the three schools.

Since no response to your request was given, you appealed a constructive denial of access on July 22. As of the date of your letter, none of the records sought had been made available.

In this regard, I would like to offer the following comments.

First, with respect to the time limits for response 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 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 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, 108 Misc. 2d 536, 87 AD 2d 388, __ NY 2d __ (1982)].

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 virtually all of the information sought is available. Contracts and, therefore, the identities of contractors are in my view clearly available. Further, the remaining records sought appear to be reflective of factual information accessible either under §87(2)(g)(i) of the Freedom of Information Law or because no ground for denial would exist.

Lastly, I would like to point out that §89(3) of the Freedom of Information Law states in relevant part that, as a general rule, an agency is not required to create a record in response to a request. Nevertheless, since you requested "records or portions thereof" containing the information described, it would appear that those portions of records reflective of that information should be made available. It is also noted that a single record may be both accessible and deniable in part. Under those circumstances, an agency in my opinion would be required to grant access to those portions that are 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 940
FOIL-AO- 3074

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

October 18, 1983

Mr. John B. Schamel
National Education Association
of New York
Elmira Service Center
Mark Twain Building #200
North Main and West Gray
Elmira, New York 14901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondece.

Dear Mr. Schamel:

I have received your letter of October 6 concerning a denial of access to records by the Superintendent of the Odessa-Montour Central School District.

According to your letter and the correspondence attached to it, on September 12 you requested copies of a report submitted by the Superintendent to the Board of Education regarding the Superintendent's investigation of a named employee's personal file. You also requested documents used in the preparation of the Superintendent's report. Following a constructive denial of access due to a failure to respond, you appealed to the Superintendent, who denied access, stating that:

> "[T]he report and related documents you are requesting were delivered to the Odessa-Montour Central School Board of Education as a confidential memo and discussed in executive session as a specific personnel matter concerning a particular individual. As such, these papers cannot be released as public records."

In this regard, I would like to offer the following comments.

First, as you are 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.

Under the circumstances, without knowing more of the contents of the materials that you requested, I cannot provide specific direction regarding rights of access. However, it appears that two of the grounds for denial might be applicable, at least in part.

One of the grounds for denial of relevance is §87(2)(g), which states that an agency may withhold records that:

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

While some aspects of intra-agency materials are accessible, others reflective of advice, recommendation, opinion, suggestion and the like may in my view be withheld.

A second basis for withholding might be §87(2)(b), which permits an agency to withhold records or portions of records when disclosure would constitute "an unwarranted invasion of personal privacy". Once again, without knowledge of the contents of the records, specific advice cannot be offered.

In short, to the extent that either §87(2)(g) or §87(2)(b) could appropriately be cited to deny access, the records in question may in my view be withheld.

Second, the specific basis for denial offered by the Superintendent was that the report made by the Superintendent was a "confidential memo and discussed in executive session as a specific personnel matter concerning a particular individual". Here I would like to point out that the Superintendent apparently alluded to one of the grounds for enty into executive session appearing in the Open Meetings Law [see §100(1)(f)]. Nevertheless, the grounds for entry into executive session in the Open Meetings Law are not necessarily consistent with the grounds for denial of access to records appearing in the Freedom of Information Law.

By means of example, if the Superintendent forwarded a memorandum to the School District offering recommendations regarding changes in curriculum, that document might justifiably be withheld under §87(2)(g) of the Freedom of Information Law. However, when the Board sought to discuss the issue, no ground for executive session would in my opinion exist. Therefore, while a record involving a particular issue might be withheld under the Freedom of Information Law, a discussion of that issue by a public body might nonetheless be required to be conducted during an open meeting.

The reverse of that situation might exist under the facts that you described. While an executive session might justifiably have been held under §100(1)(f) of the Open Meetings Law, it is possible that the records or portions thereof might be accessible under the Freedom of Information Law.

Further, you wrote that "the Board accepted the report, but never took any action in an open meeting". In this regard, if a public body discusses an issue during an executive session but takes no action or vote, §101 of the Open Meetings Law concerning minutes would not in my opinion require that minutes be taken. If, however, action was taken by the Board, minutes reflective of the Board's determination, the date and the vote must in my view be recorded in the form of minutes and made available in accordance with the Freedom of Information Law.

Lastly, as a general rule, a public body subject to the Open Meetings Law may take action during a properly convened executive session [see Open Meetings Law, §100 (1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §101(2). Nevertheless, various interpretations of the Education Law, §1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd __ NY 2d __ (1982)]. As such, if the Board took action, based upon the judicial decisions cited above and the facts that you have provided, it would appear that such action should have been accomplished by means of a vote taken during an open meeting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent John F. Dowd

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3075

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

October 19, 1983

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear [redacted]

I have received your letter of October 1 as well as copies of various other communications.

Once again, your inquiry pertains to records in possession of the New York City school system. In this regard, I would like to offer the following comments.

First, having discussed the procedural aspects of the Freedom of Information Law with representatives of the Board of Education on several occasions, I believe that there may be a misunderstanding on your part. Specifically, when records in possession of the Board of Education are denied, an appeal may be directed to John Nolan, Secretary to the Board. If, however, records are denied by a community school district, an appeal would not be forwarded to Mr. Nolan at the Board of Education, but rather to the Chancellor. In several instances, it appears that you have appealed denials of access to records of a community school district to Mr. Nolan. I believe, however, that those appeals should be directed to the Chancellor.

Second, your reliance upon the decision rendered in Blecher v. Board of Education, City of New York [Sup. Ct., Kings Cty., NYLJ, October 25, 1979] it is understandable in relation to the records that you are seeking. It is apparently your contention that the broad language in Blecher indicating that evaluations, correspondence and similar records that lead to final deter-

minations are accessible without exception. Notwithstanding Blecher, also in October of 1979, the Court of Appeals affirmed the Appellate Division decision rendered in McAuley v. Board of Education, City of New York [61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion)], which specifically found that not all predecisional materials are available. In describing the situation, the Appellate Division stated that:

> "[P]etitioner contends that the subject documents represent the application of agency policy and rules to a specific case and that to deny disclosure would allow appellants to perpetuate their tradition of maintaining a body of 'secret agency law' in this area. Appellants, on the other hand, contend that the subject documents represent precisely the kind of predecisional information which is prepared in order to assist the decision-making process and, hence, exempt from disclosure. We agree with appellants. The hearing panel documents or report sought are not final agency determinations or policy. Rather, they are predecisional materials, prepared to assist an agency decision maker (here, the Chancellor) in arriving at his decision. Only the latter has the legal authority to decide whether the rating should stand. The panel's recommendations and reasoning are not binding upon him and there is no evidence that he adopts it reasoning as his own when he adopts its conclusion."

Based upon the language quoted above, it is clear that the state's highest court confirmed that some predecisional mateirals are deniable under §87(2)(g) of the Freedom of Information Law. Consequently, your substantial reliance upon Blecher may possibly be misplaced.

Third, you also have continually referred to Education Department reports which contain information identifiable to particular personnel and students. Once again, I believe that your reliance upon the provisions of §3020-a of the Education Law may be misplaced. When a determination is appealed to the Commissioner of Education under §3020-a, I believe that the proceeding is viewed by the Education Department in a manner analogous to litigation

conducted in open court. Although such proceedings may result in published determinations, some of the records that may lead to a determination may be denied [see Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, if, for example, a tenured teacher is acquitted of all charges, §3020-a(4) of the Education Law requires that "the charges [be] expunged from his record". In your situation, as a probationary teacher, it does not appear that the procedural rights accorded to a tenured teacher exist.

Fourth, with respect to specific aspects of reports that you contend are factual in nature and therefore available under §87(2)(g)(i) of the Freedom of Information Law, I can only advise that rights of access under §87(2)(g) are in my view dependent upon the specific contents of records.

Fifth, you have asked that I review an appeal directed to Mr. Nolan regarding a request that you made on September 21 that was unanswered by Ruth Bernstein, Deputy Records Access Officer for the Board of Education.

I agree with your intimation that a response to your request, perhaps by means of an acknowledgment of its receipt, should have been made within five business days of the receipt of the request [see Freedom of Information Law, §89(3)]. Nevertheless, having reviewed your request, it is possible that the Board may be unable to locate the information sought.

By means of example, item (a) of your request involves:

> "the portions of all Chancellor's Committee Reports located in the files of the Office of Appeals and Review or in 'the vault' that are 'statistical or factual tabulations or data' and which concern 'unsatisfactory' ratings, discontinuances of probationary service, or denials of certification of completion of probation in Community School District 23 (You may delete any phrases which contain opinion as opposed to containing either statements of fact or statements which are being represented as factual.)"

Items (c), (d) and (e) pertain to:

> "(c) the entire content of all documentation packets that accompanied the reports referred to in request a)
>
> "(d) all letters sent to pedagogical personnel during the last ten years informing them of the Chancellor's decision concerning an 'unsatisfactory' rating, discontinuance of probationary service, or denial of certification of completion of probation
>
> "(e) all letters sent to pedagogical personnel during the last ten years informing them of the resolution of a Community School Board or the decision of a Community Superintendent concerning an 'unsatisfactory' rating, discontinuance of probationary service, or denial of certification of completion of probation..."

Although I am not familiar with the records of the Board of Education, it is possible that the information sought cannot be located based upon the information contained within your request. For instance, due to the nature of filing systems, there may be no way of locating "letters sent to all pedagogical personnal during the last ten years" regarding particular types of ratings. If that is so, the request might not "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law.

Lastly, you have asked that I comment regarding the relationship between Mr. Nolan and others and whether a conflict of interest might exist. In short, the authority of this office does not pertain to that type of issue.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Nolan, Secretary to the Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3076

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

October 19, 1983

Mr. John J. Sheehan
[redacted]

The staff of the Committee on Open Government 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 October 5 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a request for records of an investigation by the Division of State Police of an accident involving several vehicles in which one person was killed. The accident report, a copy of which is attached to your letter, indicates that no charges or violations were issued. You also wrote that, despite a willingness "to sell [you] $450.00 worth of photos they took of the accident scene, vehicles, etc.", both the acting records access officer and Division's Committee on Appeals denied your request. Specifically, Chief Inspector Lecakes stated that the Committee on Appeals found that:

> "...such records were compiled for law enforcement purposes, and further, that such disclosure would interfere with pending judicial proceedings. Additionally, disclosure would constitute an unwarranted investigation of the personal privacy of those concerned. For your information, representatives of persons involved in this accident have filed an action against the State of New York, therefore, the only vehicle available to obtain these records is throught proceedings available through the C.P.L.R."

I would like to offer the following comments 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 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 more of the ensuing grounds for denial. Therefore, in my opinion, it is clear that an agency must review the records sought in their entirety to determine which portions, if any, may justifiably be withheld. Moreover, the quoted language indicates that the Legislature envisioned situations in which a single record might be accessible or deniable in part.

Third, without knowledge of the contents of the records sought, clear direction cannot be provided. However, it appears that three of the grounds for denial may be relevant.

The responses to your request and appeal alluded to §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy".

In this regard, it is difficult to envision how the cited provision could appropriately be asserted, given the fact that the accident report has been made available. In addition, if indeed the State Police offered to sell photographs of the scene of the accident identifying those involved, once again, since various personal details have been or would willingly be disclosed, it appears unlikely that additional disclosures would at this juncture constitute an unwarranted invasion of personal privacy.

A second basis for withholding to which the Division alluded 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..."

Under the circumstances, since there were apparently no violations of law, it is possible that the records in question might not have been compiled for law enforcement purposes, but rather in the ordinary course of business. If that is so, §87(2)(e) could not in my view justifiably be cited to withhold the records. If, however, the records sought were indeed compiled for law enforcement purposes and disclosure would interfere with judicial proceedings, the records could in my view be withheld to that extent pursuant to §87(2)(e)(i). Nevertheless, due to the extent to which disclosures have been made, as well as the offer of photographs taken, presumably in conjunction with the accident report and the investigation, the extent to which disclosure of the records sought would interfere with a judicial proceeding would in my opinion be questionable.

Further, although you might not be involved in litigation relative to the accident, §3101(g) of the Civil Practice Law and Rules regarding discovery provides an indication of the scope of disclosure. The cited provision states that:

> "[E]xcept as is otherwise provided by law, in addition to any other matter which may be subject to disclosure, there shall be full disclosure of any written report of an accident prepared in the regular course of business operations or practices of any person, firm, corporation, association or other public or private entity, unless prepared by a police or peace officer for a criminal investigation or prosecution and disclosure would interfere with a criminal investigation or prosecution."

It is noted that the end of the provision quoted above refers to interference "with a criminal investigation or prosecution". Based upon the facts provided, the records sought do not appear to pertain to a criminal investigation.

Additionally, while the records sought might relate to litigation, that factor alone would not in my view necessarily remove them from the scope of rights of access granted by the Freedom of Information Law. As stated in Burke v. Yudelson [368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165] which dealt with records prepared in the ordinary course of business that related to litigation, accessible records should be made available to any person, without regard to status or interest. Moreover, it has been held that records may not be considered confidential under §3101(d) of the Civil Practice Law and Rules as material prepared for litigation unless such records were prepared solely for litigation [Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234]. The determination cited above also found that materials prepared for multiple purposes, one of which might be litigation, are subject to rights of access granted by the Freedom of Information Law.

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. 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 records prepared by the Division might be characterized as "intra-agency" materials. To the extent that they contain statistical or factual information, for example, I believe that they would be available, unless a different ground for denial may 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:jm

cc: Superintendent Chesworth
Chief Inspector Lecakes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3022

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

October 19, 1983

Mr. Herbert N. Wallace
Attorney at Law
322 Mill Street
Poughkeepsie, NY 12601

Dear Mr. Wallace:

I have received your letter of October 17, in which you requested "forms for obtaining information under the Freedom of Information Act".

Please be advised that the Freedom of Information Law contains no requirement that a particular form be used for the purpose of requesting records. As such, the Committee has not developed any such form. However, I would like to offer the following remarks relative to your inquiry.

First, it has consistently been advised that a specific form is unnecessary and that a request cannot be delayed or denied due to a failure to complete a form prescribed by an agency.

Second, §89(3) of the Freedom of Information Law states that a request should be made in writing for records "reasonably described". As such, in my view, any written request that reasonably describes the records sought should suffice.

Third, to provide you with additional information, enclosed 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 contains a sample letter of request.

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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3078

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

October 19, 1983

Ms. Catherine O. Clark
Town Clerk
Town of Worcester
Worcester, NY 12197

Dear Ms. Clark:

I have received your letter of October 11 and appreciate your comments.

Your remarks pertain to an advisory opinion sent to Ms. Mary Ives on October 5 regarding the use of a form prescribed by the Town of Worcester for the purpose of requesting records under the Freedom of Information Law. Although you provided the records sought promptly to Ms. Ives, I would like to offer the following comments.

First, you wrote that it is your understanding that "all requests have to be signed by the person so making the same". As indicated in my letter to Ms. Ives, §89(3) of the Freedom of Information Law merely requires that a request be made in writing that "reasonably describes" the records sought. In a technical sense, the identity of an applicant for records is generally irrelevant. 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". Consequently, the name of an applicant should have no bearing upon rights of access to records. If, for example, a name on a request is typewritten or stamped, or if a request is submitted under a corporate name, a failure to sign the request could not in my opinion constitute a basis for delaying or denying rights of access.

Second, although many agencies have developed request forms, the Freedom of Information Law itself makes no reference to a particular form to be used. I would like to point out that under the original Freedom of Information Law enacted in 1974, a form was prepared by the Comptroller to be completed when payroll information was requested. At the time, §88(1)(g) of the Law appeared to require the disclosure of payroll information only when requested by members of the news media. Nevertheless, when the current Freedom of Information Law became effective in 1978, it removed any distinction in terms of rights of access between the news media and the public generally. Consequently, the form used under the Freedom of Information Law as originally enacted became unnecessary and is now no longer required or used.

I hope that my remarks have served to provide clarification.

Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3079

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

October 25, 1983

Mr. Norman Tepper
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tepper:

Your correspondence addressed to Ms. Cathy Nolan of the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is responsible for advising with respect to the New York Freedom of Information Law.

In brief, the correspondence pertains to your unsuccessful attempts to obtain medical records pertaining to your wife, who was apparently involved in an automobile accident, treated at North Shore Hospital, and later died.

I would like to offer the following comments and suggestions.

First, the Freedom of Information Law applies only to records in possession of state and local government in New York. Stated differently, rights of access granted by the Freedom of Information Law pertains to records of an "agency", which is defined to mean:

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

As such, records of a private hospital, for example, even though it might receive substantial state and federal funding, would in my view fall outside the requirements of the Freedom of Information Law.

Second, with regard to medical records, there is no law of which I am aware that grants direct rights of access to hospital records to either the subject of the records, a patient, or, as in this instance, next of kin. There is, however, a statute that permits what might be characterized as indirect access to medical records.

Specifically, §17 of the Public Health Law entitled "Release of medical records" states in relevant part that:

> "[U]pon the written request of any competent patient, parent or guardian of an infant, committee for an incompetent, or conservation of a conservatee, an examing, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physician or hospital..."

Based upon the language quoted above, as a general rule, a physician may obtain medical records pertaining to a patient after having received a request to do so from a patient or person acting on behalf of a patient who bears one of the legal relationships described in §17.

While §17 of the Public Health Law does not make specific reference to the next of kin of a deceased patient, if, for example, you have a family doctor, it is suggested that you attempt to have that doctor request the records pertaining to your wife from North Shore Hospital.

And third, since the incident was an automobile accident, if you have not already done so, you may obtain a motor vehicle accident report from the police department that prepared the report. Accident reports would be available to you under §66-a of the Public Officers Law or the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3080

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

October 25, 1983

Ms. Bette Smith
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Smith:

I have received your letter of October 6 as well as a news article attached to it, both of which pertain to disclosure of records by the Newburgh Police Department.

The news article indicates that the Department recently adopted a "tougher policy of releasing crime information to the public and the press". The article also noted "that the police are reporting minor crimes, but are holding back details of crimes under investigation". In defending the policy, the article indicated that:

> "Gershel said that the press' easy access to the 'pink sheets', or incident reports, made some victims reluctant to report crimes for fear that their names will be printed in the paper and open them to retaliation.
>
> "He said the policy struck a 'happy balance' between the public's right-to-know and the department's obligation to safeguard people who come forward reporting crimes."

You have requested my comments regarding the policy and asked "where is the line drawn as to what can be withheld from the press and the public in this area."

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

While the Law is expansive in its scope, many of the grounds for denial are clearly intended to provide an agency, such as a police department, with the capacity to withhold records or portions of records when disclosure might be damaging to a person or a governmental process.

Notwithstanding the capacity to withhold, however, a blanket denial of access may be inappropriate. It is emphasized that the introductory language of §87(2) states that an agency may withhold "records or portions thereof" that fall within one or more grounds for denial. Therefore, there may be situations in which a single record might be both available and deniable in part. In such instances, an agency should in my view withhold or delete those portions of records that fall within one or more of the grounds for denial; the remainder should, however, be accessible.

For example, in the context of the news article, there may be three grounds for denial of relevance.

Perhaps of greatest significance with regard to records of a police department 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..."

From my perspective, records compiled for law enforcement purposes may be withheld under the language quoted above only to the extent that the harmful effects of disclosure described would arise. If, for instance, disclosure would interfere with an investigation or identify a confidential informant, the Law permits an agency to withhold records.

Another ground for denial of potential significance might be §87(2)(b). That provision enables an agency to withhold "records or portions thereof" when disclosure would result in "an unwarranted invasion of personal privacy".

The remaining ground for denial of possible significance is likely §87(2)(f), which permits an agency to withhold records or portions thereof when disclosure would "endanger the life or safety of any person".

With respect to Chief Gershel's comments, I agree that victims should not be reluctant to come forward for fear that there may be retaliation. However, in my opinion, the Freedom of Information Law provides the Department with the capacity to withhold victims'or witnesses' identities based upon the grounds for denial described earlier. For example, when disclosure of a victim's name would result in an unwarranted invasion of personal privacy or endanger that person's safety, that portion of a "pink sheet" might be deleted. The remainder that merely describes the event might be accessible. In the same vein, while I agree with Chief Gershel's intent to strike "a happy balance" between the public's right to know and considerations of privacy, safety and effective law enforcement, the Freedom of Information Law in my view permits that such a balance may be realized. Instead of withholding an entire record or file, however, it is my opinion that the Department should review records on a case by case basis to determine which portions, if any, might justifiably be withheld.

It is also noted that a police blotter or its equivalent has been found to be available under the Freedom of Information Law [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. Although the phrase "police blotter" is not specifically defined by any provision of law, the court in Sheehan, supra, based upon custom and usage, determined that a police blotter is a log or diary in which any event reported by or to a police department is recorded. It was specified in the decision that the blotter is available,

for it contains no investigative information, but rather a summary of events of occurrences. Therefore, if the Newburgh Police Department maintains a police blotter or its equivalent, I believe that it should be made available.

Finally, I would conjecture that no useful purpose would be served by withholding information that briefly describes events in which the Police Department may be involved, whether minor or serious. It is my understanding that any person can listen to radio calls on a police scanner. If that is so, and even if no police blotter is maintained, information concerning crimes and other events is effectively available to the public. As indicated earlier, this is not to say that all records prepared in conjunction with an investigation must be made available in their entirety, for the Freedom of Information Law permits an agency to deny certain records or portions of records in accordance with the grounds for denial. However, once again, I believe that police records, such as the incident reports to which the news article referred should not be withheld in every instance, but only to the extent that the grounds for denial appearing in the Freedom of Information Law may justifiably be asserted.

Enclosed is a copy of the Freedom of Information Law for your consideration. In addition, to enhance the understanding of an compliance with the Freedom of Information Law, copies of the Law and this opinion will be sent to Chief Gershel.

I hope that I 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: Chief Gershel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3081

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

October 25, 1983

Mr. Paul H. Spain
Deputy County Clerk
Rensselaer County
Office of the County Clerk
County Court House
Troy, NY 12180

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Spain:

I have received your letter of October 20 in which you requested and advisory opinion.

Specifically, you have asked whether the public has the right to know whether "a specific individual has a Pistol Permit, if he is licensed to carry a gun, and if he has a license to buy and sell firearms".

In this regard, I direct your attention to §400.00 of the Penal Law, which is entitled "[L]icenses to carry, possess, repair and dispose of firearms". Subdivision (5) of the cited provision states in relevant part that:

> "[T]he application for any license, if granted, shall be a public record."

Based upon the language quoted above, I believe that an approved pistol license application is a "public record" accessible to any person.

It is noted, too, that the Court of Appeals, the state's highest court, has held that §400.00(5) of the Penal Law grants access to approved applications, notwithstanding any of the grounds for denial of access appearing in the Freedom of Information Law [see Kwitny v. McGuire, 443 NYS 2d 867, aff'd 77 AD 2d 839, aff'd 53 NY 2d 968 (1981)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3085

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

October 28, 1983

Chief W.J. Peverly
East Syracuse Police Department
204 North Center Street
East Syracuse, NY 13057

Dear Chief Peverly:

I have received your letter of October 26 and appreciate your interest in the Freedom of Information Law.

In brief, as Chief of Police, you explained that information is requested on an ongoing basis, but that there is often a need to protect individuals identified in records or, in some instances, maintain confidentiality.

With respect to the Freedom of Information Law, as you may be aware, all records of an agency are presumptively available. However, the Law permits an agency to withhold records or portions of records that fall within one or more among eight grounds for denial. Further, many of the grounds for denial are based upon potentially harmful effects of disclosure.

For example, perhaps most relevant to records of a police department is §87(2)(e), which states that an agency may withhold records that:

> "are compiled for law enforcement purpose 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..."

Therefore, if, for instance, an investigation is in progress and disclosure would interfere with the investigation, §87(2)(e) could likely be cited as a basis for withholding.

It is noted, too, that §87(2)(f) permits an agency to withhold records or portions thereof when disclosure would "endanger the life or safety of any person".

To provide you with additional information, enclosed are various materials that may be useful to you. The attachments include the Freedom of Information Law, an explanatory pamphlet on the subject, a summary of judicial decisions rendered under the Freedom of Information Law, a list of some statutes that require confidentiality and an index to written advisory opinions rendered under the Freedom of Information Law by this office. Upon review of the index, if there are opinions of particular interest, you may request copies by identifying the opinions by key phrase or number. In the alternative, although the Committee does not have the resources to publish its opinions, they are distributed to various law libraries across the state. Close to you is the Syracuse Law School Library, which maintains all of the opinions rendered by this office. If you or your staff seek to review the opinions at that library, the person to contact would be Ms. Claudia Newton.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3083

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

October 27, 1983

Mr. David J. Finnegan
Moore, Berson, Lifflander
& Mewhinney
555 Madison Avenue
New York, NY 10022

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Finnegan:

I have received your letters of October 7 and October 13, as well as the correspondence transmitted with them.

According to your letters and the correspondence you have engaged in various requests for records in possession of the Commission on Cable Television. Although various records were made available under the Freedom of Information Law, a response to your requests by William Huff, the Commission's records access officer, indicated that:

> "...your request is in the nature of a discovery procedure in connection with the litigation you have instituted against this Commission on behalf of your client, Satellite Television of New York Associates. It is therefore appropriate this discovery be carried out according to the custom and practice associated with litigated matters."

In addition, since your client apparently refused to produce various materials sought by means of discovery by the Commission, Mr. Huff added that:

> "...as is customary in litigated matters, and consistent with fairness, we will delay responding to your additional requests pending receipt of the material we have sought from you."

The question raised in your letter of October 7 in conjunction with Mr. Huff's response is whether the Commission "can 'delay' disclosure of records based upon litigation between the parties".

Your second letter, in which you also sought an advisory opinion, refers to a letter to the Commission dated August 30 in which your firm requested "all records concerning Co-op City and satellite master antenna systems generally". Although you wrote that the Commission staff asserted that "they had made a search of all records", you later learned that the Commission filed materials with the Federal Communications Commission that cites a study concerning Co-op City and satellite master antenna systems.

As such, the question raised in your second letter is as follows:

> "[D]id the New York State Commission on Cable Television fail to comply with the provisions of the Public Officers Law by concealing from the undersigned statistical studies contained it is files?"

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

From my perspective, a response to both questions involves one issue. That issue involves the use of the Freedom of Information Law by a person who is or may be involved in litigation with the agency from which it seeks records.

It is noted in this regard that there appears to be disagreement between the Appellate Divisions that have specifically dealt with the issue.

The Appellate Division, First Department, has held in various contexts that the Freedom of Information Law is intended to enhance the people's right to know the process of governmental decision making and that, therefore, the

Freedom of Information Law cannot appropriately be used as a vehicle by which a party may circumvent disclosure devices generally employed in litigation. Most recently, the Appellate Division, First Department, stated that:

> "[W]e held in Arzuaga v. New York City Transit Authority, 73 A.D.2d 518, 519, 422 N.Y.S.2d 689, that, once litigation is commenced FOIL is 'not intended to afford a new research tool to private litigants in matters not affected by a public interest (Matter of D'Alessandro v. Unemployment Ins. Appeal Bd., 56 A.D. 2d 762, 763, 392 N.Y.S.2d 433)...[nor is it a] shortcut to the Civil Practice Law and Rules Discovery Procedures' (material in parenthesis in text and material in brackets added). A little more than a year ago we reiterated in Brady & Co. v. City of N.Y., 84 A.D.2d 113, 445 N.Y.S.2d 724, appeal dism., 56 N.Y.2d 711, 451 N.Y.S.2d 735, 436 N.E.2d 1337, our continually unanimous position against the use of FOIL to further in-progress litigation.
>
> "Upon the basis of the position taken by this Court, we find that Special Term erred when, after litigation had begun, it held that there was merit to petitioner's FOIL request. We reject Special Term's conclusion that the Court of Appeals decision in Matter of John P. v. Whalen, 54 N.Y.2d 89, 444 N.Y.S.2d 598, 429 N.E.2d 117, has any relevance to the issue involved herein. That case is distinguishable. Unlike this petitioner which is seeking to recover damages for breach of contract, the petitioner in Matter of John P. v. Whalen, supra, was a doctor who was under investigation by the State Board of Professional Medical Conduct" [Application of M. Farbman & Sons, Inc., 465 NYS 2d 28, 29; __ AD 2d __ (1983)].

If Farbman, supra, represents an accurate interpretation of the Freedom of Information Law, it would appear that the Commission could delay or perhaps withhold records under certain circumstances.

On the other hand, the Appellate Division, Fourth Department, has held on two occasions that rights of access granted by the Freedom of Information Law are not affected by the fact that the applicant for records sought under the Freedom of Information Law is also a litigant. As early as 1975, when dealing with an application made under the Freedom of Information Law by an attorney involved in litigation against an agency, the Fourth Department found that records sought under the Freedom of Information Law should be made equally available to any person, regardless of status or interest [Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Most recently, in dealing with a somewhat different situation, the Appellate Division, Fourth Department, stated that:

> "[T]he fact that the claimants may obtain the information requested pursuant to the Freedom of Information Law, does not warrant the disclosure requested under Article 31 of the CPLR. '(T)he standing of one who seeks access to records under the Freedom of Information Law is as member of the public, and is neither enhanced (Matter of Fitzpatrick v. County of Nassau, Dept. of Public Works, 83 Misc.2d 884, 887-888, 372 N.Y.S.2d 510) nor restricted (Matter of Burke v. Yudelson, 51 A.D.2d 673, 674, 378 N.Y.S.2d 165) because he is a litigant or potential litigant.' (Matter of John P. v. Whalen, 54 N.Y.2d 89, 99, 444 N.Y.S.2d 598, 429 N.E.2d 117.) As a corollary, the standing of one who seeks to discover records under the discovery provisions of Article 31 of the CPLR is a litigant, and is neither enhanced nor restricted because he may have access as a member of the public, to those records under the Freedom of Information Law. The procedures to be followed under each of these statutes are distinctly different. If the claimants desire to obtain the information they seek under the Freedom of Information Law, they must first apply to the records access officer and if their application is denied, they must appeal to the appeals officer" [Moussa v. State, 91 AD 2d 893 (1983)].

If Burke and Moussa, supra, are accurate, rights of access to the records sought should be determined in accordance with the Freedom of Information Law, notwithstanding your status as a litigant.

It is noted that both Appellate courts cited Matter of John P. v. Whalen, supra, in which the Court of Appeals stated that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted... because he is also a litigant or potential litigant [54 NY 2d, 89, 99 (1981)]. While the decision rendered in Farbman sought to distinguish the situation from Matter of John P. v. Whalen, it is my view that other decisions rendered by the Court of Appeals tend to uphold the view expressed by the Fourth Department.

For instance, in discussing the capacity of an agency to withhold records, the Court of Appeals in Fink v. Lefkowitz stated that:

> "[T]o 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 ordered (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 materials requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [47 NY 2d 567, 571 (1979)].

The Court of Appeals alluded to the eight grounds for denial listed in §87(2) in other opinions as the only bases for withholding records sought pursuant to the Freedom of Information Law [see e.g., Westchester-Rockland Newspapers v. Kimball, 50 NY 2d 575, 580 (1980); Doolan v. BOCES, 48 NY 2d 341, 346-347 (1979)].

Further, although the New York Freedom of Information Law and the federal Freedom of Information Act [5 U.S.C. §552) differ in many respects, the structure of the two statutes and their presumptions of access are the same. In this regard, in a review of the use of the Freedom of Information Act for discovery purposes, the Administrative Conference of the United States recently wrote that:

> "[T]he separate disclosure mechanisms established by the FOIA and by discovery serve different purposes. Congress' fundamental design when it enacted the FOIA in 1966 was to permit the public to inform itself about the operations of government. All members of the public are beneficiaries of the Act because Congress' goal was a better informed citizenry. A requester's rights under the Act are therefore neither diminished nor enhanced by his status as a party to litigation or by his litigation generated need for the requested records. Discovery, on the other hand, serves as a a device for narrowing and clarifying the issues to be resolved in litigation and for ascertaining the facts, or information as to the existence or whereabouts of facts, relevant to those issues. In the discovery context, a party's litigation generated need for documents does affect the access available to him and may result in the disclosure to him of documents not available to the public at large.
>
> "The purposes of these two disclosure mechanisms indicates what the relationship between them should be. The FOIA provides one level of access to government documents; under current law, that access is uniformly available to any person upon request. Discovery provides a second level of access available only to parties to litigation. A party's access in discovery to government documents which he needs for litigation purposes is independent of the access available to any member of the public under the FOIA" (Federal Register, Vol. 48, No. 200, Friday, October 14, 1983, p. 46795).

No judicial decision rendered under the Freedom of Information Law of which I am aware has discussed the issue of the use of that statute as a discovery device as expansively as the Administrative Conference has described its view. However, based upon John P. v. Whalen, supra, and the other determinations of the Court of Appeals cited earlier, I am in general agreement with the position expressed by the Administrative Conference.

I hope that I 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 Huff
William B. Finneran
Edward P. Kearse

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3084

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

October 27, 1983

Mr. Louis Briendel
81-A-2313
Box 618
Auburn, NY 13021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Briendel:

I have received your letter of October 6 in which you requested advice regarding the means by which you could obtain copies of "the state and federal guidelines for the use of asbestos". You also asked whether any directive received by the Department of Correctional Services on the subject matter might be made available to you.

In this regard, I would like to offer the following comments and suggestions.

First, I have made several inquiries on your behalf in order to determine which state agency might be able to assist you. I was informed that a source of the information in question is the Department of Labor. As such, it is suggested that you write to Mr. Norman Lund, Program Manager, Office of Public Employee Safety and Health, Department of Labor, Room 6911, Two World Trade Center, New York, NY 10047. Perhaps you could ask Mr. Lund if he could send or direct you to the federal office that has developed guidelines regarding asbestos.

Second, in terms of the use of the Freedom of Information Law, §89(3) of the Law requires that a request "reasonably describe" the records sought. As such, it is suggested that you indicate in your request that the guidelines sought pertain to government facilities, particularly correctional facilities.

Third, to request a directive sent to a correctional facility, the regulations of the Department of Correctional Services provide that the request should be sent to the facility superintendent. If such a directive is maintained only at the Albany office of the Department, a request may be sent to the Deputy Commissioner for Administration, Department of Correctional Services, Building 2, State Campus, Albany, NY 12226.

Lastly, with respect to fees for copies, the Freedom of Information Law states generally that an agency may charge up to twenty-five cents per photocopy. However, either the superintendent or the deputy commissioner for administration may in his discretion waive the fees pursuant to the Department's regulations (§5.36).

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3085

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

October 28, 1983

Chief W.J. Peverly
East Syracuse Police Department
204 North Center Street
East Syracuse, NY 13057

Dear Chief Peverly:

I have received your letter of October 26 and appreciate your interest in the Freedom of Information Law.

In brief, as Chief of Police, you explained that information is requested on an ongoing basis, but that there is often a need to protect individuals identified in records or, in some instances, maintain confidentiality.

With respect to the Freedom of Information Law, as you may be aware, all records of an agency are presumptively available. However, the Law permits an agency to withhold records or portions of records that fall within one or more among eight grounds for denial. Further, many of the grounds for denial are based upon potentially harmful effects of disclosure.

For example, perhaps most relevant to records of a police department is §87(2)(e), which states that an agency may withhold records that:

> "are compiled for law enforcement purpose 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..."

Therefore, if, for instance, an investigation is in progress and disclosure would interfere with the investigation, §87(2)(e) could likely be cited as a basis for withholding.

It is noted, too, that §87(2)(f) permits an agency to withhold records or portions thereof when disclosure would "endanger the life or safety of any person".

To provide you with additional information, enclosed are various materials that may be useful to you. The attachments include the Freedom of Information Law, an explanatory pamphlet on the subject, a summary of judicial decisions rendered under the Freedom of Information Law, a list of some statutes that require confidentiality and an index to written advisory opinions rendered under the Freedom of Information Law by this office. Upon review of the index, if there are opinions of particular interest, you may request copies by identifying the opinions by key phrase or number. In the alternative, although the Committee does not have the resources to publish its opinions, they are distributed to various law libraries across the state. Close to you is the Syracuse Law School Library, which maintains all of the opinions rendered by this office. If you or your staff seek to review the opinions at that library, the person to contact would be Ms. Claudia Newton.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 945
FOIL-AO- 3086

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

November 2, 1983

Ms. Loretta Prisco
PACE
30 Westbury Avenue
Staten Island, NY 10301

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Prisco:

I have received your letter of October 12, which reached this office on October 25.

According to your letter:

> "[O]n August 29, 1983, Community School Board #31 voted on the Superintendent's recommendations to eliminate positions in this district in order to present a balanced budget to the Central Board of Education. Each budget item was voted upon separately by the members of the Board during a closed executive session. The original recommendations of the Superintendent were changed by this vote."

You have asked for an advisory opinion regarding the propriety of voting on the elimination of positions during an executive session as well as a denial by the Board of your request "that the votes of each member of the School Board by made public."

In this regard, I would like to offer the following comments.

First, as you are aware, the Open Meeitngs Law is based upon a presumption of openness. Stated differently, all meetings of a public body, such as a school board, must be conducted open to the public, except to the extent that an executive session may be convened pursuant to §100(1) of the Open Meetings Law.

Second, from my perspective, the only ground for entry into executive session relevant to the issue described is §100(1)(f). The cited provision 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 capacity to enter into an executive session under §100(1)(f) is restricted to those situations in which a "particular person" is the subject of a discussion in relation to one or more of the topics appearing in that provision. Since the issues determined by the Board behind closed doors involved the manner in which public monies would be expended, it appears that questions of policy were determined, rather than issues involving a "particular person". If my assumptions are accurate, I do not believe that a discussion of the addition to or elimination from the budget of positions would constitute an appropriate topic for discussion during an executive session.

Third, as a general rule, a public body that has properly convened an executive session may vote during an executive session. Nevertheless, various interpretations of the Education Law, §1708(3), indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd __ NY 2d __ (1982)].

Fourth, with respect to your request and the ensuing denial relative to the votes of each member of the Board, I direct your attention to the Freedom of Information Law. Specifically, §89(3) of the Freedom of Information Law states in part that nothing in the Freedom of Information Law "shall be construed to require an entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven..." Relevant to the issue, subdivision (3) of §87 states that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Consequently, the cited provision represents one of the few instances in the Freedom of Information Law in which an agency, including a school board, must prepare a record. Further, I believe that §87(3)(a) requires that a record be prepared in every instance in which a final vote is taken which identifies each member who voted and the manner in which he or she cast a vote. Therefore, the denial of your request was in my opinion inappropriate and constitutes a failure to comply with the requirements 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: Community School Board
Frank Murphy, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3087

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

November 2, 1983

Mr. Emanuel Delvecchio
[redacted]

Dear Mr. Delvecchio:

I have received today your letter of October 23 in which you requested from this office "any information that the state of New York has" pertaining to you.

Please be advised that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As such, the Committee does not maintain possession of records generally, nor does it have the authority to compel an agency to grant or deny access to records.

Further, there is no single source in either New York State or the federal government whereby an individual may request and obtain all records pertaining to him.

Under both the federal and the New York freedom of information statutes, requests should be directed to the agencies that you believe would maintain records pertaining to you. In addition, both statutes require that an applicant "reasonably describe" the records sought. Therefore, it is likely that a request for records pertaining to you without greater description would not reasonably describe the records requested. Whenever possible, additional information, such as dates, descriptions of events, identification numbers and similar information should be included in a request in order that an agency might be able to locate the records that you are seeking.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3088

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

November 2, 1983

Mr. Ronald F. Rizzo
20536-053
Unit 2-a
P.O. Box 1000
Otisville, NY 10963

Dear Mr. Rizzo:

I have received your letter of October 26 in which you requested various materials and raised questions regarding the Freedom of Information Law.

First, as requested, enclosed is a copy of §160.50 of the Criminal Procedure Law.

Second, you alluded references to an appeals bureau in Suffolk County. In this regard, §89(4)(a) of the Freedom of Information Law provides that any person denied access to records may appeal to the head or governing body of the agency or to whomever is designated to render determinations on appeal. Unless I am mistaken, all appeals made under the Freedom of Information Law following denials of access by agencies of Suffolk County government should be directed to the Suffolk County Attorney.

Third, you requested copies of footnotes relative to §§7801 through 7804 of the Civil Practice Law and Rules. In this regard, it is noted that the case notes regarding §§7802 through 7804 alone comprise an entire volume. Under the circumstances, due to the extent of the information in question, I believe that it would be inappropriate to copy all of the information sought, for it would likely violate copyright laws. It is suggested that it would be proper and less expensive to order the appropriate volumes from the Lawyers Cooperative Publishing Company, which is located in Rochester, NY.

Fourth, you asked for assistance regarding the source of sample forms relative to suits initiated under the Freedom of Information Law. This office does not maintain the type of information that you are seeking. However, enclosed is a summary of judicial decisions rendered under the Freedom of Information Law. Perhaps you could obtain copies of records pertaining to decisions of particular interest to you from the clerks of the courts in which the decisions were rendered.

Fifth, you have asked what "21 NYCRR Chapter XXV Part 1401 means" in relation to the Freedom of Information Law. The provision that you cited consists of general regulations promulated by the Committee pursuant to §89(1)(b)(iii) of the Freedom of Information Law. It is emphasized that the regulations are procedural in nature. As such, they do not deal with the extent to which records are accessible or deniable.

Lastly, you asked whether any amendments to the Freedom of Information Law have been recently enacted. In this regard, enclosed is a copy of the current Freedom of Information Law, including all amendments.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3089

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

November 2, 1983

Mr. Herbert N. Wallace
[redacted]

Dear Mr. Wallace:

I have received your letter of October 28 in which you apparently requested from this office materials regarding a settlement relative to a construction project.

Please be advised that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As such, this office does not maintain 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.

It is suggested that you submit a request under the Freedom of Information Law, reasonably describing the records sought [see attached Freedom of Information Law, §89 (3)], to the agency that maintains the records.

Enclosed is an explanatory pamphlet that contains a sample letter of request that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3090

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

November 3, 1983

Mr. Armando Guzman, Jr.
75-B-1413 (F-17)
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Guzman:

Your letter addressed to the Secretary of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is responsible for advising with respect to the New York Freedom of Information Law.

You have requested information that would identify the address of the office that maintains "Fort Dix military files preceding a discharge therefrom". It is apparently your understanding that, following a discharge, medical files are forwarded to another agency. As such, you also requested information regarding the central headquarters of the Department of the Army, which maintains "regular discharge files".

Please be advised that the Secretary of State is a New York government officer, and that the Committee's jurisdiction involves the New York Freedom of Information Law. That statute applies only to records of units of state and local government in New York. As such, neither the New York State Department of State nor the Committee has jurisdiction with respect to records in possession of the federal agencies to which you alluded.

Relevant under the circumstances would likely be two federal statutes, the Freedom of Information Act (5 USC §552) and the Privacy Act (5 USC §552a). In this regard, to submit a request for records or to determine the

location of records pertaining to you, it is suggested that you write to the Department of the Army. Specifically, I recommend that you request general information or perhaps records subject to the Freedom of Information and Privacy Acts from the Office of General Counsel, Department of the Army, Washington, DC 20310.

In the alternative, if you or another person have access to a telephone, it is suggested that you contact the Federal Information Center nearest you. The number can be located under "United States Government" in any telephone directory. The personnel at the Federal Information Center could likely inform you of either the location of the records in which you are interested or the specific names and addresses of the individuals at the Department of the Army to whom a request should be made.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-946
FOIL-AO-3091

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

November 3, 1983

Mr. Edward L. Cuddihy
Asst. Managing Editor
The Buffalo News
One News Plaza
P.O. Box 100
Buffalo, NY 14240

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cuddihy:

I have received your letter of October 21 in which you requested an advisory opinion.

Specifically, your questions are whether the "Stadium Committee" designated by Mayor Griffin of the City of Buffalo "is subject to the provisions of the state's Open Meetings Law and if the minutes of this group's meetings are subject to the state's Freedom of Information Law."

In terms of background, you wrote that:

> "[T]he 11-member Stadium Committee was formed by Buffalo Mayor James Griffin in June 1982, meets irregularly on the call of Mayor Griffin, who is an ex officio member, to discuss and plan a possible domed baseball stadium in downtown Buffalo. The committee already has discussed architectural plans and financing with the help of state aid for such a stadium, and in the words of Mayor Griffin, has as its purposes: 'To make things happen in construction of a downtown stadium.'

> "The committee is made up of Buffalo businessmen, sports media personalities, the majority leader of the Buffalo Common Council, and the chairman of the Erie County Legislature."

You wrote further that:

> "[N]ews Reporter Franklyn Buell was told at the group's most recent meeting that the meeting was closed to the press and the public and that all meetings of this committee were so closed. Upon requesting information on the meeting, Reporter Buell was told that once the committee gets all its information and turns it over to the governor, The News can get its information from the governor's office."

It is the view of the Buffalo News that the Committee is subject to the Open Meetings Law and that the materials generated by the Committee should be subject to the Freedom of Information Law.

I agree with those contentions for the following reasons.

First, with respect to the application of the Open Meetings Law, the issue is whether the Stadium Committee is a "public body" subject to the Open Meetings Law. In this regard, it is noted that there was substantial controversy under the Open Meetings Law as originally enacted regarding the status of committees, subcommittees and similar advisory bodies that have only the capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 97(2) of the Law now 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."

The original definition referred to entities that "transact" public business; the current definition refers to entities that "conduct" public business. Moreover, there was no reference in the original definition to committees and subcommittees, for example.

Based upon the changes in the Law, the specific language of the current definition of "public body" and its judicial interpretation, I believe that a committee, such as that which you described, would constitute a "public body" subject to the Open Meetings Law.

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, a committee would, under the circumstances, be an entity consisting of at least two members. Second, even though there may have been no specific direction that a committee must act by means of a quorum, §41 of the General Construction Law has long required that any entity consisting of three or more public officers or persons can perform their duties only by means of a quorum, a majority vote of its total membership. Third, the Committee in question clearly conducts public business and performs a governmental function for a public corporation, in this instance, the City of Buffalo. As such, I believe that all the conditions required to find that the entity in question is a public body can be met.

I would also like to point out that a recent decision of the Appellate Division, Fourth Department, indicates that advisory committees, including a committee designated by the executive head of a municipality, in that case, the Mayor of Syracuse, are considered to be public bodies subject to the Open Meetings Law [Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Second, with regard to minutes, I direct your attention to §101 of the Open Meetings Law. Subdivision (1) pertains to minutes of open meetings and states that:

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

Subdivision (2) of §101 concerns minutes of executive session and requires that such minutes make reference only to the nature of action taken during an executive session, the date and the vote.

Subdivision (3) of §101 provides 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."

As such, minutes of meetings of a public body are in my opinion accessible in accordance with the provisions of the Freedom of Information Law.

Third, in terms of "material generated by this Committee", I believe that all such materials fall within the scope of rights of access granted by the Freedom of Information Law.

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

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

Under the circumstances, I believe that any materials generated by the Stadium Committee would be produced for an agency, the City of Buffalo, and, therefore, would fall within the scope of the Freedom of Information Law.

I would like to point out, too, that a decision cited earlier, Syracuse United Neighbors, supra, also found that minutes of advisory task forces designated by the Mayor of the City of Syracuse "must be disclosed" (id. at 985). With respect to records other than minutes that may be generated by the Stadium Committee, 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.

In sum, it is my opinion that the Stadium Committee designated by Mayor Griffin is, based upon the provisions of the Open Meetings Law and its judicial interpretation, a "public body" subject to the Open Meetings Law in all respects, and that any records generated by or in possession of the Committee 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor Griffin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 947
FOIL-AO-3092

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

November 3, 1983

Mr. John B. Boyhan
President
Alert Engine, Hook, Ladder
and Hose Co., No. 1, Inc.
555 Middle Neck Road
Great Neck, NY 11023

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Boyhan:

I have received your letter of October 14 and appreciate your interest in the Open Meetings Law.

As President of a volunteer fire company, you indicated that the Board of Trustees of the Company holds monthly meetings, as well as special meetings on occasion. Your question involves "who may or may not attend such meetings." It is your view that the meetings are subject to the Open Meetings Law.

In my opinion, any person may attend meetings of the Board of Trustees, for I believe that the Board is a "public body" subject 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 a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the conditions precedent can be met, I believe that a volunteer fire company is a "public body" subject to the Open Meetings Law.

I would also like to point out that the status of volunteer fire companies had long been unclear. Such companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not such bodies conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, in a landmark decision, 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.

I would like to point out, too, that both the Open Meetings and Freedom of Information Laws are based upon presumptions of openness. In the case of the Open Meetings Law, all meetings must be conducted open to the public, except to the extent that an executive session may be held

in accordance with §100(1) of the Law. Similarly, under the Freedom of Information Law, all records of a volunteer fire company are available, except to the extent that they fall within one or more of the grounds for denial of access appearing in §87(2) of that Law.

As you requested, enclosed are copies of the Open Meetings and Freedom of Information Laws, as well as an explanatory pamphlet dealing 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3093

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

November 3, 1983

Mr. Arvis Chalmers
Knickerbocker News
Box 7134
State Capitol
Albany, NY 12224

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Chalmers:

You have requested an advisory opinion under the Freedom of Information Law regarding a response to a request for records by Dolores E. Cross, President of the New York State Higher Education Services Corporation (hereafter "the Corporation").

According to the correspondence, you are interested in obtaining from the Corporation a list of persons in default, or a separate list of persons in default who are also on the state payroll. Dr. Cross explained that information regarding persons in default is withheld as a matter of policy on the ground that disclosure would result in an unwarranted invasion of personal privacy [see attached, Freedom of Information Law, §87(2)(b)]. Dr. Cross indicated that there are no separate lists that identify borrowers or defaulters by means of their employers. Nevertheless, it was stated that:

> "...we do from time-to-time run a listing of our current defaulted borrowers against the State payroll. We do not view the resultant matches obtained as a 'record'. It is simply a temporary worksheet used for our internal collection purposes."

In conjunction with Dr. Cross' contentions, I would like to offer the following comments and suggestions.

First, as indicated earlier, the applicable standard in the Freedom of Information Law involves a question regarding whether records or portions thereof would if disclosed result in "an unwarranted invasion of personal privacy". When dealing with issues relative to personal privacy, subjective judgments must often be made. Stated differently, one reasonable person viewing a particular item might contend that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy. An equally reasonable person might nonetheless contend that disclosure of the same item might be innocuous or perhaps "warranted", thereby resulting in a permissible invasion of personal privacy.

It is noted that §87(2)(b) pertains to unwarranted invasions of personal privacy "under the provisions of subdivision two of section eighty-nine of this article". In this regard, §89(2)(b) provides that "an unwarranted invasion of personal privacy" includes, but shall not be limited to situations that are described by means of five examples of unwarranted invasions of personal privacy.

Two of the examples of unwarranted invasions of personal privacy listed in §89(2)(b) may be relevant to the situation. Specifically, those two exceptions state that an unwarranted invasion of personal privacy includes:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it..."

With respect to §89(2)(b)(i), the question in my view is whether the information sought could be equated with "credit history". If a list identifying defaulters could be construed as a record reflective of credit histories, it would appear that the records sought could justifiably be withheld.

On the other hand, the relationship between a person who obtains a loan from the Corporation involves a single event relating to credit. In my opinion, that relationship based upon one loan could not likely be viewed as a "history" of a person's credit worthiness.

With regard to §89(2)(b)(iv), the information in my view is of a personal nature, disclosure might result in personal or economic hardship to the individuals in default or identified on the default list, but the information is relevant to the work of the Corporation. In construing §89(2)(b)(iv), it has been found that its language is conjunctive. As stated by the Court of Appeals in Gannett Co. Inc. v. County of Monroe, which construed the analogous provision of the original Freedom of Information Law, "the exception...is available only if there is both proof of such hardships and it is established that the records sought are not relevant or essential to the ordinary work of the agency or municipality. The latter branch of this conjunctive requirement cannot be met in this instance" [emphasis added by court, 45 NY 2d 954, 955 (1978)]. Similarly, in a recent decision that involved §89(2)(b)(iv), the court cited the Gannett decision and found that the application of that provision required that the "test" of finding that disclosure would result in personal or economic hardship and that the information was not relevant to the work of the agency could not be met. Therefore, it was held that the records were required to be made available [Flatbush Development Corp. v. Insurance Department, Sup. Ct., New York Cty., NYLJ, October 7, 1983].

If the records sought could not be characterized as containing credit histories, and if a court employed the test described in relation to §89(2)(b)(iv) of the Freedom of Information Law, it is possible that either the entire default list or any subgrouping within it, such as a "match" between the general default list and the state agency payroll, would be available, for those records in each instance would be relevant to the work of the Corporation.

It is possible that a court might not look to the examples of unwarranted invasions of personal privacy listed in §89(2)(b) of the Freedom of Information Law. As indicated earlier, the cited provision states that an unwarranted invasion of personal privacy includes but "shall not be limited to" those examples. Consequently, while a court might seek guidance from the examples listed in §89(2)(b), I do not believe that it would be bound by those five specific references to unwarranted invasions of personal privacy.

In view of the foregoing, rights of access to the information that you are seeking are in my opinion unclear. In brief, once gain, if it is found that the contents of the list are reflective of "credit history", the records sought could in my opinion be withheld. On the other hand, if a court does not consider the information analogous to credit histories, it is possible that the entire default list or any subgrouping derived from the list might be available, for any such record would be relevant to the work of the agency. In the alternative, a court might reject either of those absolutes and determine that some aspects of the records sought are accessible, while others may be withheld. For instance, some aspects of a list might be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy; others might be available based upon a finding that disclosure would constitute a permissible invasion of personal privacy.

Second, whether or not a record derived by means of a match that identifies persons on the state payroll is characterized as a "worksheet" or is used temporarily, I believe that such a list would constitute a "record" that falls within the scope of 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, a "worksheet" or similar printout would in my view constitute a "record" that falls within the scope of the Freedom of Information Law.

In order to learn more about the Corporation's procedures and the nature of the worksheet developed of matches of persons on the general default list with the state payroll, as I informed you by telephone, I have contacted Gilbert Harwood, Counsel to the Corporation, on your behalf.

According to Mr. Harwood, the current worksheet is developed by running the general default list against the list of persons who received any salary compensation from the state during calendar year 1982. Therefore, the "match" includes people who are in repayment, people who are no longer employed by the state, CETA employees, temporary employees, and in some instances, people who appear to be in default but who might be exempt from repayment due to a particular status, such as a handicapping condition. As such, although a "match" is made against the state payroll, there is no existing record that clearly identifies current state employees who are in default.

In terms of the contents of the "match" developed by the Corporation against the state payroll, as indicated earlier, people identified as defaulters may be in repayment or may have defaulted due to circumstances beyond their control, such as being laid off, being a temporary employee or, perhaps due to medical problems.

Consistent with statements by Dr. Cross, it is possible that the identities of those persons would if disclosed result in an unwarranted invasion of personal privacy. Further, if disclosure of defaulters' names may be viewed as a deterrent to default, disclosure of the identities of those individuals might serve no useful purpose.

On the other hand, there may be persons identified on the list who currently earn a significant state salary but who nonetheless remain in default. Perhaps the disclosure of the identities of those people would represent a less severe invasion of privacy, for there may be no good reason for their failure to repay a loan. In addition, once again, in terms of a deterrent to default, disclosure of the identities of state employees who earn a substantial salary might serve to enhance the work of the Corporation by increasing its capacity to collect monies due on unpaid loans.

Under the circumstances, I believe that rights of access to the information that you are seeking remain unclear and are subject to judicial interpretation. However, it is suggested that you might want to contact Dr. Cross for the purpose of reaching a compromise under which you could obtain those portions of existing records identifying state employees earning a substantial salary, but who remain in default and are not in repayment.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dolores Cross, President
Gilbert Harwood, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3093

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

November 3, 1983

Mr. Arvis Chalmers
Knickerbocker News
Box 7134
State Capitol
Albany, NY 12224

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Chalmers:

You have requested an advisory opinion under the Freedom of Information Law regarding a response to a request for records by Dolores E. Cross, President of the New York State Higher Education Services Corporation (hereafter "the Corporation").

According to the correspondence, you are interested in obtaining from the Corporation a list of persons in default, or a separate list of persons in default who are also on the state payroll. Dr. Cross explained that information regarding persons in default is withheld as a matter of policy on the ground that disclosure would result in an unwarranted invasion of personal privacy [see attached, Freedom of Information Law, §87(2)(b)]. Dr. Cross indicated that there are no separate lists that identify borrowers or defaulters by means of their employers. Nevertheless, it was stated that:

> "...we do from time-to-time run a listing of our current defaulted borrowers against the State payroll. We do not view the resultant matches obtained as a 'record'. It is simply a temporary worksheet used for our internal collection purposes."

In conjunction with Dr. Cross' contentions, I would like to offer the following comments and suggestions.

First, as indicated earlier, the applicable standard in the Freedom of Information Law involves a question regarding whether records or portions thereof would if disclosed result in "an unwarranted invasion of personal privacy". When dealing with issues relative to personal privacy, subjective judgments must often be made. Stated differently, one reasonable person viewing a particular item might contend that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy. An equally reasonable person might nonetheless contend that disclosure of the same item might be innocuous or perhaps "warranted", thereby resulting in a permissible invasion of personal privacy.

It is noted that §87(2)(b) pertains to unwarranted invasions of personal privacy "under the provisions of subdivision two of section eighty-nine of this article". In this regard, §89(2)(b) provides that "an unwarranted invasion of personal privacy" includes, but shall not be limited to situations that are described by means of five examples of unwarranted invasions of personal privacy.

Two of the examples of unwarranted invasions of personal privacy listed in §89(2)(b) may be relevant to the situation. Specifically, those two exceptions state that an unwarranted invasion of personal privacy includes:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it..."

With respect to §89(2)(b)(i), the question in my view is whether the information sought could be equated with "credit history". If a list identifying defaulters could be construed as a record reflective of credit histories, it would appear that the records sought could justifiably be withheld.

On the other hand, the relationship between a person who obtains a loan from the Corporation involves a single event relating to credit. In my opinion, that relationship based upon one loan could not likely be viewed as a "history" of a person's credit worthiness.

With regard to §89(2)(b)(iv), the information in my view is of a personal nature, disclosure might result in personal or economic hardship to the individuals in default or identified on the default list, but the information is relevant to the work of the Corporation. In construing §89(2)(b)(iv), it has been found that its language is conjunctive. As stated by the Court of Appeals in Gannett Co. Inc. v. County of Monroe, which construed the analogous provision of the original Freedom of Information Law, "the exception...is available only if there is both proof of such hardships and it is established that the records sought are not relevant or essential to the ordinary work of the agency or municipality. The latter branch of this conjunctive requirement cannot be met in this instance" [emphasis added by court, 45 NY 2d 954, 955 (1978)]. Similarly, in a recent decision that involved §89(2)(b)(iv), the court cited the Gannett decision and found that the application of that provision required that the "test" of finding that disclosure would result in personal or economic hardship and that the information was not relevant to the work of the agency could not be met. Therefore, it was held that the records were required to be made available [Flatbush Development Corp. v. Insurance Department, Sup. Ct., New York Cty., NYLJ, October 7, 1983].

If the records sought could not be characterized as containing credit histories, and if a court employed the test described in relation to §89(2)(b)(iv) of the Freedom of Information Law, it is possible that either the entire default list or any subgrouping within it, such as a "match" between the general default list and the state agency payroll, would be available, for those records in each instance would be relevant to the work of the Corporation.

It is possible that a court might not look to the examples of unwarranted invasions of personal privacy listed in §89(2)(b) of the Freedom of Information Law. As indicated earlier, the cited provision states that an unwarranted invasion of personal privacy includes but "shall not be limited to" those examples. Consequently, while a court might seek guidance from the examples listed in §89(2)(b), I do not believe that it would be bound by those five specific references to unwarranted invasions of personal privacy.

In view of the foregoing, rights of access to the information that you are seeking are in my opinion unclear. In brief, once gain, if it is found that the contents of the list are reflective of "credit history", the records sought could in my opinion be withheld. On the other hand, if a court does not consider the information analogous to credit histories, it is possible that the entire default list or any subgrouping derived from the list might be available, for any such record would be relevant to the work of the agency. In the alternative, a court might reject either of those absolutes and determine that some aspects of the records sought are accessible, while others may be withheld. For instance, some aspects of a list might be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy; others might be available based upon a finding that disclosure would constitute a permissible invasion of personal privacy.

Second, whether or not a record derived by means of a match that identifies persons on the state payroll is characterized as a "worksheet" or is used temporarily, I believe that such a list would constitute a "record" that falls within the scope of 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, a "worksheet" or similar printout would in my view constitute a "record" that falls within the scope of the Freedom of Information Law.

In order to learn more about the Corporation's procedures and the nature of the worksheet developed of matches of persons on the general default list with the state payroll, as I informed you by telephone, I have contacted Gilbert Harwood, Counsel to the Corporation, on your behalf.

According to Mr. Harwood, the current worksheet is developed by running the general default list against the list of persons who received any salary compensation from the state during calendar year 1982. Therefore, the "match" includes people who are in repayment, people who are no longer employed by the state, CETA employees, temporary employees, and in some instances, people who appear to be in default but who might be exempt from repayment due to a particular status, such as a handicapping condition. As such, although a "match" is made against the state payroll, there is no existing record that clearly identifies current state employees who are in default.

In terms of the contents of the "match" developed by the Corporation against the state payroll, as indicated earlier, people identified as defaulters may be in repayment or may have defaulted due to circumstances beyond their control, such as being laid off, being a temporary employee or, perhaps due to medical problems.

Consistent with statements by Dr. Cross, it is possible that the identities of those persons would if disclosed result in an unwarranted invasion of personal privacy. Further, if disclosure of defaulters' names may be viewed as a deterrent to default, disclosure of the identities of those individuals might serve no useful purpose.

On the other hand, there may be persons identified on the list who currently earn a significant state salary but who nonetheless remain in default. Perhaps the disclosure of the identities of those people would represent a less severe invasion of privacy, for there may be no good reason for their failure to repay a loan. In addition, once again, in terms of a deterrent to default, disclosure of the identities of state employees who earn a substantial salary might serve to enhance the work of the Corporation by increasing its capacity to collect monies due on unpaid loans.

Under the circumstances, I believe that rights of access to the information that you are seeking remain unclear and are subject to judicial interpretation. However, it is suggested that you might want to contact Dr. Cross for the purpose of reaching a compromise under which you could obtain those portions of existing records identifying state employees earning a substantial salary, but who remain in default and are not in repayment.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dolores Cross, President
Gilbert Harwood, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3094

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

November 3, 1983

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear [redacted]:

Your letter of October 11 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government, a unit of the Department of State, which is responsible for advising with respect to the Freedom of Information Law.

According to your letter, you have attempted without success to "get the release" of x-rays "from the Lewis County General Hospital in Lowville, New York to take to [your] chiropractor". You wrote, however, that in its refusal to provide the x-rays, officials of the County Hospital claimed that "a state law makes it illegal" to provide the x-rays to your chiropractor. Attached to your letter is a copy of §17 of the Public Health Law, which is cited as the basis for the refusal on the ground that a chiropractor is not a physician.

In this regard, I would like to offer the following comments.

First, the Freedom of Information Law applies generally to records in possession of units of state and local government. The scope of the Law is determined in part by the term "agency", which is defined in §86(3) of the Freedom of Information Law to include:

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

If the Lewis County General Hospital is part of county government, I believe that it would be an "agency" and that the records in its possession would fall within the requirements of the Freedom of Information Law.

Second, the Freedom of Information Law is based upon 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, there may be two grounds for denial of relevance. Nevertheless, in my view, neither would be applicable.

Section 87(2)(b) 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..." In turn, §89(2)(c) states in part that:

> "[U]nless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...
>
> ii. when the person to whom a record pertains consents in writing to disclosure;
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Therefore, unless a different ground for denial may appropriately be cited to withhold records, I believe that records pertaining to you could be made available when you consent in writing to disclosure or when you request records and present reasonable proof of identity.

The other 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. 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, it would appear that x-rays would consist of factual information. As such, in my opinion, §87(2)(g) could not be cited to withhold the records in question.

Fourth, having reviewed §17 of the Public Health Law, I do not believe that there is any requirement that the Hospital must refuse to make medical records available to a competent patient, for example. In a situation in which medical records are maintained by a private hospital, the Freedom of Information Law would not be applicable. In such a case, a private hospital could in my view withhold medical records unless they are requested on behalf of a patient by a physician or another hospital. However, if the Lewis County General Hospital is run by the County, I believe that the Freedom of Information Law would apply and that the x-rays should be made available to you.

Lastly, if a chiropractor is not considered a "physician", the requirements concerning disclosure to physicians under §17 of the Public Health Law would not be applicable. Nevertheless, for the reasons described earlier, it would appear that the records should be made available to you or to a person designated on your behalf under the Freedom of Information Law.

Enclosed for your consideration is a copy of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Administrator, Lewis County General Hospital

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 949
FOIL-AO- 3095

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

November 4, 1983

Jack Rossman, President
Worcester Concerned Citizens
P.O. Box 115
Worcester, NY 12197

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rossman:

I have received your letter of October 10 as well as an attachment signed by Ms. Mary Ives.

Your letter and the statement by Ms. Ives pertain to the implementation of the Freedom of Information and Open Meetings Laws by the Town of Worcester.

According to your letter a major issue facing the Town pertains to a water system improvement project. Following the public hearings on the subject, you wrote that approval of the project by the Town Board was "accomplished in a 'Secret Meeting' of the Town Board Members in early July, '83."

In this regard, it is noted that the Open Meetings Law has been given a broad construction by the courts. Specifically, it has been held that any convening of a quorum of a public body constitutes a "meeting" subject to the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)] that must be preceded by notice in accordance with §99 of the Law (see attached).

With respect to notice, §99(1) of the Open Meetings Law concerns meetings scheduled at least a week in advance and requires that notice of such meetings be given to the news media and to the public by means of posting in one or more designated locations not less than seventy-two hours prior to such meetings. Section 99(2) pertains to meetings scheduled less than a week in advancy 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. Therefore, although the Open Meetings Law requires that notice of the time and place of all meetings must be provided, there is nothing in the Open Meetings Law that would prohibit a public body from calling a special or emergency meeting on short notice. Further, §99(3) states that the Open Meetings Law does not require the publication of legal notice. Consequently, situations often arise in which notice may be given to a newspaper, for example, but in which the newspaper does not publish the notice due to time or space constraints.

Whether the project in question was approved at a "secret meeting" in my view involves a question of fact. It is suggested that you review the Town Board's minutes of its July meetings to obtain more information relative to the allegation.

It is noted, too, that this office has been contacted several times by various Town officials during the past few weeks in order to raise questions regarding compliance with the Freedom of Information and Open Meetings Laws. Based upon those conversations, it appears that good faith efforts are being made to comply with both statutes.

In terms of the enforcement of the Open Meetings Law, §102(1) of the Law states in relevant part that:

> "[A]ny aggrieved person shall having standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.

> "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."

Please be advised that the statute of limitations regarding an Article 78 proceeding is four months. Therefore, if, for example, a violation of the Open Meetings Law occurred at the beginning of July, the statute of limitations may have run.

With regard to Ms. Ives' statement, it does not appear that the Freedom of Information Law was violated.

Ms. Ives wrote that a request for records was made on September 18, that a response was given in three days and that the records were made available on September 23. Section 89(3) of the Freedom of Information Law requires that an agency must respond to a request within five business days of its receipt. Therefore, a response was given within the time period prescribed by the Law.

It is also noted that §87(1)(b)(iii) permits an agency to charge up to twenty-five cents per photocopy up to nine by fourteen inches. Further, an agency is required to provide copies of records accessible under the Law. However, I believe that an agency may require payment prior to making copies, for §89(3) states in part that copies shall be made "upon payment of, or offer to pay" the requisite fees for copies.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Town Board
Catherine Clark, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3096

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

November 4, 1983

Mr. Edward Lieberman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lieberman:

As you are aware, your letter of October 23 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the New York Freedom of Information Law.

According to your letter, you are interested in "uncovering" information about yourself. Although you expressed the belief that the information may be obtained under the "Freedom of Information Act", you wrote that you are not familiar with the means by which you may assert your rights.

In this regard, I would like to offer the following comments and suggestions.

First, several statutes may be relevant to your inquiry. The New York Freedom of Information Law is applicable to records of units of state and local government. There is also a federal Freedom of Information Act, as well as a federal Privacy Act, which apply to records of federal agencies. Therefore, if you are interested in seeking records of New York City or State agencies, the Freedom of Information Law would apply; if you seek records from a federal agency, the federal Freedom of Information and Privacy Acts would apply.

Second, each agency under both the state and federal statutes designates an access officer. As such, requests should be addressed to the access officers at the agencies that you believe might maintain records pertaining to you. It is suggested, too, that you mark "Freedom of Information Request" on the outside of an envelope in order to ensure that your request will be forwarded to the appropriate person.

Third, both the state and federal freedom of information statutes require that a request "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you include names, dates, identification numbers, descriptions of events and similar information that would enable an agency to locate the records sought.

Fourth, Governor Cuomo recently approved the "Personal Privacy Protection Law", which will become effective on September 1, 1984 and will apply to New York State agencies. That law will enhance an individual's capacity to obtain records pertaining to him, permit a person to attempt to correct or amend a record, and establish controls on the nature of personal information that may be collected by state agencies.

Enclosed for your consideration are copies of the New York Freedom of Information Law, an explanatory pamphlet containing a sample letter of request, and a copy of a federal publication that contains the text of the federal Freedom of Information and Privacy Acts, as well as sample letters of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3097

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

November 4, 1983

Mr. Scott Morgenstern
82-A-2631
Long Island Correctional Facility
Unit #1D
P.O. Box 1012
Brentwood, NY 11717

Dear Mr. Morgenstern:

I have received today your letter of October 23 in which you requested from this office "any information that the State of New York has" pertaining to you.

Please be advised that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As such, the Committee does not maintain possession of records generally, nor does it have the authority to compel an agency to grant or deny access to records.

Further, there is no single source in either New York State or the federal government whereby an individual may request and obtain all records pertaining to him.

Under both the federal and New York freedom of information statutes, requests should be directed to the agencies that you believe would maintain records pertaining to you. In addition, both statutes requires that an applicant "reasonably describe" the records sought. Therefore, it is likely that a request for records pertaining to you without greater description would not reasonably describe the records requested. Whenever possible, addition information, such as dates, descriptions of events, identification numbers and similar information should be included in a request in order that an agency might be able to locate the records that you are seeking.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3098

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

November 4, 1983

Mr. John J. Sheehan
[redacted]

The staff of the Committee on Open Government 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 October 11, as well as the correspondence attached to it.

According to the correspondence, you requested from the Division of State Police a copy of a blood alcohol test regarding a named individual who was involved in a motor vehicle accident. A review of the accident report and a letter from the Town Justice of the Town of Norwich indicates that the individual pleaded guilty to a charge of driving while intoxicated. In response to your request, it was found that disclosure would result in an unwarranted invasion of personal privacy and that, therefore, the record sought would be denied.

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

In my opinion, since the individual to whom the record pertains was convicted of driving while intoxicated, and since the proceedings involving the charges arising out of the accident have apparently been terminated, the blood alcohol test results should in my view likely be made available.

As you are 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.

As indicated in the response to your request by the State Police, it would appear that the only ground for denial would involve a finding that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law.

If the charges against the individual had not yet been determined, or if the charges were dismissed in her favor, I might concur that the record in question could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. In those circumstances, it is possible that the record might also be deniable under §87(2)(e)(ii), for the test would constitute a record compiled for law enforcement purposes which if disclosed might have deprived a person of a right to a fair trial or impartial adjudication. Similarly, in a situation in which a person is charged, but the charge is dismissed in his or her favor, records pertaining to the charge may become sealed and confidential pursuant to the provisions of §160.50 of the Criminal Procedure Law. Nevertheless, since the individual in question pleaded guilty, presumably on the basis of the test in question, and was sentenced, disclosure at this juncture would in my view likely result in a permissible rather than an unwarranted invasion of personal privacy.

It is noted, too, that breathalyzer test results were found to be available under the Freedom of Information Law prior to the determination of a charge in a situation in which there was news media exposure to an incident [Foley v. Wilson, Sup. Ct., Wayne Cty., Nov. 23, 1982]. Foley did not deal with the issue in the same context as that presented in the correspondence, and the Court found that some of the records involved in the investigation could be withheld under §87(2)(e). However, it was also determined that "at the conclusion of any investigation and criminal action, the respondents are to promptly provide the petitioner with the records he requested (id.).

In this instance, once again, it appears that the investigation has ended, and the subject of the test has been charged and pleaded guilty. If that is so, the record sought should in my view be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: N.G. Lecakes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-948
FOIL-AO-3099

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

November 4, 1983

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear [redacted]:

I have received your letter of October 18 and the materials attached to it.

The correspondence describes your efforts to gain access to records in possession of the Keshequa Central School District pertaining to your son. You wrote that "school officials kept 'saying' [you] could get the requested records but every time [you] went to the school to see them they asked [you] to see someone else or make [your] request to someone else". Since you have not yet been provided access to your son's file, you have asked whether your rights had been violated.

In my opinion, you do have the right to inspect and/or copy the records in which you are interested that pertain to your son.

Although the Freedom of Information Law applies generally to records of units of state and local government, including school districts, I believe that various other provisions of law would be more directly relevant. Specifically, the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) provides rights of access to "education records" identifiable to a student under the age of eighteen to parents of the students, while concur-

rently guaranteeing confidentiality of those records with respect to third parties. It is emphasized that the regulations promulgated by the United States Department of Education under the Act define "education records" expansively to mean those records which:

> "(1) Are directly related to a student, and
>
> (2) are maintained by an educational agency or institution or by a party acting for the agency or institution."

As a general rule, the only records identifiable to your child that would fall outside the definition would be those solely in possession of a teacher that are not accessible or revealed to any individual other than a substitute teacher. Therefore, conversely, the Act grants rights of access to you to any education records identifiable to your child that may be revealed to more than one person within the School District.

I would also like to refer to several statements addressed to you in a letter dated July 21 by the Superintendent of Schools, Randolph A. Coon.

One of the matters to which Mr. Coon alluded involved minutes of the School Board meetings. Specifically, he wrote that "[Y]our request for July 11, 1983 Board minutes cannot be honored yet because the minutes have not yet been approved by the Board. That would ordinarily occur on August 8, 1983." In this regard, I direct your attention to the Open Meetings Law, which in subdivision (1) of §101 pertains to the contents of minutes of open meetings, in subdivision (2) pertains to the contents of minutes of executive sessions, and in subdivision (3) prescribes time limits within which minutes must be prepared and made available. The cited provision requires that minutes of open meetings be prepared and made available within two weeks of such meetings. The same provision also requires that if action is taken during an executive session, minutes must be prepared and made available within one week.

It has been recognized that, in some instances, a public body might not reconvene during a period of one or two weeks, as the case may be, to approve minutes. Consequently, it has been suggested that, to comply with the Law, minutes should be prepared within the required time limits, but that they might be marked "non-final", "unapproved", "draft", for example. By so doing, the public can learn generally of what transpired at a meeting, and at the same time, notice is effectively given that the minutes are subject to change.

Mr. Coon also referred to minutes of meetings of a committee on the handicapped. In this regard, I believe that a committee on the handicapped is a "public body" subject to the Open Meetings Law. "Public body" is defined to mean:

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

A committee on the handicapped is an entity consisting of more than two members that is required to act by means of a quorum under §51 of the General Construction Law. In addition, the description of duties of a committee on the handicapped appearing in §4402 of the Education Law indicates that such a committee transacts public business and performs a governmental function for a public corporation, a school district. Therefore, I believe that the Committee is subject to the Open Meetings Law in all respects.

Nevertheless, it is likely that portions of the meetings of the committee on the handicapped fall outside the scope of the Open Meetings Law. Specifically, §103(3) of the Law states that its provisions shall not apply to "matters made confidential by federal or state law." In this regard, the federal Family Educational Rigths and Privacy Act provides that "education records" identifiable to particular students are confidential to all but the parents of the students. Since education records are generally confidential, a discussion of such records would

constitute a matter made confidential by federal law and therefore would be outside the scope of the Open Meetings Law. For example, if the committee is engaged in a discussion of a particular student other than your own child, the discussion would be confidential to all but the parent of the student, who could assert his or her right to engage in a discussion of education records pertaining to his or her child. By coupling the rights granted by federal law and the Open Meetings Law, a discussion of a particular child by a committee on the handicapped would in my view be open to the members of the committee and the parents of the child.

It is also noted that, §§4402(3)(c) of the Education Law provides that a committee on the handicapped shall:

> "[P]rovide written prior notice to the parents or legal guardian of the child whenever such committee plans to modify or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child and advise the parent or legal guardian of the child of his opportunity to address the committee, either in person or in writing, on the propriety of the committee's recommendations on program placements to be made to the board of education or trustees."

Lastly, as a condition precedent to the receipt of funds under the Education of the Handicapped Act, states and school districts that receive funding through the Act are required to comply with the regulations adopted by the United States Department of Education. In this regard, §121a.345 of the Department's regulations, entitled "parent participation" states that:

> "(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:
>
> (1) Notifying the parents of the meetings early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall given the parent, on request, a copy of the individualized education programs."

In view of the direction given in the regulations quoted above, it is clear that a public agency, such as a committee on the handicapped, must make efforts to ensure that parents may attend meetings and that parents are fully aware of any discussions and deliberations that transpire at the meetings.

In sum, I believe that the records in which you are interested, including minutes of a meeting of a committee on the handicapped that pertain to your child, should be made available to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Randolph A. Coon, Superintendent
Bradley Lowell, President
Keshequa School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3100

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

November 7, 1983

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear [redacted]:

I have received your letter of October 27 in which you requested an advisory opinion.

According to your letter, you have unsuccessfully attempted to obtain written verification from Pace University regarding the completion of an undergraduate program. However, due to a balance owed to the University, you indicated that you cannot obtain the written verification that you seek. Your question is whether Pace University is permitted to withhold such information from you.

In this regard, it is emphasized that the Freedom of Information Law applies only to records in possession of an "agency", which is defined in §86(3) of the Freedom of Information Law to include units of state and local government in New York. Consequently, Pace University, a private institution, would not in my view fall within the scope of the Freedom of Information Law.

There is, however, a federal statute that likely deals with your question. Specifically, the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), commonly known as the "Buckley Amendment", pertains to education records in possession of:

> "...all educational agencies or institutions to which funds are made available under any Federal [program for which the U.S. Commissioner of Education had administrative responsibility, as specified by law or by delegation of authority pursuant to law.]" [regulations promulgated by the United States Department of Education, §99.1(a)].

Therefore, if, for example, Pace University participates in the federal guaranteed student loan program, or other similar programs, I believe that it would be subject to the provisions of the Buckley Amendment.

In brief, the Buckley Amendment grants rights of access to "education records", a term that is defined broadly, to parents of students under the age of eighteen and to "eligible students". An eligible student is a person eighteen years of age or more who attends or attended an institution of post-secondary education, such as a college or university. Concurrently, the Buckley Amendment requires that education records generally be kept confidential with respect to third parties, unless parents of students or eligible students consent to disclosure.

Since the Buckley Amendment is administered by the United States Department of Education, I have contacted the appropriate office of the Department on your behalf. Under the circumstances, it appears that you have the right to request and obtain a copy of an "unofficial" record indicating the nature of the undergraduate program in which you participated. However, due to the monies owed to the University, I was informed that the University would not be obliged to provide an official transcript, containing the official seal of the University, for example.

It is noted, too, that there is a decision involving a request by a former student of the State University who sought an official transcript but who owed the University money. In that case, it was found that a regulation promulgated by the Board of Trustees of the State University was reasonable in enabling the University to withhold an official transcript until debts had been paid [see Spas v. Wharton, 106 Misc. 2d 180 (1980)].

I am unaware of the nature of rules and regulations that might have been adopted by Pace University regarding the issue. However, once again, based upon my conversation with a representative of the Department of Education, an unofficial record regarding the undergraduate program should be provided.

If you need additional information regarding your rights, it is suggested that you contact Ms. Pat Ballinger, United States Department of Education, Switzer Building, Room 4512, Washington, DC 20202. Ms. Ballinger can be reached by phone at (202) 245-0233.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Registrar, Pace University

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3101

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

November 7, 1983

Mr. Joseph D. Mullady
Mr. Kevin Allen
80-A-0629
Box 51
Comstock, NY 12821

Dear Messrs. Mullady and Allen:

I have received your letter of October 31 as well as the materials attached to it.

Having reviewed the correspondence, as you requested, I am returning the correspondence addressed to the Deputy Commissioner of Administration of the Department of Correctional Services and the Superintendent of the Long Island Correctional Facility.

Also enclosed for your consideration are copies of the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law, the Freedom of Information Law itself, and an explanatory pamphlet on the subject.

It is noted that §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of its receipt. If no response has been given, I believe that you could consider your request to have been constructively denied and that an appeal may be submitted pursuant to §89(4)(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

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3102

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

November 9, 1983

Ms. Isabelle H. Malm
Underhill Society of America, Inc.
Office of the Historian
21 Moeller Street
Hicksville, NY 11801

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Malm:

As you are aware, you letter addressed to the Attorney General has been forwarded to the Committee on Open Government, a unit of the Department of State. The Committee is responsible for advising with respect to the Freedom of Information Law.

Your question is "who may go into Town Clerk's offices and research vital statistics records".

First, it is noted in this regard that the Freedom of Information Law does not include within its scope vital records. Those records are specifically dealt with in §§4173 and 4174 of the Public Health Law. Enclosed are copies of those provisions for your consideration.

Second, I would also like to point out that the State Health Department maintains original vital records, and town and city registrars maintain duplicate copies. As such, there may be two sources of vital records. If you are interested in obtaining more information on the subject, it is suggested that you write to the State Health Department, Bureau of Vital Records, Tower Building, Empire State Plaza, Albany, NY 12237. The Bureau of Vital Records may be reached by phone at (518) 474-3038.

Third, as the legal custodian of vital records, the Health Department has promulgated regulations regarding access to those records. Further, §35.5 of its regulations deals specifically with genealogical searches. Enclosed is a copy of that provision. From my perspective, while many vital records are available only if they are requested for a "proper purpose", many records sought for genealogical research should be available to any person.

Lastly, it is suggested that additional inquiries on the subject be directed to the Bureau of Vital Records at the State Health Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3103

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

November 10, 1983

Mr. John R. Robinson
80-D-0110
Box 51
Comstock, NY 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Robinson:

I have received your letter of October 27 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns rights of access to records of a district attorney containing the results of a "polygraph examination". You indicated that the examination in question involved a criminal matter under investigation more than ten years ago, and that you "voluntarily submitted to such tests".

In this regard, I would like to offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records. Therefore, if, for example, the records to which you referred have been destroyed, the Freedom of Information Law would not apply and the agency would not in my opinion be obliged to create or reconstruct a new record on your behalf [see attached, Freedom of Information Law, §89(3)].

Second, assuming that the records in which you are interested continue to exist, they would in my view likely be available.

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.

Two of the grounds for denial may be relevant. One is §87(2)(e), which permits an agency to 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 disclosed confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Under the circumstances, due to the passage of time, it would appear unlikely that any of the harmful effects of disclosure described in §87(2)(e) would arise now.

The other provision of potential significance is §87(2)(b) which states that an agency may withhold records 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)(c) states in part that:

> "[U]nless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Therefore, if no other ground for denial would apply, records pertaining to you would be available upon presentation of reasonable proof of your identity.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 952
FOIL-AO-3104

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

November 10, 1983

Ms. Cecily Bailey
Press-Republican
170 Margaret Street
Plattsburgh, NY 12901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Bailey:

I have received your letter of October 26 in which you requested an advisory opinion regarding the implementation of the Freedom of Information and Open Meetings Laws by the Board of Trustees of the Village of Saranac Lake.

According to your letter, you have unsuccessfully sought tape recordings of meetings of the Board. You wrote that you were informed by Village officials "that the tapes are not public record because they are used merely as tools for minutes of the meetings." Further, although you requested to listen only to those aspects of the tape involving the open meeting, your capacity to do so was denied because the tape includes a recording of the Board's executive session.

The other matters to which you referred pertain to a special meeting held without notice and a "personnel appointment" approved during an executive session.

I would like to offer the following comments regarding the issues presented in your letter.

With respect to the tape recording, I believe that the portion of the tape reflective of an open meeting, and perhaps portions reflective of the discussion in executive session, are, based upon the language of the Freedom of Information Law and its judicial interpretation, accessible to you.

Section 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 language quoted above, a tape recording prepared by or in possession of the Village constitutes a "record" subject to rights of access granted by the Freedom of Information Law.

In construing the definition in relation to records of a volunteer fire company that involved a lottery, the Court of Appeals, the state's highest court, held that:

> "The 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" [Westchester-Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)].

As such, if the Village maintains a tape recording or any document, regardless of physical form, in my view, it would constitute a "record" that falls within the scope of the Freedom of Information Law.

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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law. Since the portion of the tape involving the open meeting was publicly disclosed, and since an person could have been present at the open meeting, that aspect of the tape would in my view clearly be available. Moreover, it has been held judicially that a tape recording of an open meeting is accessible under the Freedom of Information Law [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 noted, too, 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 grounds for denial that follow. Therefore, I believe that the Legislature envisioned situations in which a record might be available and deniable in part. Under the circumstances, since you requested only that portion of the tape recording that pertains to the open meeting, I believe that the Village would be obliged to make that aspect of the tape available to you, either by means of listening or by permitting a copy to be made of that portion of the tape.

The remaining issues described in your letter pertain to the Open Meetings Law.

With regard to notice of meetings, I direct your attention to §99 of the Law. Section 99(1) pertains to meetings scheduled at least a week in advance and requires that notice of the time and place must be given to the news media (at least two) and posted in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) pertains to meetings scheduled less than a week in advance and requires that notice be given in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. Consequently, I believe that notice must be given prior to all meetings, whether regularly scheduled or otherwise.

Finally, you referred to a situation in which a personnel appointment was made and voted upon during an executive session. In my view, there may have been no requirement that the vote be made in public. As a general rule, if a public body has properly convened an executive session, it may vote during the executive session, unless the vote is to appropriate public monies. Therefore, if, for example, an appointment is made to fill a vacancy for which funds had previously been appropriated, it is unlikely that the Open Meetings Law was violated.

It is noted that if action is taken in executive session, §101(2) requires that minutes of the action taken, the date and vote must be prepared. Further, §101 (3) requires that minutes of an executive session must be made available within one week. The minutes should include a record of votes that identifies the manner in which each member voted pursuant to §87(3)(a) of the Freedom of Information Law.

Enclosed are copies of the Freedom of Information and Open Meetings Laws. Copies of those statutes and this opinion will be sent to the persons identified in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Rick Meyer
Marilyn Clement

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3105

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

November 10, 1983

Mr. Maurice R. Archer
81-D-0113 H-53
Taconic Correctional Facility
250 Harris Road
Bedford Hills, NY 10507

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Archer:

I have received your letter of September 27 as well as the correspondence attached to it. Please note that the materials reached this office on October 13.

You have requested assistance regarding the capacity of yourself or the Committee to enforce the Freedom of Information Law by means of requiring that certain information pertaining to you be amended or corrected.

In this regard, I would like to offer the following comments.

First, although you suggested an intent to employ the provisions of the Freedom of Information Law as a mechanism for seeking to correct or amend records, nothing in the Freedom of Information Law pertains to your capacity to do so. As a general matter, the Freedom of Information Law grants rights of access to certain records. Nothing in the Law, however, deals with the capacity of an individual to attempt to amend or correct records pertaining to him.

Second, the authority of this office is solely advisory. Stated differently, neither the Committee nor myself has the capacity to compel an agency to grant or deny access to records, or, in this instance, to correct records that might be inaccurate.

Third, I do not believe that the Department of Correctional Services is authorized to review, correct or amend criminal history information. However, the regulations promulgated by the Division of Criminal Justice Services permit a person to review a criminal history record pertaining to him and to challenge the accuracy of such a record. Enclosed for your consideration are copies of Parts 6050 and 6051 of the regulations promulgated by the Division of Criminal Justice Services. It is suggested that you carefully review those regulations for the purpose of directing an inquiry to the Division.

Fourth, in a related vein, you referred to a pre-sentence report. In this regard, it is emphasized that specific provisions of the Criminal Procedure Law deal with access to and the contents of pre-sentence reports and memoranda. Consequently, enclosed for your consideration is §390.50 of the Criminal Procedure Law, which is entitled "Confidentiality of pre-sentence reports and memoranda".

Lastly, it is suggested that you contact an attorney with a legal aid group or Prisoners' Legal Services. Perhaps an attorney associated with such a group could provide you with the help that you need.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3106

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

November 10, 1983

Mr. Richard Becker
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Becker:

I have received your letter of October 16, as well as the correspondence attached to it.

This most recent correspondence involves your continuing efforts to gain access to records from the Office of Mental Health. The response to your latest request by H.J. Bloch, Director of Human Resources Management at the Kings Park Psychiatric Center, directed you to refer your inquiries to the Claims Bureau at the Department of Law.

Under the circumstances and in view of your previous correspondence, I have contacted the Office of Counsel at the Office of Mental Health on your behalf in order to obtain additional information and to attempt to determine the reason for Mr. Bloch's response.

In this regard, I would like to offer the following comments.

First, the records in which you are interested pertain to events that occurred at least ten years ago. The records in question concern eligible lists for a particular job title as well as a list of the names of persons who were hired under that title. Due to the passage of

time, it is possible that the records sought might no longer exist. If that is so, there would be no obligation on the part of the agency to create or reconstruct new records on your behalf [see attached Freedom of Information Law, §89(3)]. On the other hand, if, for example, eligible lists continue to exist, I believe that such lists should be made available under both the Freedom of Information Law and rules promulgated by the Department of Civil Service.

Second, in my opinion, the response by Mr. Bloch was inappropriate. I believe that an agency in receipt of a request made under the Freedom of Information Law is required to respond to the request. Further, even if the same records are kept in several locations by more than one agency, an agency in receipt of the request is in my view required to attempt to locate the records in its possession for the purpose of determining rights of access.

Lastly, having discussed the matter with an attorney for the Office of Mental Health, I was informed that Mr. Bloch would be contacted for the purpose of explaining to him his responsibilities under the Freedom of Information Law. As such, whether or not the records in which you are interested continue to exist, I believe that you will soon receive an appropriate response from the Office of Mental Health via Mr. Bloch.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3107

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

November 10, 1983

Ms. Dolores Helen Slocum
[redacted]

Dear Ms. Slocum:

I have received your letter of October 26 as well as the materials attached to it.

In brief, you alluded to §§87(2)(b) and 89(2)(b) of the Freedom of Information Law concerning "privacy rights" in relation to a personal situation in which you are involved.

In this regard, I would like to offer the following comments.

First, the provisions of the Freedom of Information Law pertain to records maintained by units of state and local government in New York. As a general matter, 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, the provisions to which you alluded permit an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". As such, the Freedom of Information Law deals with the capacity to withhold records based upon considerations of privacy; it does not in any way deal with the physical safety of an individual. Consequently, it does not appear that the Freedom of Information Law or the services of this office would be of relevance to the situation described in your correspondence.

It is suggested that you discuss the issues with an attorney.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3108

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

November 14, 1983

[redacted]
P.O. Box 618
Auburn, NY 13021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear [redacted]

I have received your letter of October 27 in which you asked that I "investigate Skidmore College" regarding the release of your "school transcript records".

In this regard, I would like to offer the following comments.

First, as a general matter, the Freedom of Information Law is applicable to records of an "agency". Section 86(3) of the Freedom of Information Law defines "agency" to include, in brief, units of state and local government in New York. Since Skidmore College is a private institution, I do not believe that the Freedom of Information Law would be applicable to its records.

Second, although the Freedom of Information Law might not apply, it is likely that the provisions of the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) concerning student records are applicable. The cited provision generally grants access to eligible students eighteen years of age or more in attendance at a post-secondary institution rights of access to "education records" pertaining to them.

Third, I have contaced Skidmore College on your behalf in conjunction with your request that I "investigate". Apparently, due to the program in which you are involved, Skidmore College does not prepare a traditional type of "transcript". I was informed that, in order to prepare a transcript, the evaluation forms sent to you by Skidmore College would have to be completed and returned to the College. I was also informed that upon your return of the completed forms, a transcript would be sent promptly to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3109

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

November 14, 1983

Mr. Earl G. Hall
76-D-0216
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hall:

I have received your letter of November 3 in which you requested assistance regarding the capacity to gain access to records pertaining to you.

According to your letter, you have been denied the right to copies of records regarding school, work and program attendance which you were at the Woodbourne Correctional Facility. It is your belief that someone submitted remarks pertaining to you concerning your participation in those programs that are untrue. As such, your question involves rights of access to records concerning program attendance as well as the identity of your "false accuser".

In this regard, 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, it would appear that records pertaining to you that deal with attendance at the various programs that you identified would be available. Of relevance are two of the grounds for denial, both of which in my view indicate that the records of attendance should be made available.

In brief, §87(2)(g) of the Freedom of Information Law permits the denial of certain "inter-agency or intra-agency" materials [see attached, Freedom of Information Law, §87(2)(g)]. Nevertheless, the cited provision states that "statistical or factual tabulations or data" found within such materials must be made available [see §87(2)(g)(i)]. Since records of attendance would likely constitute factual data, I believe that they should be made available.

Further, although §§87(2)(b) and 89(2)(b) permit an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy", §89(2)(b) provides that, unless a different ground for denial is applicable, disclosure would not constitute an unwarranted invasion of personal privacy when a person to whom a record pertains seeks such a record.

Third, with respect to the name of your "accuser", rights of access are in my view questionable. As indicated earlier, the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would constitute an unwarranted invasion of personal privacy. It is possible, depending upon the circumstances, that disclosure of the identitiy of the "accuser" would result in such an invasion.

Fourth, the Department of Correctional Services, acting pursuant to the Freedom of Information Law, has promulgated procedural regulations. In this regard, it is suggested that you direct a request for the records sought, providing as much description as possible, to the facility superintendent, who is required to respond to a request within five business days of its receipt. Enclosed is a copy of the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3110

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

November 14, 1983

Mr. Vincent Pippard
81-C-263 E-2-16
Box B
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pippard:

I have received your letter of October 25 in which you asked how you might obtain records regarding a proceeding pertaining to you conducted by the superintendent at the Ossining Correctional Facility. You are specifically interested in seeking minutes of the proceeding.

In this regard, I would like to offer the following comments and suggestions.

First, since you did not indicate the nature of the proceeding, it is all but impossible to provide specific direction concerning rights of access.

Second, as a general matter, 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, a request made under the Freedom of Information Law must "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 identifying information as possible, including names, dates, identification numbers, description of events and similar information that will enable agency officials to locate the records sought.

Fourth, in accordance with the Freedom of Information Law, the Department of Correctional Services has promulgated procedural regulations. Under those regulations, a request for records reasonably described should be directed to the facility superintendent. In the event that the records sought are withheld, the reasons for the denial must be given. Further, if the records are denied, you have the right to appeal to Counsel to the Department of Correctional Services.

Enclosed for your review are copies of the regulations of the Department promulgated under the Freedom of Information Law, as well as the Freedom of Information Law itself.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3111

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

November 16, 1983

Mr. God Kundalini Isa Allah
AKA William H. Harrison
82-A-4148
354 Hunter Street
Ossining, New York 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Allah:

I have received your letter of October 28, as well as the correspondence attached to it.

Your inquiry concerns your unsuccessful attempts to obtain records from various offices, including courts and a legal aid society. In this regard, I would like to offer the following comments.

First, it is emphasized that the Freedom of Information Law includes within its scope records of agencies. The term "agency" is defined in §86(3) of the Law to include:

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

In turn, §86(1) defines "judiciary" to mean "the courts of the state, including any municipal court, whether or not of record".

As such, in my view, neither court records nor those in possession of a legal aid society would be subject to the provisions of the Freedom of Information Law.

Second, as you are aware, §255 of the Judiciary Law generally requires a court clerk to provide access to records in his custody upon payment of the appropriate fees. Further, since some of the records sought involve a justice court, another statute might be applicable. Specifically, §2019-a pertains to access to "justices' criminal records and docket". Since the cited provision may be useful and relevant to you, enclosed is a copy 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.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3112

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

November 16, 1983

Mr. Sam Rotenberg
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rotenberg:

I have received your letter of October 31 in which you expressed complaints regarding the implementation of the Freedom of Information Law by the Departments of Labor and Law.

In order to assist you, I have contacted both departments on your behalf.

First, based upon a conversation with an official of the Department of Labor, certain records were made available to you. Other aspects of your request were not answered, apparently due to an incapacity to read your request. As such, perhaps a legible, second request would represent an appropriate course of action.

Second, having contacted the Department of Law, I learned that the designated records access officer is Mr. Albert Singer, whose office is located in Albany.

Third, as a general matter, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for responding 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 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3113

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

November 17, 1983

Mr. Charles J. Theophil
[redacted]

The staff of the Committee on Open Government 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 November 8 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, the New York City Department of Finance prepares and makes available a computer printout of its assessment roll. You apparently requested a record indicating all "parcels on Blocks Nos. 8577 to 8668, Queens, I request a list of the parcels which were granted the Veterans Exemption, with name and address of owner, block & lot numbers and amount of exemption".

In response to your request, Gerald Koszer, Records Access Officer for the Department, indicated that there would be a minimum charge of twenty-five dollars and that producing the information sought would constitute "creating a new record in response to your request."

In conjunction with the facts that you provided, I would like to offer the following comments.

First, the Freedom of Information Law is applicable to all records of an agency. Section 86(4) 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."

As such, I believe that it is clear that computer tapes and discs are subject to rights of access granted by the Law.

Second, §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.

In the context of information stored in a computer on a tape or disc, if, for example, the information sought could be made available based upon existing computer programs, I do not believe that making the information available would involve the creation of a new record. On the other hand, if the information that you are seeking cannot be produced based upon existing programs, a response to your request would in my view represent the creation of a new record, which is not required by the Freedom of Information Law.

Third, with respect to fees, §87(1)(b)(iii) of the Freedom of Information Law states that each agency is required to adopt regulations regarding:

> "...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."

Assuming that the information sought would not involve the creation of a a record, the fees for producing records should in my opinion be based upon the actual cost of reproduction. In many instances in which information is obtained from a computer, the actual cost of reproduction is based upon the use of computer time. For example, if it costs the Department one-hundred dollars an hour to use a computer, and a half hour of computer time is necessary to produce the information sought, the actual cost of reproduction would be fifty dollars.

Once again, however, if reprogramming would be necessary to produce the information that you are seeking, I do not believe that the Department of Finance would be obligated to reprogram on your behalf 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:jm

cc: Gerald Koszer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3114

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

November 18, 1983

Mr. James Egan
Chief Assistant County Attorney
Orange County Department of Law
Orange County Government Center
Goshen, New York 10924

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Egan:

I have received your letter of November 10 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, the Director of the Real Property Tax Service of Orange County received a request from a "private business for release of computer tapes containing tax assessment information provided to the County by the various town assessors within Orange County". You wrote further, that, by informal agreement, town assessors provide assessment information to the County, which enters the information on to computer tapes. The information is then used by the County to print the annual County and town tax statements. The Director of the Real Property Tax Service has contended that the information provided by town assessors "belongs to the town and he has no authority to release same." He also contended that the firm requesting the information should submit its request directly to the town assessor.

Your question is whether the Director of the Real Property Tax Service is required to release to a commercial enterprise real property tax assessment information (or data tapes containing this information) of the various towns within Orange County, or should the requests be made directly to the various town assessors?"

In this regard, I would like to offer the following comments.

First, §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, I believe that even though the information requested may be based upon records submitted to the County by various towns, the computer tape constitutes a "record" subject to rights of access and that the County is required to respond to the request.

Second, as you are 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.

Third, under the circumstances, due to judicial interpretations that involved situations similar to that which you described, I believe that the assessment information that exists in the form of a computer tape is likely available.

In my view, the tape would be accessible under §87(2)(g)(i) of the Freedom of Information Law. Section 87(2)(g) of the Law enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

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

Under the circumstances, the assessment rolls could in my view be characterized as "intra-agency" materials. However, it appears that virtually all of the information contained within an assessment roll, whether it is found within the traditional assessment books or on computer tapes, consists of factual data that is available.

Fourth, §89(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 view of the provision quoted above, nothing in the Freedom of Information Law can be cited to limit or abridge rights of access granted by other provisions of law or by means of judicial determination. Moreover, §89(6) preserves rights of access granted by other provisions of law or by the courts.

In this regard, it has long been held that the contents of an assessment roll as well as materials used in the development of assessments are available to the public [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951) and Sanchez v. Papontas, 32 AD 2d 948 (1969)].

In addition, most recently, it was held that the information contained in traditional assessment roll books that was reproduced within computer tapes is also accessible. In Szikszay v. Buelow [436 NYS 2d 448 (1981)], it was found that:

> "[A]n assessment roll is a public record (Real Property Tax Law §156 subd. 2; General Municipal Law §51; County Law §208 subd. 4)...Such records are open to public inspection and copying except as otherwise provided by law (General Municipal Law §51; County Law §208 subd. 4). Even prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law §66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying..." (id. at 562, 563).

Moreover, although it was argued that disclosure of the contents of the assessment roll would constitute an unwarranted invasion of personal privacy under §87(2)(b)(iii) of the Freedom of Information Law, the court stated that:

> "[I]n view of the history of public access to assessment records, and the continued availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.R.L.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted'..." (id. at 563).

It is noted, too, that a decision rendered by the Supreme Court, Nassau County, held that a computer tape of an assessment roll was available, notwithstanding a contention that it consisted of a list of names and addresses that would be used for commercial purposes [Real Estate Data, Inc. v. County of Nassau and Abe Seldin, Chairman, Board of Assessors, Sup. Ct., Nassau Cty., September 18, 1981].

In sum, assuming that the Director of the Real Property Tax Service maintains computer tapes reflective of assessment rolls submitted by towns, I believe that the tape would fall within the definition of "record", and that, based upon the judicial determinations cited earlier, the tapes would be available from the Director.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3115

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

November 18, 1983

Mr. Levon Jackson
82-A-3375
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

Dear Mr. Jackson:

I have received your recent letter in which you requested from this office various records pertaining to you.

Please be advised that the Committee on Open Government is responsible for advising with respect to 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 grant or deny access to records.

Nevertheless, I would like to offer the following comments and suggestions.

One aspect of your request involves your "arrest record from childhood until now". In this regard, the Department of Correctional Services has promulgated regulations regarding Department records pursuant to the Freedom of Information Law. Enclosed is a copy of those regulations, which in §5.22 make specific reference to the "DCJS report". The DCJS report is the equivalent of a "rap sheet" that indicates arrests and convictions. Section 5.22 indicates that a DCJS report shall be released pursuant to §5.20 concerning the examination of an inmate record by an inmate. The cited provision also indicates that a request for a DCJS report should be directed to the facility superintendent.

The remaining aspect of your inquiry concerns information relating to you since your incarceration. Once again, a request should be directed to the facility superintendent.

It is also emphasized that §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". Therefore, rather than merely requesting records pertaining to yourself without further description, it is suggested that you provide as much specificity as possible, including dates, identification numbers, descriptions of events, 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:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3116

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

November 28, 1983

Hon. L. Paul Kehoe
Member of the Senate
40 Canal Street
P.O. Box 607
Lyons, NY 14489

Dear Senator Kehoe:

I have received your letter of November 17, which reached this office on November 25. Your interest in the Freedom of Information Law is much appreciated.

You have requested "those portions of the Freedom of Information Law and the corresponding regulations and policy statements which deal with the question of what employee records are subject to the Freedom of Information Act". You wrote further that you are particularly interested in provisions that deal with "the question of public access to records of a school teacher's absenteeism."

Enclosed for your consideration is a copy of the Freedom of Information Law. Please note that regulations promulgated by the Committee deal solely with the procedural aspects of the Law. As such, they do not pertain to substance, i.e., rights of access to records.

With respect to your question, I would like to offer the following comments.

First, the Freedom of Information Law includes within its scope all records of an agency, such as a school district. Section 86(4) 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."

Therefore, attendance records are subject to rights of access granted by the Law, even though they may be contained within personnel files.

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 issue involves the extent to which one or more of the grounds for denial might properly be asserted to withhold the records sought.

From my perspective, two of the grounds for denial may be relevant.

One is §87(2)(g) pertaining to "inter-agency or intra-agency" materials. Specifically, 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 determinations must be made available.

Under the circumstances, attendance records would likely consist solely of "statistical or factual tabulations or data". As such, I do not believe that §87(2)(g) could be cited as a basis for withholding.

The remaining ground for denial of 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".

It is emphasized that, when dealing with issues regarding privacy, subjective judgments must often be made. One reasonable person might consider that disclosure of an item of personal information would be offensive, thereby resulting in an unwarranted invasion of personal privacy. Nevertheless, an equally reasonable person considering the same information might feel that disclosure would be inoffensive or innocuous, thereby resulting in a permissible invasion of privacy.

I would like to point out that there have been a number of judicial decisions rendered that involve the privacy of public employees. Those decisions indicate that public employees enjoy less privacy than the public generally, for it has been found in various contexts that public employees must be more accountable than others. Further, in terms of the Freedom of Information Law, the courts in several instances found that records that are relevant to the performance of a public employee's official duties are accessible, for disclosure in those situations 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 a record is irrelevant to the performance of one's official duties, it might justifiably be withheld under §87(2)(b) [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In my view, a record that merely indicates amounts of time in which an employee was absent is relevant to the performance of his or her official duties, and, therefore, should be made available. However, to the extent that an

attendance record indicates the nature of an illness, a reason for taking personal leave, or the site of one's vacation, for example, disclosure of those items would in my opinion constitute an unwarranted invasion of personal privacy and could be withheld or deleted.

There is one decision of which I am aware that deals specifically with attendance records of police officers. It was held in Bahlman v. Brier (see attached) that such records could be withheld. Whether the circumstances present in Bahlman are similar to those that may have precipitated your question is unknown to me. Further, a suit have been initiated that deals with the attendance records of a specific public employee. As yet, no determination has been rendered. If you would like me to apprise you of the decision when it is rendered, I would be pleased to do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3117

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

December 5, 1983

Ms. Sandra Osheyack
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Osheyack:

As you are aware, your letter of November 4 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information Law.

According to your letter, some years ago you applied to the Office of Vocational Rehabilitation for participation in a program. Your concerns involve the confidentiality of the records pertaining to you, whether other governmental entities may review such records without your consent, or whether the Buckley Amendment would apply to the records in question.

From my perspective, the records in question are clearly confidential and cannot be disclosed, except in conjunction with the vocational rehabilitation program. I direct your attention to §1007 of the Education Law which, states that:

> "[I]t shall be unlawful, except for purposes directly connected with the administration of the vocational rehabilitation program, for any person or persons to solicit, disclose, receive, or make use of, or authorize,

> knowingly permit, participate in, or acquiesce in the use of any list of, or names of, or any information concerning, persons applying for or receiving vocational rehabilitation, directly or indirectly derived from the record, papers, files, communications of the state or subdivisions or agencies thereof, or acquired in the course of the performance of official duties without the consent of each such applicant or recipient. Such records, papers, files and communications shall be regarded as confidential information and privileged within the meaning of section forty-five hundred four of the civil practice law and rules."

The reference at the end of §1007 pertaining to §4504 of the Civil Practice Law and Rules involves the physician-patient privilege.

With respect to the Buckley Amendment, I do not believe that the cited provision of federal law (the Family Educational Rights and Privacy Act) would be applicable, for the Office of Vocational Rehabilitation is not in my view an educational agency or institution as defined by that statute. Nevertheless, as indicated earlier, the records are in my opinion generally confidential under the Education Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3118

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

December 5, 1983

Mr. J. Woods
#81-A-2413
P.O. Box 149
Attica, NY 14011

The staff of the Committee on Open Government 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 of November 6 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, your question involves rights of access to records pertaining to you that are in possession of the Legal Aid Society and a court clerk.

For the reasons expressed in the following paragraphs, I do not believe that the Freedom of Information Law is applicable either to records of the Legal Aid Society or the court clerk.

Perhaps most relevant in terms of the scope of the Freedom of Information Law under the circumstances is the term "agency". If records are kept by an agency, the Freedom of Information Law is applicable; if records are not maintained by an agency, the Freedom of Information Law would not apply. Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

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

Since the Freedom of Information Law does not include within its coverage a non-governmental entity, such as the Legal Aid Society, and specifically excludes the courts and court records, rights of access granted by the Freedom of Information Law would not in my opinion apply to the records in question.

With respect to court records generally, however, there may be substantial rights granted by the Judiciary Law, §255, a copy of which is enclosed. A request for court records might, therefore, be successful.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3119

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

December 6, 1983

Mr. Fred Greenberg
[redacted]

The staff of the Committee on Open Government 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 3 in which you raised a question regarding the requirements of the Freedom of Information Law.

Specifically, you asked whether you are "entitled under the F.O.I.L. to certification when [you] requested that the Board of Education certify that no employee received compensation for 3020-a service for the period January 1, 1981 through December 30, 1982 and no such employee resided or was employed in the territory which he/she served".

In terms of background, John Nolan, Secretary to the Board, wrote on October 5 that Board employees are prohibited by law from serving on 3020-a panels within the Board's jurisdiction. As such, he asserted that no records exist that would indicate a contrary finding.

I would like to offer the following comments with respect to the Freedom of Information Law as it pertains to your question.

The only provision of relevance in my view is §89(3), which deals with responses to requests. In relevant part, the cited provision states that:

> "[U]pon 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."

In my view, the language quoted above pertains only to requests and searches for records made under the Freedom of Information Law. If, for example, a record had been found in response to a request and a copy made, a certification under the Freedom of Information Law would not indicate that the contents of the record are accurate, as in a legal certification, but rather that a true copy was made. Similarly, in the context of your question, I believe that you have the right to request and obtain a certification indicating that, after having made a diligent search, it was found that the records sought are not in possession of the Board. The certification could not, however, be construed to verify the accuracy of the response in terms of a practice.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 958
FOIL-AO- 3120

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

December 6, 1983

Mr. Stephen Polowe-Aldersley
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Polowe-Aldersley:

I have received your letter of November 8, as well as the materials attached to it. Please accept my apologies of the delay in response.

Your inquiry concerns the development of a master plan by the Town of Irondequoit. In brief, in terms of the decision-making process, the Town Planning Board appointed a Master Plan Review Committee, which, in turn, appointed a series of "citizen" subcommittees. You indicated further that seven subcommittees consisting of eight members each were appointed by the Review Committee to prepare recommendations relative to eight "strategy areas". Having spoken with a member of the Planning Board, you were informed that meetings of the Review Committee, and apparently those of the subcommittees, would not be open to the public, and that their minutes would not be available.

Your question involves the status of the Review Committee and the subcommittees under the Open Meetings Law.

In this regard, I would like to offer the following comments.

It is noted at the outset that there was substantial controversy under the Open Meetings Law as originally enacted regarding the status of committees, subcommittees, and similar advisory bodies that have only the capacity to advise and no authority to take final action. In 1979, however, one of a series of amendments to the Open Meetings Law involved a redefinition of the term "public body". Section 97(2) of the Law now 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."

The original definition referred to entities that "transact" public business; the current definition refers to entities that "conduct" public business. Moreover, there was no reference in the original definition to committees or subcommittees, for example.

Based upon the changes in the Law, the specific language of the current definition of "public body" and its judicial interpretation, I believe that the committee and subcommittees that you described would each constitute a "public body" subject to the Open Meetings Law.

In my view, such a conclusion can also be reached by viewing the definition of "public body" in terms of its components. First, a committee or subcommittee would, under the circumstances, be an entity consisting of at least two members. Second, even though there may have been no specific direction that a committee or subcommittee must act by means of a quorum, §41 of the General Construction Law has long required that any entity consisting of three or more public officers of persons can perform their duties only by means of a quorum, a majority of its total membership. Third, the entities in question clearly conduct public business and perform a governmental function for a public corporation, in this instance, the Town of Irondequoit. As such, I believe that all the conditions required to find that the entities in question are public bodies can be met.

I would like to point out that a decision of the Appellate Division, Fourth Department, indicates that advisory committees, including a committee designated by the executive head of a municipality, are considered to be public bodies subject to the Open Meetings Law [Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Further, public bodies must provide public notice of the time and place of their meetings. Since committees and subcommittees are apparently public bodies, they would in my view be required to comply with §99 of the Law. Subdivision (1) of §99 pertains to meetings scheduled at least a week in advance and requires that notice by 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) concerns 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.

With respect to minutes of open meetings, §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."

The language quoted above in my view represents what may be characterized as minimum requirements concerning the contents of minutes. Clearly §101 does not require that every comment made at a meeting be recorded or that a verbatim account of a meeting be prepared.

However, as noted earlier, it was held in Syracuse United Neighbors, supra, that advisory committees must prepare minutes. From my perspective, if the entities in question adopt a proposal, as a body, such a step is in my view reflective of action taken that must be recorded in minutes, even if the governing body has the authority to accept, reject or modify the recommendation.

Lastly, in a related area, I direct your attention to the Freedom of Information Law. Section 87(3)(a) states that each agency, including a committee, shall maintain:

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

In my opinion, the record of votes envisioned by §87(3)(a) should be included in minutes when action is taken by a committee or subcommittee. Once again, while action taken by an advisory body might not represent the final action, such a step would in my view represent its (i.e., the committee's) final action.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3121

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

December 6, 1983

John C. Bivona, Esq.
780 New York Avenue
Huntington, NY 11743

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bivona:

I have received your letter of November 10 in which you sought advice regarding the Freedom of Information Law.

According to your letter, you "requested an examination of certain cards in the Office of the Assessor of the Town of Huntington, concerning the data upon which the Assessor based his assessments for 5 properties..." Although the request was granted, the cards were removed from the file and you were not permitted to see them. The contents of the cards were apparently read to you.

Your question involves the right to physically examine the records sought.

In this regard, I would like to offer the following comments.

First, the language of the Freedom of Information Law in my view clearly confers a right to inspect and copy accessible records. Section 87(2), the focal point of the Law, states at the outset that "[E]ach agency shall...make available for public inspection and copying all records", except those that fall within one or more of the ensuing grounds for denial. Further, §89(3) states in relevant part that, in response to a request, the agency "shall make such record available to the person requesting it."

In view of the specific language of the Freedom of Information Law, the act of reading to you the contents of the records would not in my opinion constitute compliance or an adequate response to a request; on the contrary, as you suggested, assuming that the records are accessible under the Law, I believe that they should have been made physically available to you for review.

Second, with respect to rights of access to the cards, it is noted that 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."

If the cards that you requested are analogous to those described above, I believe that they were determined long ago to be available to the public for inspection and copying.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Assessor, Town of Huntington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3122

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

December 7, 1983

Ms. Janna Moore
The Village Voice
842 Broadway
New York, NY 10003

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Moore:

I have received your letters of November 11 and November 21.

Your question is whether the New York City Public Development Corporation and the Brooklyn Navy Yard Development Corporation are subject to the Freedom of Information Law.

In terms of background, both entities are not-for-profit corporations; both are also local development corporations as described in §1411 of the Not-For-Profit Corporation Law. In addition, as you suggested in your letter, I contacted representatives of the two corporations, and both contended that, due to their not-for-profit status, their records fall outside the scope of the Freedom of Information Law. It is your view that they are subject to the Freedom of Information Law, for it is your belief that they perform a governmental function.

While it is possible that not all local development corporations fall within the requirements of the Freedom of Information Law, I believe that the two corporations in question, due to their functions and their connection with government, are subject to the Freedom of Information Law.

The scope of the Freedom of Information 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 judicial or the state legislature."

In view of the language quoted above the question is whether the corporations are "governmental" entities performing a "governmental" function.

As noted earlier, both corporations are local development corporations. In this regard, §1411(a) of the Not-For-Profit Corporation Law describes the purposes of local development corporations and states 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."

Therefore, due to their status as not-for-profit corporations, it is not clear that the two corporations in question are governmental entities, but it is clear that they perform a governmental function.

In an effort to learn more about local development corporations generally, it was found that their relationships to government are inconsistent. Some are apparently analogous to chambers of commerce and, in great measure, carry out their duties independent of government. Others appear to be extensions of government that carry out their duties in conjunction with government. In my opinion, the Public Development Corporation and the Brooklyn Navy Yard Development Corporation fall into the latter category.

With respect to the Public Development Corporation, the Official Directory of the City of New York states that:

> "[T]he New York City Public Development Corporation is a not-for-profit corporation established pursuant to the Mayor's Executive Order No. 14, dated June 27, 1966, to serve as a flexible instrument for economic development in order to protect and enhance the City's job and income base. P.D.C. is active in both industrial and commercial development. Its Board of Directors consists of 31 members representing business, labor and government. The chairman, who is appointed by the Mayor from a panel recommended by the Economic Development Council of New York City, appoints 15 members approved by the Mayor. The Mayor appoints 15 members (5 of his own nomination, 5 nominated by the Board of Estimate and 5 by the Vice-Chairman of the City Council). Term 1 year until a successor is appointed."

Based upon the description of the Corporation quoted above, it was created by means of an executive order, its chairman and fifteen other members are appointed by the Mayor, and the remaining fifteen members must be approved by the Mayor. As such, the Public Development Corporation is a creation of New York City government and the Mayor appoints the majority of its members. Therefore, while the Corporation might be not-for-profit, in view of the means by which it was established and the degree of control exercised by the Mayor, it appears that it could be characterized as a "governmental entity", which, according to §1411(a) of the Not-For-Profit Corporation clearly performs "an essential governmental function". If my contentions are accurate, the Public Development Corporation is an "agency" subject to the requirements of the Freedom of Information Law.

Similarly, with respect to the Brooklyn Navy Yard Development Corporation, you wrote that "Mayor Koch appoints 19 of the 36 on the board, and approves those individuals selected for top executive offices." If that is so, the nexus with government appears to be so significant that the Corporation in actuality functions as an extention of New York City government. Once again, while every local development corporation does not maintain the same type of relationship with a municipality, the control of the board of Brooklyn Navy Yard Development Corporation by the City of New York apparently renders the Corporation an extension of City government, the Corporation is essentially an arm of City government, and its records would likely fall within the requirements of the Freedom of Information Law.

Although I am unaware of any judicial determination that deals specifically with the status of a local development corporation under the Freedom of Information Law, it is noted that there is precedent regarding the application of the Freedom of Information Law to certain not-for-profit corporations. Specifically, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the Court of Appeals found that volunteer fire companies, which are not-for-profit corporations, are subject to the Freedom of Information Law. In so holding, the Court stated that:

> "[W]e begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

> "True the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit."

Volunteer fire companies, not-for-profit corporations, perform "as essential public service"; local development corporations perform "an essential governmental function." The boards of volunteer fire companies are chosen independently, and without the consent of the municipalities with which they maintain a relationship.

In the case of the two corporations in question, representatives of New York City government select a majority of the members of their boards, one of the corporations was created by executive order, and both, therefore, are clearly connected with City government. Due to the nature of their relationship with New York City government, the Public Development Corporation and the Brooklyn Navy Yard Development Corporation are, in my opinion, subject to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: New York City Public Development Corporation
Brooklyn Navy Yard Development Corporation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3123

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

December 7, 1983

Mr. Nick Fox
Mr. Wes Rehberg
The Binghamton Press Co., Inc.
Vestal Parkway East
Binghamton, New York 13902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Messrs. Fox and Rehberg:

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

According to your letter, on October 30, emergency room personnel at a Johnson City hospital contacted the Broome County Sheriff's Department to report that a "small girl was dead on arrival". The death is apparently being investigated as a possible homicide. Although questions were answered about the death and the victim was identified, you wrote that "[T]he record of that complaint was removed from the stack of complaints which [your] reporters review daily and it was only by rumor that [you] found out of the death the next day." The report of the incident was removed on the ground that it was part of the Sheriff's Department's investigation. Moreover, having made a written request for the complaint report, the Sheriff denied without stating a reason.

Your question is whether police officials can remove a blotter entry or the records of a complaint relative to an incident.

In this regard, I would like to offer the following comments.

First, a problem that persists involves the term "police blotters". It is noted that the original Freedom of Information Law, which restricted rights of access to specific categories of records, granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. The structure of the current Freedom of Information Law reverses the presumption of access of the original Law and now states that all records are available, except to the extent that they fall within one or more grounds for denial appearing in §87(2). From my perspective, the current Freedom of Information Law was enacted to expand rights of access to records.

The difficulty involving the phrase "police blotter" is that it is not defined by any statutory provision of law. Consequently, the nature and content of police blotters might differ from one law enforcement agency to another.

Nevertheless, the Appellate Division, Third Department, in 1977 held that the term "police blotter", based upon custom and usage, is a log or diary in which any event reported by or to a police department is recorded [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. The Court indicated further that a police blotter is generally a record of events or occurrences that contains no investigative information and that, therefore, it is available.

If the Sheriff's Department maintains a blotter analogous to that described in Sheehan, supra, I believe that its contents, including the report of the death in question, should have been made available.

Second, I believe that the analysis in the preceding paragraphs is consistent with the current Freedom of Information Law, which, again, requires that all records be made available, except to the extent that one or more grounds for denial would apply.

With regard to complaints and the contents of police blotters generally, several of the grounds for denial might be relevant. However, their application in my view is dependent upon the nature and content of the records.

For example, §87(2)(a), the first ground for denial, indicates that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". If the records in question identify the victim of a sexual offense who is under the age of eighteen, such records might be considered confidential under §50-b of the Civil Rights Law; if a juvenile offender is named, such a record might also be confidential by statute. It is noted, however, that the circumstances in which the records in question could be withheld due to confidentiality requirements would likely be rare.

A second ground for denial of potential significance is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute an "unwarranted invasion of personal privacy". If a blotter or complaint report contains no identifying details, it is unlikely in my opinion that the cited provision could justifiably be asserted. Moreover, the fact that a name or other identifying detail might appear would not in every instance permit such records to be withheld. Further, even when identifying details appear and disclosure of the details would result in an unwarranted invasion of personal privacy, those aspects of a record might be deleted, while the remainder of the record would be available.

A third basis for withholding that might be relevant 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."

Under the circumstances, either a complaint made by a hospital or a police blotter entry, if it is consistent with the blotter described in Sheehan, it would not in my view be compiled for law enforcement purposes, but rather in the ordinary course of business. If that is so, even though such records might relate to an investigation, they might not consist of records compiled for law enforcement purposes. Further, the language of §87(2)(e) is clearly based upon potentially harmful effects of disclosure. A record that merely indicates that an event occurred might not interfere with an investigation or deprive a person of a right to a fair trial. Records prepared in relation to the event for an ongoing investigation by a police agency might, however, justifiably be withheld under §87(2)(e).

The final ground for denial of possible significance would in my view be §87(2)(g). The cited provision 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..."

From my perspective, a complaint submitted by a private hospital would fall outside of the exception, for the hospital would not be an "agency". In addition, records prepared in response to the complaint by the Sheriff's Department would likely consist of a description of an event that is factual in nature. Under those circumstances, §87(2)(g) could not be cited to withhold, for the records would consist of "factual" information accessible under §87(2)(g)(i).

In sum, without familiarity with the specific contents of the records sought, it is impossible to provide specific direction. Nevertheless, in conjunction with the comments made in the previous paragraphs, it would appear that the records in which you are interested should have been made available.

As a final point, as noted earlier, the Sheriff denied your request without stating a reason. In this regard, I would like to point out that §1401.7(b) of the Committee's regulations requires that the reasons for the denial be stated in writing.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff Anthony C. Ruffo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3124

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

December 8, 1983

Mr. John P. Noone
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Noone:

I have received your letter of November 12 in which you raised questions regarding rights of access to records under the Freedom of Information Law.

Your first area of inquiry concerns voter registration information kept by a school district on cards as well as a computer printout. You have asked whether members of the public may copy the names and addresses of voters, or whether you are required to "pay a fee to the School Administration to have them do the copying" for you.

In this regard, I believe that either the cards or the list of voters would be accessible under the Freedom of Information Law. By means of analogy, the Election Law requires a board of elections to publish a list of registered voters and their addresses. While I know of no provision that specifically deals with rights of access to records of a school district's registered voters, due to the similarity of the registration information, I believe that either the cards or the computer printout would be accessible.

Further, as a general rule, both §§87(2) and 89(3) of the Freedom of Information Law permit the public to inspect and copy accessible records. As a consequence, I believe that you may "copy down" the names and addresses of registered voters. In the alternative, upon payment of a fee of up to twenty-five cents per photocopy, you may request photocopies of the records in question from the District.

Your second question concerns a procedure under which a computer printout is prepared that lists "the bank number of the checks used to pay any school expenses". You asked whether you were entitled "to see the checks themselves or some type of informational sheet that states to whom the check was issued, the amount of the check and what expense was paid."

In my opinion, to the extent that the School District maintains possession of checks, vouchers, ledgers, books of account, and similar documents that indicate the manner in which School District expenses have been incurred, they would be available.

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 records of expenditures maintained by the District would in my view fall within one of the grounds for denial. Nevertheless, due to its structure, I believe that such records 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. 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 the information in question would consist of "statistical or factual tabulations or data", the records of expenditures incurred by the District would in my view be available under the Freedom of Information Law.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations that govern the procedural aspects of the Law, and an explanatory pamphlet 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3125

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

December 8, 1983

Ms. Evelyn Perilli
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Perilli:

I have received your letter of November 12 in which you requested advice regarding rights of access to records under the Freedom of Information Law.

You indicated that you are a teacher in the Brewster School District and that the District "maintains several information folders on their teachers". The teachers are apparently permitted to review their "personnel folders". Your questions are whether you may request that the District reveal to you all records that it maintains that pertain to you, whether you may copy all such information, including parent letters, evaluations and other materials contained in folders pertaining to you.

In this regard, I would like to offer the following comments.

First, the scope of the Freedom of Information Law is determined in part by the definition of "record". That term is defined in §86(4) to include:

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

Due to the breadth of the language quoted above, any information in any physical form whatsoever would be subject to rights of access granted by the Freedom of Information Law, whether or not they are kept in a so-called "personnel folder".

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, based upon the nature of the records in which you are interested, I can envision three grounds for denial that might be of potential relevance.

The initial ground for denial in the Freedom of Information Law concerns records that are "specifically exempted from disclosure by state or federal statute" [see Freedom of Information Law, §87(2)(a)]. One statute that confers confidentiality is the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), a federal Act that pertains to student records. In brief, that statute provides that any "education record" identifiable to a particular student is confidential to all but the parents of the student, unless the parents waive confidentiality. If, for example, student records or letters submitted by parents identify particular students, they might be considered confidential under the federal Act, and, therefore, might be deniable.

Another ground for denial of possible significane is §87(2)(b), which permits agencies to withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". Depending upon the nature of the contents of the file, it is possible that disclosure of some identifying details might result in an unwarranted invasion of personal privacy. However, without knowledge of the nature of the contents of a file, it is all but impossible to provide specific guidance.

A third ground for denial of 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. 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.

In the context of your question, it would appear that factual information pertaining to you would be accessible. However, other materials consisting of advice, suggestions, recommendation, or opinion, for example, might justifiably be withheld. For instance, if an evaluation is reflective only of an opinion and does not constitute a final determination regarding performance, it might be deniable under §87(2)(g).

Lastly, it is suggested that you review the terms of your collective bargaining agreement. In many cases, collective bargaining agreements contain specific provisions regarding access to personnel records by the individuals to whom the records pertain. Further, often such agreements grant rights of access to individuals that exceed rights granted by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Brewster School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 3126

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

December 12, 1983

Mr. Alvin Peskin
82-A-1628
Taconic Correctional Facility
250 Harris Road
Bedford Hills, NY 10507

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Peskin:

I have received your letter of November 16 and the materials attached to it.

Your inquiry concerns unsuccessful attempts to obtain your dental records, which are apparently maintained at the Taconic Correctional Facility. Although you were advised that a request should be directed to the facility superintendent, and that he would respond, your requests to date have not been answered.

It is noted in this regard 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 regarding 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)].

Further, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that the facility superintendent was responsible for answering your request. Under the circumstances, it is suggested that you appeal, on the ground that your request has been constructively denied, to Counsel, Department of Correctional Services, Building 2, State Campus, Albany, NY 12226.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3127

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

December 12, 1983

Mr. H. M. Alberts
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Alberts:

As you are aware, your letter of November 18 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information Law.

Your first area of inquiry is whether an agency may charge "an hourly fee for staff time spent in gathering material for review." In this regard, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge a fee of up to twenty-five cents per photocopy, unless a different or additional fee is permitted to be charged pursuant to statute. Further, as a general rule, while an agency may charge for copies, no fee may be assessed for searching for records or reviewing the contents of records to determine rights of access. Section 1401.8(a) of the regulations promulgated by the Committee, which govern the procedural aspects of the Law, states that:

> "[T]here shall be no fee charged for the following:
>
> (1) Inspection of records;
>
> (2) Search for records."

With respect to the hours during which the public may request or review records, §1401.4 of the regulations provides 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."

It is noted, however, that an agency is not required to respond to a request immediately, for §89(3) of the Freedom of Information Law states that an agency must respond to a request within five business days of the receipt of a request.

Lastly, you raised a question regarding "lists of available information". Due to the structure of the Freedom of Information Law, it is virtually impossible to identify records that are always available or deniable. Many of the grounds for withholding records [see §87(2)] are based upon harmful effects of disclosure. Therefore, often records might be deniable now, but they might become available at some time in the future. For example, disclosure of records of an ongoing criminal investigation might if disclosed interfere with the investigation. Nevertheless, when the investigation has ended, the same records might become available.

There is, however, a requirement that each agency prepare a list of its records by subject matter. Specifically, §87(3)(c) requires that each agency maintain:

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

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, and an explanatory pamphlet that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3128

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

December 13, 1983

Mr. John L. Arons
Town Attorney
Office of the Town Attorney
Town Hall
Mahopac, NY 10541

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Arons:

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

According to your letter, "[T]he Town Clerk of the Town of Carmel has received a request for copies of both sides of cancelled checks for police officers." Your question is whether the records must be made available.

I believe that the front of checks issued to police officers are available under §51 of the General Municipal Law and the Freedom of Information Law, for they would be reflective of factual information accessible under §87(2)(g)(i) and because case law indicates that disclosure of the information would result in a permissible rather than an unwarranted invasion of personal privacy.

Nevertheless, with respect to the reverse sides of checks, it is noted that 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, I believe that the reverse sides of the checks may be withheld under the Freedom of Information Law, §§87(2)(b) and 89(2)(b)(iv).

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3129

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

December 14, 1983

Mr. Thrameah Abdul Aziz
83-A-5954
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Aziz:

I have received your letter of November 20 concerning an unsuccessful attempt to obtain various records including a rap sheet, from a court clerk.

In this regard, I would like to offer the following comments and suggestions.

First, with respect to your rap sheet, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate in §§5.20 and 5.22 that a request for a "DCJS report", or rap sheet, can be made to the facility superintendent.

Second, the Freedom of Information Law includes within its coverage agency records. 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."

In turn, §86(1) defines "judiciary" to include:

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

As such, the Freedom of Information Law does not include the courts or court records within its scope.

Third, although I cannot offer specific advice regarding the court records in which you are interested, many court records are available under §255 of the Judiciary Law, a copy of which is attached.

Lastly, under the circumstances, it is suggested that you contact your attorney, or a representative of a legal aid group or Prisoners' Legal Services, for example.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3130

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

December 14, 1983

Mr. Roman Little
82-A-6129 12-1
Box 307
Fishkill, NY 12508

Dear Mr. Little:

I have received your recent letter in which you requested advisory opinions prepared by this office that deal in several areas with the treatment of inmates by correction officers and related procedures.

Please be advised that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As such, this offices does not maintain records generally, nor does it maintain the specific information that you requested. Nevertheless, I would like to offer the following comments.

First, it is suggested that you direct a request for the records in question to the facility superintendent. A request should be made in writing and "reasonably describe" the records sought [see Freedom of Information Law, §89(3)].

Second, under the circumstances, you might want to discuss the issues with a representative of a legal aid group or Prisoners' Legal Services, for example.

Enclosed for your consideration 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:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3131

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

December 15, 1983

Mr. Michael Hajovsky
[redacted]

Dear Mr. Hajovsky:

I have received your letter of December 11, in which you requested a "ruling" regarding a denial of access to criminal court records.

In this regard, I would like to offer the following comments.

First, the authority of the Committee on Open Government is advisory; the Committee is not empowered to issue a "ruling" or otherwise compel an agency to grant or deny access to records.

Second, the scope of the Freedom of Information Law is determined in part by the term "agency", which is defined in §86(3) to mean:

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

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

As such, the Freedom of Information Law does not apply to the courts or court records.

Third, although the Freedom of Information Law does not apply to records sought, there are various provisions, particularly those found in the Judiciary Law and the Criminal Procedure Law, that may be relevant. In addition, while you indicated that the case in which you were involved is closed, you did not indicate whether the charges were dismissed, or whether the person charged was convicted. Often if charges are dismissed, records relating to an arrest are sealed (see Criminal Procedure Law, §160.50). On the other hand, if there was a conviction, it would appear that some of the records in which you are interested should be made available by the Court Clerk.

Lastly, under the circumstances, it is suggested that you discuss the matter 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3132

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

December 16, 1983

Mr. John R. Robinson
80-D-0110
Box 51
Comstock, NY 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Robinson:

I have received your letter of November 23, in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a request directed to the Office of the New York County District Attorney on October 27. Assistant District Attorney David A. Wardell responded on November 14 by indicating that the "matter is currently being investigated and you will be provided with further details in the near future". As of the date of your letter, no determination had been rendered, and you have complained that the response "does not conform" with the Freedom of Information Law.

In this regard, 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 request. 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 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, 108 Misc. 2d 536, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David A. Wardell, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3133

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

December 16, 1983

Charles J. Macellaro, Esq.
Yonkers Avenue Professional Building
570 Yonkers Avenue
Yonkers, NY 10704

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Macellaro:

I have received your letter of November 23, and the materials attached to it. As Counsel to the Municipal Housing Authority for the City of Yonkers, you have requested an advisory opinion under the Freedom of Information Law.

Specifically, you wrote that your client, the Authority,

> "...let out contracts to Bristol Construction Corp. for a rehabilitation contract. Many controversies have arisen between [your] client and the contractor and the contractor has already threatened suit...The contractor's FOIL request...would require the services of [your] employees for several days to comply with. [Your] client's Regulations...call for charges for employee time where special records or an unusually large volume of records is requested."

Your questions are whether the Authority may charge for employees' time, as well as twenty-five cents per page and whether the Authority may "refuse this request in its entirety due to the fact that the contractor is threatening litigation and, possibly, attempt to thwart the CPLR provisions on discovery."

In this regard, I would like to offer the following comments.

First, with respect to fees, §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 up to nine by fourteen inches or the actual cost of reproducing records that cannot be photocopied, unless a different statute permits a higher fee to be assessed. The Freedom of Information Law makes no reference to the capacity to charge for personnel costs, search time, or the time needed to evaluate the contents of records in terms of rights of access. Moreover, §1401.8 of the regulations promulgated by the Committee, which govern the procedural aspects of the Law, states that:

> "[E]xcept when a different fee is otherwise prescribed by statute:
>
> (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 foregoing, I do not believe that the Authority may assess a fee for employees' time, but rather is restricted to the imposition of a fee of twenty-five cents per photocopy.

In reviewing a copy of the Board's rules and regulations, a statement is made to the effect that:

> "[A] person requesting special records or an unusually large volume of records, may be charged for employee time necessary in making transcripts, collating, typing, etc."

While it is reiterated that employees' time may not in my view be charged regardless of the volume of a request, the language quoted above refers to "making transcripts, collating, typing". In my opinion, if, for example, a transcript is requested that has not been prepared, the Authority would have no obligation to create such a record pursuant

to the Freedom of Information Law. Section 89(3) of the Law states in part that, as a general rule, an agency is not required to create a transcript or become involved in "typing" in order to respond to a request.

With regard to the second question pertaining to your capacity to withhold records due to a threat of litigation, I do not believe that a denial on that basis would be appropriate.

There are judicial determinations which tend to indicate that a request made under the Freedom of Information Law after litigation has been commenced may be inappropriate, for such a request would circumvent disclosure devices available under the Civil Practice Law and Rules [see e.g., M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp., App. Div., 465 NYS 2d 28 (1983) and Arzuaga v. New York City Transit Authority, 73 AD 2d 518 (1979)]. There are other decisions, however, which have held to the contrary, stating that the procedures and rights of access accorded under the Freedom of Information Law and the Civil Practice Law and Rules are separate and distinct, and that the rights of an individual under the Freedom of Information Law are not diminished merely because that person may also be a litigant [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 and Moussa v. State, 91 AD 2d 863 (1982)].

In the situation that you described as I understand it, no litigation has been commenced. Consequently, it would appear that a response should be made to the request pursuant to the Freedom of Information Law.

Lastly, you asserted that the request involves a great volume of records. It is noted in this regard that §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. To the extent that the request might not reasonably describe the records in question, it is suggested that the Authority's records access officer confer with the applicant for the purpose of attempting to identify the records sought with more precision.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3134

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

December 16, 1983

Mr. Richard Becker
[redacted]

Dear Mr. Becker:

I have received your letter of November 20, which again concerns your unsuccessful efforts to obtain records from the Kings Park Hospital pertaining to you.

In conjunction with your request that I "follow up" on the matter, I have called the Office of Counsel at the Office of Mental Health and have been assured that Mr. Bloch will be contacted.

Moreover, in a situation in which a request is made under the Freedom of Information Law, but in which no response is given within five business days of its receipt, the request may be considered "constructively" denied. In such cases, an appeal may be directed to the head of the agency or the person designated for the purpose of rendering a determination on appeal [see Freedom of Information Law, §89(4)(a)]. Consequently, in the future, if no response is given within the appropriate time, it is suggested that you appeal to the Commissioner.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3135

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

December 16, 1983

Mr. Caswell Lathan
60-B-0010
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lathan:

I have received your letter of November 25 in which you requested direction regarding access to records pertaining to you.

According to your letter, you are involved in a judicial proceeding in which you sought leave to proceed as a poor person. It is your belief that information regarding the amount of money in your prison cash account has been disclosed without your consent. Your question involves reference to specific aspects of law or directives that prohibit the disclosure of that type of information.

In this regard, I would like to offer the following comments.

First, I am unaware of any provision of law that would prohibit disclosure of the information in question. As a general matter, the Freedom of Information Law is permissive. Stated differently, although the Law permits an agency to withhold certain types of records, it does not require that such records must be withheld. Further, the only instance in my opinion in which records must be withheld would involve those situations in which a statute specifically prohibits disclosure.

Second, with regard to records of the Department of Correctional Services, enclosed is a copy of the Department's regulations promulgated under the Freedom of Information Law. Please note that §5.23 makes specific reference to "Confidential records and data" and §5.25 refers to "General inmate records and data". The latter provision states that such records may be released in the discretion of the Commissioner "for a proper purpose". However, without greater knowledge, I could not state with certainty that the records in question may have been disclosed under §5.25.

Third, if there are directives on the subject, it is suggested that you seek to inspect them through a request submitted to the facility superintendent (see §5.20). When making a request, §89(3) of the Freedom of Information Law requires that an applicant seek records "reasonably described". As such, it is suggested that you provide as much description of the records sought as possible.

Lastly, it is recommended that you contact an attorney, a representative of a legal aid group or Prisoners' Legal Services, 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

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3136

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

December 20, 1983

Mr. Gabriel C. Hodge
[redacted]

Dear Mr. Hodge:

I have received your letter of December 15 in which you requested from this office "a complete copy of your criminal history".

In this regard, it is emphasized at the outset that the Committee on Open Government 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.

It is suggested, however, that there may be two methods by which you may request and obtain criminal history information pertaining to you.

First, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate in §§5.20 and 5.22 that a request for a "DCJS report", which is the equivalent of a criminal history record, can be directed to the facility superintendent. In the alternative, a request may be made directly to the Division of Criminal Justice Services, which is located at Stuyvesant Plaza, Executive Park Tower, Albany, NY 12203.

I recommend that you attempt to review both the regulations of the Department of Correctional Services and those of the Division of Criminal Justice Services prior to making a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3137

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

December 20, 1983

Mr. Mark E. Fettinger
Senior Investigator
Fulton County Sheriff's Department
116 South Perry Street
Johnstown, New York 12095

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fettinger:

I have received your letter of November 28 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, a few months ago, the Fulton County Sheriff's Department investigated the death of an eighteen year old male who left a suicide note, which was treated as evidence. You wrote that the case was closed as a suicide for there was no indication of of criminal activity, and that members of the family of the deceased have requested a copy of the note.

Your questions are whether there is "any statute or case that would preclude" the Department from releasing the note, and if you are permitted to disclose it, "who is entitled to it, wife, parents, in-laws?"

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

First, it is emphasized that the Freedom of Information Law is permissive. Stated differently, although the Law permits an agency to withhold records that fall within one or more grounds for denial [see attached Freedom of Information Law, §87(2)], it does not require that records

must be withheld, even if a ground for denial applies. In my view, the situations in which you could not disclose would involve circumstances in which a statute other than the Freedom of Information Law prohibits the disclosure of specific records. Based upon the facts that you presented, I do not believe that any statute would require confidentiality relative to the suicide note.

In terms of rights of access, there may be two grounds for denial of relevance. However, it appears at this juncture that only one of those grounds would be applicable, and then perhaps only with respect to certain applicants.

Specifically, the provision that is generally most applicable with respect to records pertaining to an investigation 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 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 states that records compiled for law enforcement purposes may be withheld in conjunction with the potentially harmful effects of disclosure that are described above. Since the investigation has been closed, I do not believe that §87(2)(e) could justifiably be cited to withhold the suicide note.

The remaining ground for denial of potential 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". Without knowledge of the contents of the note, I could

not offer specific direction as to whether the record in question may be withheld with respect to the public generally. Further, although I am unaware of any determinations rendered under the New York Freedom of Information Law that pertain to the privacy of a deceased person, there are decisions that have been rendered under the federal Freedom of Information Act, which contains similar provisions, in which it was held that disclosure of records pertaining to a deceased person would not constitute an unwarranted invasion of personal privacy.

Nevertheless, it is possible that persons other than the deceased might be identified in the suicide note. Under those circumstances, a request by a member of the public might be withheld depending upon the contents of the note and considerations of privacy relative to persons identified in the note. If, on the other hand, the wife of a deceased is mentioned in the note and she requests a copy, or if a person requests if on her behalf, it appears that the note would be available to those 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:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3138

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

December 20, 1983

Mr. Barth C. Jeter
83-A-5063
Box 149
Attica, NY 11423

Dear Mr. Jeter:

I have received your note concerning Social Service appointments.

In all honesty, I cannot determine exactly the type of information that you want. If, however, you are seeking information regarding "Social Service employment appointments", it is suggested that you direct a request to the Records Access Officer, Department of Social Services, 40 North Pearl Street, Albany, NY 12243.

In making a request, it is noted that the Freedom of Information Law requires that an applicant seek records "reasonably described". Consequently, if a request is to be made, you should include as much information as possible, including dates, descriptions of events, identification numbers and similar information that might enable agency officials to locate the records in which you are interested.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3139

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

December 20, 1983

Mrs. R. Kane
[redacted]

Dear Mrs. Kane:

As you are aware, your letter addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information Law.

Your question is whether, pursuant to a request made under the Freedom of Information Law, you may obtain information regarding a marriage license from New York City. You wrote that New York City officials informed you by phone that the record sought is confidential.

In this regard, I would like to offer the following comments.

First, although the Freedom of Information Law generally pertains to government records in New York, marriage records and the duties of the clerks who maintain possession of such records are considered separately in a different provision of law. As such, the Freedom of Information Law would not in my view apply to marriage records.

Second, §19 of the Domestic Relations Law deals specifically with access to marriage records, the duties of clerks that maintain such records, and the fees that may be imposed for searching marriage records and producing copies. Enclosed for your consideration is a copy of the cited provision of the Domestic Relations Law. Please note that the City Clerk of the City of New York may impose substantial fees for searching marriage license 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3140

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

December 20, 1983

Mr. Eskel Norbeck
NEA-NY
Rochester Service Center
100 Allen's Creek Road
Rochester, NY 14618

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Norbeck:

I have received your letter of November 28 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the correspondence attached to it, your request for the names and addresses of students enrolled in the Churchville-Chili Central School District was denied. Although you wrote that the list would not be used for commercial purposes, the Superintendent of Schools expressed the opinion that it could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, and that the District could not control the use of such a list after it leaves the jurisdiction of the District.

You also indicated that the records access officer for the District was unable to inform you of the next step in the appeal process. Further, it is intimated in your letter that no policy or procedure regarding requests for records has been adopted by the District.

In this regard, I would like to offer the following comments.

First, although the Freedom of Information Law deals with records in possession of government in New York, rights of access to student records are governed by a provision of federal law, the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment".

In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record", a term that is broadly defined, that identifies a particular student or students is confidential, unless the parents of student under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over, an "eligible student", similarly waives his or her right to confidentiality.

An exception to the rule of confidentiality in the Buckley Amendment involves "directory information". Directory information is defined in the regulations of the Department of Education to include:

> "...the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information."

Prior to disclosing directory information, educational agencies must provide notice to parents of students under the age of eighteen or to eligible students in order that the parents or the eligible students may essentially prohibit any or all of the items from being disclosed. Therefore, if an educational agency or institution has adopted a policy on directory information, those items designated as directory information would be available to any person. If, however, an educational agency or institution has not designated a policy on directory information, it would in my view be prohibited from disclosing records pertaining to students or eligible students without the written consent of the parents or eligible students, as the case may be.

Therefore, if the District has not adopted a policy on directory information pursuant to the Buckley Amendment, I believe that it would be prohibited from disclosing the list in question. Further, while your request might not be reflective of any commercial interest, since the Buckley Amendment is a federal Act, the provisions of the New York Freedom of Information Law would not in my opinion alter . responsibilities imposed upon the District by that federal law.

Second, with respect to procedure, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general rules and regulations regarding the procedural implementation of the Freedom of Information Law. In turn, §87(1) requires each agency, including a school district, to adopt rules and regulations consistent with those of the Committee.

One aspect of the Committee's regulations, §1401.7 (a), requires 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."

To ensure that the District is aware of the regulations promulgated by the Committee, copies of this opinion, the Committee's regulations, and model regulations will be forwarded to the Superintendent and are enclosed for your review.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: David P. Ryan, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3141

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

December 20, 1983

Mr. God Kundalini Isa Allah
82-A-4148
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Allah:

I have received your letter of November 25 and appreciate your kind comments.

Following receipt of my letter of November 16, you apparently requested records from various agencies and courts, some of which have not responded to the requests. Your question involves the steps that may be taken when an agency or a court fails to respond.

In this regard, I would like to offer the following comments.

First, with respect to police departments and other agencies subject to the Freedom of Information Law, it is noted that the Law and the regulations promulgated by the Committee 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)].

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 an appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 108 Misc. 2d 536, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

Second, as indicated in my earlier letter to you, a court is not an "agency" as defined by §86(3) of the Freedom of Information Law. As such, the Freedom of Information Law does not apply to the courts and court records. If a court clerk fails to respond to a proper request, it is suggested that you seek the assistance of an attorney or legal services group, or that you submit a written complaint to the Office of Court Administration.

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3142

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

December 20, 1983

Albert E. Clune, Esq.
71 Main Street
P.O. Box 659
Unadilla, NY 13849-0659

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Clune:

I have received your letter of November 28, as well as the correspondence attached to it.

You have requested an advisory opinion regarding the fees that may be assessed for copies of accident reports in possession of a police department. It is your contention that the fees are governed by the Freedom of Information Law and that a police department may charge no more than twenty-five cents per photocopy. The correspondence, however, indicates that the fee for an uncertified copy of an accident report of the Sidney Police Department is five dollars.

The question, therefore, is "whose position is correct".

In this regard, I would like to offer the following comments.

First, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, 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.

Some of the confusion regarding the issue might be attributed to §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 authority.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief, Sidney Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3143

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

December 21, 1983

Mr. Louis F. Bowers
82-D-199
C.C.F. Box #B
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bowers:

I have received your letter of November 26, in which you requested advice and assistance regarding the Freedom of Information Law.

Specifically, you wrote that you are interested in reviewing a pre-sentence report pertaining to you. Apparently you were informed that only a court may obtain or disclose the contents of a pre-sentence report.

I agree with that contention.

The first ground for denial of access to records in the Freedom of Information Law, §87(2)(a), 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 pre-sentence reports. Subdivisions (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, psychiatrict 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 pre-sentence 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.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-962
FOIL-AO-3144

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

December 21, 1983

Mr. Mark Gesner
Editor in Chief
Albany Student Press
State University of New York at Albany
Campus Center 329
1400 Washington Avenue
Albany, New York 12222

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gesner:

I have received your letter of November 30 in which you requested an advisory opinion.

Specifically, your inquiry concerns the application of the Freedom of Information and Open Meetings Laws to the Advisory Task Forces on Alcohol Policy and Bus Fee Alternatives, both of which have been established by the State University at Albany. You indicated that meetings of the task forces have been closed and that their minutes have been withheld. You wrote further that in your capacity as editor in chief of the Albany Student Press, you contacted the Vice President for Student Affairs in order to ascertain his position on the matter, and that he informed you that Counsel to the State University believes that neither the Freedom of Information Law nor the Open Meetings Law would apply to the task forces. You also enclosed various memoranda containing the views of University officials.

In my opinion, meetings of the task forces are subject to the Open Meetings Law, and minutes prepared by the task forces are subject to rights of access granted by the Freedom of Information Law. In this regard, I would like to offer the following comments.

First, with respect to the Open Meetings Law, it is noted that there has been a long-standing disagreement between this office and the Office of Counsel at the State University regarding the scope of the Open Meetings Law. From my perspective, the position taken by Counsel fails to recognize changes in the Open Meetings Law, judicial determinations rendered under the Law, and other relevant provisions of law.

Second, the coverage of the Open Meetings Law is determined in part by the definition of "public body". Section 97(2) of the Law defines "public body" to include:

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

In terms of background, it is important to note that the language quoted above differs from the original definition of "public body" as it appeared in the Open Meetings Law when the Law became effective in 1977.

At that time, questions arose regarding the status of committees, advisory bodies and similar entities which may have had the capacity only to advise, and no authority to take action. The problem arose in several instances because the definitions of "meeting" and "public body" referred to entities that "transact" public business. While the Committee consistently advised that the term "transact" should be accorded an ordinary dictionary definition, i.e., to carry on business [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d, which was later affirmed by the Court of Appeals at 45 NY 2d 947 (1978)], it was contended by many that the term "transact" referred only to those entities having the capacity to take final action.

To clarify the Law and clearly indicate that committees, subcommittees and other advisory bodies should be subject to requirements of the Open Meetings Law, the definition of "public body" was amended in 1979 to its current language. As such, even though an entity may have solely advisory authority or merely the capacity to recommend, I believe that it would fall within the requirements of the Open Meetings Law.

A review of the elements of the definition of "public body" in my opinion results in such a conclusion in the case of task forces.

The task forces consist of more than two members. Further, I believe that they are required to conduct their business by means of a quorum. In the latest memorandum on the subject from Counsel to the State University, the point was made that the Open Meetings Law is applicable "only to quorum-attended sessions" of various bodies that function within the State University of New York system. While neither the by-laws or acts creating the task forces in question might make specific reference to any quorum requirement, the task forces in my view can conduct their business only by means of a quorum. In this regard, I direct your attention to §41 of the General Construction Law, which has long stated 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, whether an entity consists of public officers or "persons" who are designated to carry out a duty collectively, as a body, such an entity would in my view be required to perform such a duty only by means of a quorum pursuant to §41 of the General Construction Law.

Further, as I understand the functions of the task forces, they conduct public business and perform a governmental function for an agency, in this instance the State University. The issues with which the task forces deal, alcohol policy and bus fee alternatives, likely impact not only upon students, but the community in which the University is situated. As such, policy determinations on the issues would appear to have an effect beyond the confines of the University.

I would also like to point out that judicial determinations rendered before and after the enactment of amendments to the definition of "public body" indicate that advisory bodies are subject to the Open Meetings Law. As early as 1977, it was found that an advisory committee was required to conduct its business by manes of a quorum and that it was subject to the Open Meetings Law even though the committee "has no power or authority to exercise, and its advice is not controlling" [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510, 512 (1977)]. Moreover, a more recent unanimous decision rendered by the Appellate Division pertained to advisory bodies that were not designated by a public body, but rather by an executive. The entities in question consisted of an advisory committee and a task force whose "recommendations may be characterized as advisory only", but which were nonetheless found to be "public bodies" subject to the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, 985 (1981)].

Based upon the preceding analysis of the definition of "public body", the definition of "quorum" and a review of judicial determinations rendered under the Open Meetings Law, it is my view that the task forces in question are "public bodies" subject to the Open Meetings Law.

With regard to the minutes that have been withheld, I direct your attention to the Freedom of Information Law. Whether or not the task forces are considered public bodies subject to the Open Meetings Law and, therefore, required to prepare and make minutes available [see Open Meetings Law, §101], the minutes would in my opinion nonetheless by subject to the requirements of the Freedom of Information Law.

The scope of the Freedom of Information Law is expansive, as evidenced by §86(4), 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."

Due to the breadth of the language quoted above, "any information in any physical form whatsoever", such as minutes, in possession of the State University, which is clearly an agency, are in my opinion "records" that fall within the scope of the Freedom of Information Law. It is emphasized that several judicial interpretations of the Freedom of Information Law stress the broad application of the Law. For instance, in Warder v. Board of Regents, [410 NYS 2d 742 (1978)] it was found that notes taken at a meeting in order to prepare minutes were not "personal", but rather constituted "records" subject to rights of access. Moreover, in discussing the term "record", the Court of Appeals 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 nongovernmental activities, especially where both are carred on by the same person or persons" [Westchester Rockland Newspapers v. Kimball, 50 NYS 2d 575, 581 (1980)].

Lastly, in Syracuse United Neighbors, supra, it was determined that the advisory bodies found to be public bodies under the Open Meetings Law were also required to prepare minutes and make them available pursuant to the Freedom of Information Law. In my opinion, the same requirements would be applicable to the task forces.

I hope that I 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: Lewis Welch
Carolyn Pasley
Frank Pogue

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3145

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

December 21, 1983

Mr. Armando Guzman, Jr.
75-B-1413 F-17
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

Dear Mr. Guzman:

I have received your letter of November 29 in which you raised questions regarding the existence of provisions regarding procedures to be followed in the event of war or nuclear conflict.

Please be advised that the Committee is responsible for advising with respect to the Freedom of Information Law. As such, this office is not a repository of records, nor does it function as a researcher with respect to questions that might arise regarding government generally.

Nevertheless, enclosed for your consideration are provisions found within Article 2-B of the Executive Law entitled "State and Local Natural and Man-Made Disaster Preparedness". Under the cited provision, a disaster preparedness commission was established. I believe that the commission operates out of the Division of Military and Naval Affairs, which is located at the State Campus, Public Security Building, Albany, NY 12226. Further, §23 of the Executive Law indicates that each county and each city may develop disaster preparedness plans.

At this juncture, I am unaware of whether the state commission or any unit of municipal government has in fact developed final disaster preparedness plans. However, if you are interested in determining whether such plans exist, it is suggested that you submit a request under the Freedom of Information Law to units of government that may be of particular interest to you. Further,

it is noted that §89(3) of the Freedom of Information Law requires that a request reasonably describe the records sought and states that an agency may charge up to twenty-five cents per photocopy when records are made available.

Whether there are specific plans regarding persons confined in institutions, such as correctional facilities; is unknown to me. However, again, a request could be directed to either the facility superintendent or the records access officer at the Department of Correctional Services in Albany.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-963
FOIL-AO-3146

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

December 21, 1983

Mr. James E. Switzer
School District Clerk
Wayne Central School District
6076 Ontario Center Road
Ontario Center, NY 14520

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Switzer:

I have received your letter of December 2 and appreciate your continued interest in compliance with the Freedom of Information and Open Meetings Laws.

You have raised a series of questions pertaining to those statutes, and I will attempt to respond to each of them.

The first area of inquiry concerns the status under the Open Meetings Law of "an inservice workshop conducted for school board members by a guest speaker and held at the BOCES center outside of the district's boundaries". From my perspective, the answer is dependent upon specific facts that may be present. If, for example, a quorum of the board is present for the purpose of listening to and interacting with the speaker, as a body, such a gathering in my view would constitute a "meeting" subject to the Open Meetings Law. If, on the other hand, the board attends a convention or workshop conducted by the School Boards Association, and a majority is present to listen to a speaker, the members would not in my opinion be conducting business as a body, and, therefore, the Open Meetings would not apply.

The second question is whether it is necessary to record the names of members of a board who "make motions and/or vote aye or nay on votes conducted in executive session on Committee on the Handicapped placement/appeal matters, decisions to bring 3020-a charges and other 'allowable' executive session topics". Although others disagreed, you have contended that "names must be listed".

I agree with your contention, for §87(3)(a) of the Freedom of Information Law requires that:

> "[E]ach agency shall maintain:
>
> (a) a record of the final vote of each member in every proceeding in which the member votes..."

As such, the Freedom of Information Law requires that a record of votes be prepared that identifies the manner in which each member votes and effectively prohibits secret ballot voting by members of public bodies.

The third question involves the extent to which discussions on the removal of asbestos from school buildings may be held in executive session. You asked further whether that topic is considered "pending litigation". In this regard, as you are aware, a public body is required to conduct its business during an open meeting, unless and until one or more of the grounds for executive session may appropriately be cited to exclude the public. As a general matter, a discussion of the removal of asbestos would in my view likely have to be discussed during an open meeting.

The provision to which you referred permits a public body to enter into an executive session to discuss "proposed, pending or current litigation" [see Open Meetings Law, §100(1)(d)]. Therefore, if a lawsuit has been initiated, or if the board is discussing its litigation strategy with regard to a pending or proposed lawsuit, an executive session could in my opinion be justified. It is emphasized, however, that the possibility of litigation, or even the threat of litigation do not usually constitute appropriate topics for discussion in executive session. It has been held that the purpose of §100(1)(d) is to enable a public body to discuss privately its litigation strategy in order that its strategy is not bared to its adversary [see Concerned Citizens to Review the Jefferson Mall, v. Town Board of the Town of Yorktown, 84 AD 2d 612, appeal dismissed 54 NY 2d 957 (1981) and Weatherwax v. Town of Stony Point, __ AD 2d __, 2nd Dept., App. Div., NYLJ, Dec. 5, 1983].

Lastly, you asked whether it is "proper to withhold from public inspection any portion of a bid document which has been received and publicly opened, after public legal notice for invitation of bids and after final review and award of successful bidders by the Board of Education."

Like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of openness. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

It is likely that only one of the grounds for denial is relevant to the type of situation that you described. Specifically, §87(2)(c) provides that an agency may withhold records or portions thereof which:

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

Based upon the language quoted above, if the time for submission of bids has passed and the bids were opened publicly, I believe that the records would be available, for disclosure would not "impair" the agency's capacity to engage in a favorable and fair contractual agreement, nor would disclosure at that juncture place any bidder at a competitive disadvantage. Moreover, it has been held that once a contract is awarded, the types of documents to which you referred are clearly accessible under the Freedom of Information Law [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1980)].

I hope that I 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3147

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

December 22, 1983

Mr. Robert Algmin
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Algmin:

I have received your letter addressed to the chairman of the Committee. As indicated above, the staff is authorized to prepare advisory opinions.

According to your letter, you submitted a complaint "against the police department of Spring Valley" on November 10, which was entered in the Department's records. A few days later, you requested a copy of the complaint. You were given what appeared to be handwritten excerpts, rather than a "full typewritten report". Further, although you completed a request form, no reason for the denial was given. As such, it is apparently your belief that you cannot appeal. You have asked that this office intercede on your behalf.

It is noted at the outset that without knowledge of the nature of the complaint, or the ensuing investigation, it is all but impossible to provide specific direction. However, I would like to offer the following general comments.

First, it is emphasized that the Freedom of Information Law, §86(4), defines "record" broadly to include "any information in any physical form whatsoever" that is "kept, held, filed, produced or reproduced by, with or for an agency". As such, all records of the Police Department 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.

With respect to police records generally, the ground for denial cited most often 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 techniques or procedures, except routine techniques and procedures..."

The language quoted above is based upon potentially harmful effects of disclosure and indicates that all police records are not exempt from the Freedom of Information Law. If, for example, disclosure of records compiled for law enforcement purposes would interfere with an ongoing investigation, the records could in my view be withheld. However, when an investigation has terminated, it is possible that the same records might be accessible.

Third, although no reasons for a denial were given, I believe that you may nonetheless appeal. It is noted that the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, state in §1401.7(b) that:

> "[D]enial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and

> that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

I would like to point out, too, that the Freedom of Information Law in §89(4)(a) states that any person denied access to records may within thirty days appeal to the head or governing body of the agency, or whomever is designated to render a determination on appeal. Therefore, even though no reasons for a denial were stated, I believe that you may appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law.

In an effort to "intercede", a copy of this opinion will be sent to the Police Department. In addition, copies of the Freedom of Information Law and the Committee's regulations will be sent to the Department and are enclosed for your review.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3148

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

December 22, 1983

Mr. Anthony Quinones
82-A-1783
Box 51
Comstock, NY 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Quinones:

I have received your letter of December 6 in which you requested advice regarding the "kind of information" that a correction officer may obtain regarding inmates.

In all honesty, I am not familiar with every aspect of the Correction Law or the rules and regulations that may have been promulgated by the Department of Correctional Services. It is possible that there may be specific provisions that deal directly with the issue. Consequently, it is suggested that you request from the facility superintendent or the Department's records access officer regulations, directives, or statutes that specifically pertain to rights of access to inmate records by correction officers.

As a general matter, assuming that a correction officer requests records that are unrelated to the performance of his or her official duties, I believe that a correction officer would have the same rights of access as any member of the public under the Freedom of Information Law. On the other hand, if the correction officer has a need to review inmate records in the performance of his or her official duties, it would appear that such records of necessity would be available to that person.

You also asked whether a correction officer may have access to "privileged information concerning an inmate". If records are subject to a statutory privilege, such as communications between an attorney and client, I believe that such records remain confidential and would not be accessible to a correction officer.

Enclosed is a copy of the Freedom of Infomation Law for your 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3149

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

December 22, 1983

Ms. Suzanne Strek
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dunkirk:

As you are aware, your letter of November 30 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information Law.

According to your letter and the materials attached to it, you read aloud and personally delivered statements in which you requested information from officials of the City of Dunkirk. When you were told that you should request the records pursuant to the Freedom of Information Law, you submitted a request on November 7. The information sought involves "the readings of the recording devices that monitor the operations of the sewage treatment plant for July 29, 1983 from midnight to noon." As of the date of your letter, no response to your request was given.

In this regard, I would like to offer the following comments.

First, the Freedom of Informtion and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, contain specified time limits for response to a request. 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 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, 108 Misc. 2d 536, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

Second, 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.

Third, assuming that records of readings in which you are interested exist, I believe that they are accessible under the Law. Although the records fall within one of the grounds for denial, due to the structure of the provision, the Law in my view directs that they 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

ii. 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. While the records sought might constitute "intra-agency" materials, they would likely consist solely of "statistical or factual tabulations or data".

Lastly, you alluded to a requirement that a form prescribed by the City be completed in order to request records. Neither the Freedom of Information Law nor the regulations refers to any requirement that a specific form must be used. Section 89(3) of the Law states that an agency may require that a request be made in writing, and that the request "reasonably describe" the records sought. As such, the Committee has consistently advised that any written request that reasonably describes the records sought should suffice.

Enclosed for your consideration are copies of the Freedom of Information Law, the Committee's regulations and an explanatory pamphlet that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Mayor Gregoreski
Dunkirk Common Council

NO

3150

Clerical Error

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-351

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

December 27, 1983

Mr. Patrick J. King, Jr.
[redacted]

The staff of the Committee on Open Government 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 December 8 in which you requested assistance regarding the Freedom of Information Law.

According to your letter, during a conversation with the Village Clerk of the Village of Atlantic Beach, she informed you "that there are no Freedom of Information forms in her office and she would love to see one." You wrote that the clerk advised you that "her Village has not adopted any rules or regulations pertaining to the Freedom of Information Law".

Apparently your inquiry was precipitated by the clerk's refusal to permit you to review a record "putting the Village of Atlantic Beach on public notice that there was wood in the public highway".

In this regard, I would like to offer the following comments.

First, with respect to the use of a form for the purpose of requesting records, there is nothing in the Freedom of Information Law that requires an agency to devise a form. Further, in situations in which agencies have prescribed forms, it has been advised that a failure to use or complete the form cannot constitute a valid basis for delaying or denying access.

Section 89(3) of the Freedom of Information Law states that an agency may require that a request be made in writing. That provision also requires that an applicant request records "reasonably described". As such, any written request that reasonably describes the records sought should be sufficient.

Second, under the Freedom of Information Law as enacted in 1974 and as later amended (effective January 1, 1978), each agency, including a village, is required to adopt procedural regulations consistent with the Law and regulations promulgated by the Committee pursuant to §89(1)(b)(iii). Specifically, §87(1)(a) states that:

> "[W]ithin sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

Consequently, the Board of Trustees of the Village is required to promulgate rules and regulations. In order to assist the Village, copies of the Freedom of Information Law and the Committee's regulations will be sent to the Clerk. In addition, model regulations designed to enable an agency to develop its regulations easily will also be forwarded to the Clerk.

Lastly, it is emphasized that the Freedom of Information 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.

Since I have no detailed information regarding the record concerning wood on the highway, no specific direction regarding rights of access can be offered, other than a reiteration that a denial of access can be appropriate only in conjunction with one or more of the grounds for withholding listed in the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Clerk, Village of Atlantic Beach

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3152

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

December 27, 1983

Mr. Ralph Quinones
83-A-0843
Collins Correctional Facility
Helmuth, NY 14079

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Quinones:

I have received your letter of December 2 in which you requested assistance from this office.

According to your letter, you are interested in obtaining photocopies of medical records pertaining to you that are in possession of the Erie County Medical Center. In response to a request for those records, officials of the Medical Center apparently indicated that it is not their "policy" to release those records.

In this regard, I would like to offer the following comments and suggestions.

First, if the Erie County Medical Center is a part of Erie County government, I believe that it would be an "agency" required to comply with the Freedom of Information Law. If it is a private facility, it would not be subject to the Freedom of Information Law.

Second, assuming that the Erie County Medical Center is part of the County government, it is likely that some medical records pertaining to you should be made available, while others may justifiably be withheld. In brief, medical

records consisting of factual information should in my opinion be accessible to you under the Freedom of Information Law. However, those aspects of the medical records consisting of diagnostic opinion, advice or recommendations could likely be denied [see attached, Freedom of Information Law, §87(2)(g)].

Third, perhaps a better method of obtaining your medical records involves the application of §17 of the Public Health Law. That provision does not grant a patient the right to gain access to medical records pertaining to him. It does, however, generally require that a hospital or physician make those records available to a physician who requests the records on behalf of a patient. Specifically, the cited provision states in part that:

> "[U]pon the written request of any competent patient...an examining, consulting or treating physician or hospital must release and deliver, exclusive or personal notes of the said physician or hospital copies of all x-rays, medical records and test records, including all laboratory tests regarding the patient to any other designated physician or hospital...Either the physician or hospital incurring the expense of providing copies of x-rays, medical records and that records including all laboratory tests pursuant to the provisions of this section may impose a reasonable charge to be paid by the person requesting the release and deliverance of such records as reimbursement for such expenses."

As such, it is suggested that you contact the physcian of your choice in order that he or she may request and obtain medical 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3153

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

December 28, 1983

Mr. Richard I. Cantor
Corporation Counsel
City of Poughkeepsie
Municipal Building
P.O. Box 300
Poughkeepsie, NY 12602

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cantor:

I have received your second letter regarding the status of the Poughkeepsie Associated Fire Department under the Freedom of Information Law.

Once again, the issue is whether the Poughkeepsie Associated Fire Department, a corporate entity created by special legislation, is considered an "agency" as defined by §86(3) of the Freedom of Information Law. The entity in question appears to serve as an independent benevolent association with a voluntary membership. However, the statute that created the corporation states that one of its purposes involves "the better general regulation of all matters pertaining to volunteer firemen as a body".

Having spoken with various persons having expertise in relation to municipal law and volunteer fire companies, it is possible that the answer might lie in the nature of the duties currently carried out by the corporation. Specifically, if the government of the City of Poughkeepsie maintains supervision over the Poughkeepsie Associated Fire Department and maintains a relationship with the Department in terms of the performance of the Department's duties, it would appear that the Department, in carrying out its

duties relative to "the general regulation matters pertaining to volunteer firemen", is an agency subject to the Freedom of Information Law. If, however, the City of Poughkeepsie has supplanted the governmental functions to which reference is made in Chapter 224 of the Laws of 1930 by means of its charter or the enactment of local laws, it would appear that the Poughkeepsie Associated Fire Department does not carry out any governmental function and, therefore, would not be an "agency" subject to 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3154

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

December 28, 1983

Mr. Marvin Datz
[redacted]

The staff of the Committee on Open Government 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 letter of November 26, as well as the materials attached to it.

Your inquiry concerns a request for records directed to the New York City Department of Transportation. Apparently the request was initially made on October 31 and, due to a failure to respond within five business days, an appeal was directed to Commissioner Ameruso on November 14. As of the date of your letter, no response had been given.

In this regard, I would like to offer the following comments.

First, 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 "construtively" 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 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, 108 Misc. 2d 536, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, with regard to your request, it is emphasized that the Freedom of Information Law is applicable to existing records. Further, §89(3) states that, as a general rule, an agency is not required to create or prepare a record in response to a request.

Based upon a review of your request, it is possible that various aspects of the information sought might not exist in the form of a record or records. To that extent, the Department of Transportation would not in my opinion be obliged to prepare or create any record on your behalf.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to Samuel Azadian, the Department's Records Access Officer, and Commissioner Ameruso.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Commissioner Ameruso
Samuel Azadian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3155

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 29, 1983

Mr. Constantin-Horia A. Nicolau
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nicolau:

Your recent letter sent to the Department of State has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information Law.

According to your letter, on September 20 you requested from the Westchester County Department of Public Safety Services a "written attestation" concerning an event that occurred on February 2 during which you were apparently arrested.

In this regard, I would like to offer the following comments.

First, as I understand the facts, there would be no requirement that the agency in question must supply a written attestation regarding the event.

Second, however, assuming that you request and obtain records either from the Department or from a court clerk, for instance, either could certify a copy of the record made available. It is noted that the certification made with respect to a record granted under the Freedom of Information

Law would merely represent an indication that you received a true copy. A certification made by a court clerk might indicate that the contents of the records are accurate. Consequently, it is suggested that you seek a certification after having obtained records from either the agency or a court clerk.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 968
FOIL-AO-3156

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 29, 1983

Mr. Harvey M. Elentuck
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Elentuck:

In response to a note written on a copy of correspondence sent to this office, enclosed is the Committee's recently issued annual report on the Freedom of Information and Open Meetings Laws.

With respect to rights of access to the three types of records marked on the correspondence, I would like to offer the following comments.

The first type of record in question involves "scheduling information (dates, times, locations) of the next several public meetings of the Middle Island School Board". In my view, if such a schedule has been prepared, it would clearly be available for it would consist of factual data accessible under §87(2)(g)(i) of the Freedom of Information Law.

It is noted, too, that the Open Meetings Law requires that a public body give notice of the time and place of all meetings. Specifically, §99(1) of that statute provides that:

> "[P]ublic notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting."

As such, notice of a meeting scheduled at least a week in advance must be given to the news media and posted for the public not less than seventy-two hours prior to the meeting. However, the Law does not require that a series of meetings must be scheduled.

The second area of information involves "[A] record which indicates the procedure whereby a member of the public may become a scheduled speaker at a public meeting". If such a record exists, I believe that it would be reflective of an agency policy and, therefore, accessible under §87 (2)(g)(iii).

It is emphasized, however, that the Open Meetings Law is silent with respect to public participation. Consequently, a public body, such as a school board, may but need not permit members of the public to speak or otherwise participate at meetings.

The final area involves "litigation files of all court cases filed since 1981" in which either the Superintendent, the District or the Board "are named as parties". You made specific reference to your interest in "petitions to the court, memoranda of law, verified answers and replies". Assuming that the records sought are filed with or in possession of a court clerk, I believe that they should be made available by the District. Under those circumstances, court records would generally be available to the public under §255 of the Judiciary Law. Consequently, they would in my view be equally available from the agency 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: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 966
FOIL-AO- 3157

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 29, 1983

Ms. Mary Hilt
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Hilt:

I have received your letter of December 19 and the materials attached to it.

According to your letter, you submitted a request for rezoning to the Sand Lake Planning Board. The Board apparently determined to hold a "workshop" regarding the request. However, when you asked to attend that gathering, you were denied the opportunity to do so. Further, upon questioning other Town officials regarding the meeting of the Planning Board, none could inform you of the time and place of the meeting. In addition, although you have attempted to obtain notes pertaining to the meeting, no response to your request has been given.

In this regard, I would like to offer the following comments.

First, the Planning Board is in my opinion clearly a "public body" required to comply with the Open Meetings Law. Moreover, a so-called "workshop" or "work session" is in my view a meeting that must be convened open to the public and preceded by notice.

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 highes court, found that any gathering of a quorum of a

public body for the purpose of conducting public business is a "meeting" that falls within the framework of the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which the 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)]. Consequently, a "workshop" or similar gathering is a "meeting" subject to the Open Meetings Law in all respects.

Second, as indicated earlier, every meeting must be preceded by notice given in accordance with §99 of the Open Meetings Law. Subdivision (1) of §99 pertains to meetings scheduled at least a week in advance and requires that notice of the time and place of such meetings must be given to the news media (at least two) and posted for the public in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision (2) of §99 pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and posted in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

Therefore, once again, a workshop conducted by a town planning board must be preceded by notice as described in §99 of the Open Meetings Law.

Third, the Open Meetings Law is based upon a presumption of openness. All meetings of a public body must be open to the public, except to the extent that one or more grounds for executive session may appropriately be cited to exclude the public [see Open Meetings Law, §100(1)(a) through (h)]. Consequently, a public body cannot exclude the public or conduct a closed meeting to discuss the subject of its choice.

With respect to your request for notes, I would like to point out that §101 of the Open Meetings Law contains what might be characterized as minimum requirements regarding the contents of minutes. In addition, however, if notes or similar records of a meeting were prepared, I believe that they would be subject to rights of access granted by the Freedom of Information Law.

Like 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 grounds for denial appearing in §87(2)(a) through (h) of the Law.

Further, §86(4) of the Freedom of Information Law defines "record" broadly to include "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Based upon the definition of "record", it has been held that notes taken at a meeting are subject to rights of access granted by the Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

In terms of procedure, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law. In turn, §87(1)(a) states in part that:

> "...the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

As such, the Town Board of the Town of Sand Lake, the governing body of a public corporation, is in my view required to adopt uniform rules and regulations applicable to all agencies, including the planning board, that operate within Town government.

One requirement that should be included in the Town's regulations involves the designation of one or more records access officers who are responsible for coordinating the Town's response to requests for records.

In order to attempt to inform appropriate Town officials of the requirements of the Open Meetings Law and the Freedom of Information Law, copies of this opinion, both of those statutes, the Committee's regulations and model regulations will be sent to the Town Board and the Planning 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: Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3158

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 29, 1983

Mr. David M. Razler
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Razler:

I have received your letter of December 9 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, at the end of November, you directed a request under the Freedom of Information Law to the State University at Stony Brook for certain records of the Stony Brook Foundation, Inc. In response, you received a denial of the request on the grounds that "the records are not in the custody of the university" and that the Foundation, as a not-for-profit corporation, is not subject to the Freedom of Information Law.

It is your view that the Foundation "is clearly an arm of a government agency, incorporated merely to ease paperwork requirements for accepting and managing donations and endowments". You wrote further that:

> "[T]he main offices of the foundation are located next door to the offices of the SUNY at Stony Brook president, on the second floor of the campus adminstration building, and connected to the president's office. However, most of the foundation work is carried on at other campus offices. The books

> are maintained, and the foundation's required annual report and tax documents are prepared, along with all other SUNY at Stony Brook financial records on the fourth floor of the campus administration building. The Sullivan and Buskin awards program are run from the campus Office of Undergraduate Studies, located on the third floor of the campus library.
>
> "The persons doing the work of administering the foundation, the foundation's books and the foundation's programs, who work out of the offices mentioned above, are full-time employees of SUNY at Stony Brook, whose job descriptions and assignments include administration of those foundation programs. Foundation fundraising is the provence of a SUNY at Stony Brook vice president. In practice, there is absolutely no line separating one body from the other."

You have requested an advisory opinion regarding rights of access to records under the Freedom of Information Law. In this regard, I would like to offer the following comments.

First, the scope of the Freedom of Information Law is determined in part by means of the definition of "agency". Section 86(3) of the Law defines that term 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, while the Foundation might perform a governmental function for an agency, the State University of New York, it is questionable whether it is a governmental entity.

However, in a somewhat similar situation in which the Court of Appeals considered the status of a volunteer fire company, also a not-for-profit corporation, it was found that such an entity is an "agency" subject to the Freedom of Information Law. In so holding, the Court found that:

> "[W]e begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and compex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible'...For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, at 579 (1980)].

If the relationship between the State University of New York and the Foundation in question is similar to that of a volunteer fire company and a municipality, it would appear that the Freedom of Information Law, despite its not-for-profit status, would be an "agency" required to comply with the Freedom of Information Law.

I would like to point out, too, that there is a strong nexus between the Foundation and the State University at Stony Brook. Specifically, incorporation papers kept by the Department of State indicate that one of the purposes of the Foundation is:

> "[T]o assist in advancing the welfare and development of the State University of New York at Stony Brook by accepting and encouraging gifts to this corporation and by using such gifts to advance such purposes in a manner consistent with the educational policies of the State University of New York."

As such, it appears that the Foundation carries out its duties for the benefit and on behalf of the University at Stony Brook.

Second, assuming that the facts in your letter are accurate, records pertaining to the Foundation and its work are in possession of officials at the State University at Stony Brook. While those officials might not have legal custody of the records, it appears that they maintain physical custody of the records in which you are interested. If that is so, I believe that the records pertaining to the Foundation in possession of State University officials fall within the scope of the Freedom of Information Law, whether or not the Foundation is considered an "agency".

Here 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."

Based upon the broad language quoted above, any information in possession of State University officials at Stony Brook would in my view constitute a "record" subject to rights of access.

In the decision of the Court of Appeals cited earlier, the Court also discussed the term "record" and 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 nongovernmental activities, especially where both are carried on by the same person or persons. The present case provides its own illustration. If we were to assume that a lottery and fire fighting were generically separate and distinct activities, at what point, if at all, do we divorce the impact of the fact that the lottery is sponsored by the fire department form its success in soliciting subscriptions from the public? How often does the taxpayer-lottery participant view his purchase as his 'tax' for the voluntary public service of safeguarding his or her home from fire? And what of the effect on confidence in government when this fund-raising effort, though seemingly an extracurricular event, ran afoul of our penal law?" [id. at 581].

Under the circumstances, the situation of the State University at Stony Brook and the Foundation appears to be somewhat analogous to that described by the Court. Consequently, it is reiterated that records maintained by State University of New York officials concerning the Foundation are in my opinion subject to the Freedom of Information Law, for they are apparently in the physical possession of the University.

I hope that I 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: Rosemarie Williams Nolan