STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3159

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

January 3, 1984

Mr. Francis D. Phillips, II
Village Attorney
Village of Monroe
7 Stage Road
Monroe, NY 10950

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. Phillips:

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

According to your letter, an individual has requested various police investigative reports from the Village of Monroe under the Freedom of Information Law. Apparently, that person is not the subject of the reports. It is your view that "these reports are not subject to disclosure" under the Freedom of Information Law, and you have requested any guidance on the subject that I might offer.

Under the circumstances, without additional information regarding the status of the investigation or the nature of the records sought, it is difficult to provide specific direction. However, I would like to offer the following general comments.

First, it is emphasized that the provision that is most often cited with respect to police investigative reports is based upon potentially harmful effects of disclosure. It is noted, too, that the analogous provision in the Freedom of Information Law as originally enacted in

1974 permitted an agency to withhold "investigatory files compiled for law enforcement purposes" [see original Law, §88(7)(d)]. As such, under the original language, records prepared in conjunction with an investigation were forever deniable. In contrast, §87(2)(e) of the current Freedom of Information Law 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..."

If, for example, an investigation is ongoing, the capacity to withhold would likely be substantial, for disclosure might interfere with an investigation or deprive a person of a right to a fair trial or impartial adjudication. However, if the investigation has been terminated, it is possible that disclosure would no longer interfere with an investigation or deprive a person of a right to a fair trial and, therefore, the records might be available.

Further, if the files refer to confidential informants, witnesses and their statements, any one of three bases for withholding might apply. As indicated earlier, §87(2)(e)(iii) states that an agency may withhold records compiled for law enforcement purposes which if disclosed would "identify a confidential source or disclose confidential information relating to a criminal investigation".

Perhaps those types of records might if disclosed result in an unwarranted invasion of personal privacy or endanger the life or safety of a particular individual or individuals. Sections 87(2)(b) or 87(2)(f) of the Freedom of Information Law might, therefore, be cited to justify withholding.

Of possible significance is a recent decision of the Appellate Division, Fourth Department, that dealt with records of testimony of various individuals and in which it was found that the records were deniable under §87(2)(e)(iii) [see attached, Hawkins v. Kurlander, App. Div., Fourth Department, Dec. 16, 1983, ___ AD 2d ___]. From my perspective, however, the discussion in the dissenting opinion serves to clarify the issue, for it indicated that specific circumstances should determine the extent to which records may be denied or must be made available under the Freedom of Information Law. Other decisions of possible interest to you may be State, Div. of State Police v. Boehm, 419 NYS 2d 23, 71 AD 2d 810, Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979) and Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., June 24, 1982.

The fact that the individual requesting the records might have no connection with the investigation may be most relevant in terms of protecting the privacy of a person involved in the investigation whose name might not have become public through judicial proceedings, for instance. If the investigation resulted in an arrest or a trial during which witnesses or others presented evidence in open court, the capacity to withhold in my view would be substantially decreased.

Another ground for denial that might be relevant 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.

Records prepared by the Police Department could likely be characterized as "intra-agency" materials. Consequently, to the extent that they are reflective of advice, recommendation, opinion or suggestion, for example, I believe that they may be withheld.

Lastly, it is possible, too, that records pertaining to an investigation might become sealed. Section 160.50 of the Criminal Procedure Law pertains to situations in which charges made against an accused are dismissed in his or her favor. In those cases, virtually all of the records pertaining to the investigation may be sealed.

If you could provide additional information regarding the circumstances of the case, perhaps I could provide more specific guidance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3160

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

January 5, 1984

Mr. Earl G. Hall
76-D-0216
Great Meadow Correctional Facility
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 December 18 in which you requested assistance from this office.

Specifically, you attached a copy of a letter sent to you by B.W. Ward, Sr. Correction Counselor, which indicated that program attendance records pertaining to you as well as "program evaluations" would be withheld. You also requested the name of an attorney who might be able to represent you.

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

First, as indicated in my letter to you of November 14, to the extent that records indicating your attendance at various programs exist, I believe that they would be available. However, as stated by Counselor Ward, it would appear that evaluative materials concerning your participation in the program could justifiably be withheld.

I direct your attention to §87(2)(g) of the Freedom of Information Law. The cited provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which 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 appears that the attendance records as well as the evaluation reports could be characterized as "intra-agency" materials. If the attendance records are reflective of statistical or factual information, I believe that they would be accessible under §87(2)(g)(i). The evaluation reports, however, due to their nature, would not likely consist of any of the types of accessible information described in subparagraphs (i), (ii) or (iii) of §87(2)(g). Consequently, the denial by Mr. Ward with respect to the program evaluations was likely appropriate.

Second, §89(4)(a) of the Freedom of Information Law states that a person denied access may withhin thirty days of a denial appeal the denial to the head of an agency or whomever is designated to render determinations on appeal under the Freedom of Information Law. In the case of the Department of Correctional Services, its regulations indicate that an appeal may be directed to Counsel to the Department, State Campus, Correctional Services Building, Albany, NY 12226.

Lastly, although I cannot recommend any particular individual who might be able to provide legal assistance, it is suggested that you contact 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3161

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

January 5, 1984

Mr. Ronald F. Rizzo
20536-053
Federal Correctional Institution
P.O. Box 1000, Unit 2-A
Otisville, NY 10963

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. Rizzo:

I have received your letter of December 29, in which you requested assistance from this office.

According to your letter, you sent a request under the Freedom of Information Law to the New York State Tax Commission at 80 Centre Street in New York City on November 27. As of the date of your letter, no response had been given.

In this regard, I have contacted the New York State Department of Taxation and Finance on your behalf and have learned that the State Tax Commission is not located at the address to which you referred. It was also suggested that a request for records of the Tax Commission should be directed to:

Paul Greenberg
Records Access Officer
NYS Department of Taxation
and Finance
State Campus
Tax & Finance Building
Albany, NY 12227

You also indicated that you have been trying to locate the person to whom a request may be made regarding records that pertain to your imprisonment in various state correctional facilities.

Please be advised that §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations of a procedural nature. In turn, §87(1) requires each agency to adopt its own regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee. The Department of Correctional Services has promulgated such regulations regarding its records. In brief, if the records are maintained at the facility in which you are currently located, a request may be made to the facility superintendent. To the extent that the records are maintained at the Department's offices in Albany, a request should be directed to the Department's records access officer pursuant to §5.11 of the regulations. Enclosed for your consideration is a copy of those regulations.

Finally, you alluded to imprisonment at two county facilities and asked whether requests for records pertaining to your incarceration at those facilities should be directed to the facilities. In this regard, it is suggested that you seek to obtain records from the facility superintendent or the records access officer in Albany prior to submitting a request to the counties in question, for it is possible that the records regarding your incarceration at county facilities might be included in those now maintained by the Department. If the records are not kept by the Department of Correctional Services, it is recommended that requests should be addressed to the "records access officer" at each of the county facilities.

I hope that I 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-971
FOIL-AO-3162

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

January 6, 1984

Mr. Morton J. David
[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. David:

I have received your letter of December 23, in which you requested an advisory opinion.

According to your letter, the Mayor of the Village of Ardsley "contends that minutes may not be released to the public until they are approved." In response to your objection to that practice, the Village Attorney prepared a response, a copy of which is enclosed with your letter, in which he indicated that a short delay is excusable. The Village Attorney also wrote that "[R]ecording tapes are not public records, and are not available for public use."

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

First, the respect to access to minutes, as indicated in the response by the Village Attorney, §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..."

Based upon the language quoted above, in my view, 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" or "draft",for instance. By so doing, the requirements of the Open Meetings can be met; concurrently, members of the public who receive the minutes are aware that the contents may be changed.

Second, I believe that a tape recording of an open meeting is a "record" subject to rights of access granted by the Freedom of Information Law.

It is emphasized that §86(4) of the Freedom of Information Law defines 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."

Therefore, if the clerk uses a tape recording in the performance of her official duties, i.e., as an aid in preparing minutes, I believe that the tape recording constitutes a "record" that falls within the requirements of the Freedom of Informaton Law.

Moreover, it has been held judicially that a tape recording of an open meeting is accessible to the public under the Freedom of Information Law [see Zaleski v. Hicksville Union Free School District, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

In order to enhance compliance with the Freedom of Information and Open Meetings Laws, as you requested, copies of this opinion will be sent to Mayor Marie Stimpfl and the Village Attorney, Arthur T. Connick.

I hope that I 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: Marie Stimpfl, Mayor
Arthur T. Connick, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 923
FOIL-AO- 3163

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

January 6, 1984

Mr. Robert Hoagland
Superintendent/Business Manager
Romulus Central School
Romulus, NY 14541-0080

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. Hoagland:

I have received your thoughtful letter of December 19, as well as the materials attached to it.

The focal point of your letter pertains to a recent meeting of the Board of Education of the Romulus Central School District. In brief, following an executive session, a member of the Board was about to state that certain requests for funding would be considered at a later meeting. However, during the statement, he was interrupted by a reporter who questioned whether the requests were discussed during the executive session. Due to an apparent misunderstanding, it was reported that the discussion of the funding requests behind closed doors violated the Open Meetings Law. Nevertheless, you wrote that, in fact, the Board did not discuss the requests.

Under the circumstances, assuming that the Board's discussion in executive session involved only personnel matters dealing with particular individuals [see attached, Open Meetings Law, §100(1)(f)] and collective bargaining negotiations [see §100(1)(e)], I do not believe that any violation of the Open Meetings Law occurred.

In the future, as I indicated via the news article, it is suggested that motions for entry into executive sessions be somewhat more specific. The "personnel" exception 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 view of the language quoted above, a statement that "personnel" will be discussed, without more, is in my opinion inadequate. I believe that reference should be made to the fact that the discussion pertains to a "particular person" and to one or more of the topics listed in the exception. For instance, in the context of the situation described in your letter, which involved the qualifications of a teacher, a motion should in my opinion have included a phrase to the effect that an executive session was sought to discuss "the employment history" of a "particular person". Similarly, with regard to a discussion of negotiations, reference to the union with which collective negotiations were being conducted should in my opinion have been included in the motion.

Finally, having reviewed the rules adopted by the Board under the Freedom of Information Law, I would like to offer the following brief comments.

The rules were apparently adopted pursuant to the Freedom of Information Law as originally enacted in 1974. That statute was repealed and replaced by a new Freedom of Information Law that became effective on January 1, 1978. As a consequence, the regulations promulgated by the Committee were modified to reflect changes in the Freedom of Information Law. It is noted, too, that §87(1) of the Freedom of Information Law requires the Board of Education to adopt rules and regulations consistent with the Law and the regulations pomulgated by the Committee.

Enclosed for your consideration are copies of the Open Meetings Law, the Freedom of Information Law, the Committee's regulations adopted under the Freedom of Information Law, and model regulations. As in the case of your existing regulations, the model enables the Board to comply by filling in the appropriate blanks. In addition, as requested, enclosed are five copies of an explanatory pamphlet that deals with the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3164

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

January 6, 1984

Mr. Robert R. Reninger
[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. Reninger:

I have received your letter of December 15 and the correspondence attached to it.

The materials concern your requests for copies of violation notices pertaining to a specific parcel of property located in the Town of Greenburgh. You have asked whether, based upon the correspondence, it is my view that the Town is in compliance with the Freedom of Information Law.

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

First, on your behalf and in order to obtain clarification of the situation, I have contacted Susan Tolchin, Town Clerk, with whom you have had substantial correspondence. Ms. Tolchin indicated to me that the records in which you are interested, to which the Building Inspector made reference to a letter prepared in 1981, are not now in possession of the Building Inspector or the Town Clerk. Therefore, under the circumstances, if the Town does not maintain possession of the records sought, there has been no denial and the Freedom of Information would not be applicable.

Ms. Tochin also informed me, however, that if records exist regarding the property in conjunction with the controversy, they would likely be in possession of the Town Justice Court. She told me, too, that she suggested that you submit a request to the Clerk of the Court with respect to the records in question.

Second, one of your letters indicates that there is no provision in the Town Code that specifies that records of the Town Court be submitted directly to that office. Here I would like to point out that, while the Town Justice Court may be a part of the government of the Town of Greenburgh, the definition of "agency" appearing in §86(3) of the Freedom of Information Law specifically excludes the judiciary. In turn, §86(1) of the Freedom of Information Law defines "judiciary" to mean the courts. Consequently, the Freedom of Information Law does not in my view apply to the courts and court records.

Although rights granted by the Freedom of Information Law do not extend to the courts, various provisions of the Judiciary Law and court acts provide broad rights of access to court records. In the case of the Town Court, it would appear that §2019-a of the Uniform Justice Court Act would likely be applicable to the records in which you are interested. Therefore, as Ms. Tolchin recommended, I, too, suggest that you seek the records in question from the Town Justice 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

cc: Susan Tolchin, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3165

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

January 6, 1984

Mr. Eric Swenson
Environmental Control Specialist
Town of Oyster Bay
Department of Public Works
Division of Environmental Control
150 Miller Place
Syosset, New York 11791

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. Swenson:

I have received your letter of December 16 in which you requested assistance regarding the interpretation of the Freedom of Information Law.

Specifically, you have requested clarification regarding the exception concerning inter-agency and intra-agency materials.

The question pertains to §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. Conversely, to the extent that such materials are reflective of advice, opinion, or recommendation, for example, they may in my view be withheld.

To provide additional information regarding the intent of §87(2)(g), enclosed is a copy of a letter sent to me shortly after the enactment of the amended Freedom of Information Law in 1977 by the Assembly sponsor of the legislation. Please note that Assemblyman Siegel expressed the intent that records prepared by consultants, for example, were not intended to fall within the scope of §87(2)(g). Nevertheless in Sea Crest v. Stubing [442 NYS 2d 130, 82 AD 2d 546 (1981)], the Appellate Division, Second Department, found that records furnished, pursuant to contract, by a consultant were subject to the exception. In view of Assemblyman Siegel's comments as well as the definition of "agency" [see enclosed, Freedom of Information Law, §86(3)], I do not feel that a private firm could be characterized as an "agency".

Other decisions that may in my view be helpful or instructive with respect to the scope of §87(2)(g) are Miracle Mile Associates v. Yudelson [68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied, (1979)], McAuley v. Board of Education, City of New York [61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion)], Ingram v. Axelrod [App. Div., 90 AD 2d 568 (1982)] and Kheel v. Ravitch [93 AD 2d 422 (1983)]. Rather than discussing those cases in detail, I have enclosed them for your consideration.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3166

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

January 6, 1984

[redacted] Sr.
81-C-0157 A-3-27
Correctional Facility 1
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 [redacted]:

I have received your recent letter in which you requested assistance regarding access to records.

According to your letter, you are attempting to obtain legal documentation pertaining to your children, who are in the care of the Chemung County Department of Social Services. You wrote further that, although the County Court Judge "requested" that the appropriate agencies forward the records to you, they have apparently not yet made the records available. You have asked how you might obtain the records.

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

First, while the Freedom of Information Law applies to rights of access to records generally, it appears that particular provisions of the Social Services Law pertain to the records in which you are interested.

Subdivision (4) of §372 of the Social Services Law requires that records and reports of courts and agencies "having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent

children who shall receive, accept or commit any child" must be kept confidential, except under specified circumstances. As such, I believe that the records sought fall outside the scope of rights granted by the Freedom of Information Law. It is noted that §87(2)(a) of the Freedom of Information Law permits an agency to withhold records that are "specifically exempted from disclosure by statute".

Second, subdivison (3) of §372 of the Social Services Law states in relevant part that:

> "[U]pon application by a parent, relative or legal guardian of such child or by an authorized agency, after due notice to the institution or authorized agency affected and hearing had thereon, the supreme court may by order direct the officers of such institution or authorized agency to furnish to such parent, relative, legal guardian or authorized agency such extracts from the record relating to such child as the court may deem proper."

Based upon the language quoted above, it is suggested that you apply for the records to the Supreme Court in Chemung County. It is also recommended that you seek the services 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3167

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

January 11, 1984

Mr. Michael N. Wright
[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. Wright:

I have received your letter of January 2 in which you requested guidance from this office.

According to your letter, having submitted a complaint against an attorney, you are interested in obtaining records of "the decision-making deliberations and investigation of the State of New York Grievance Committee for the Tenth Judicial District". Having requested the information, you were informed that it is confidential.

In this regard, although the Freedom of Information Law generally grants broad rights of access to records, one of the exceptions to rights of access pertains to records that are "specifically exempted from disclosure by state or federal statute". Under the circumstances, a statute, §90 of the Judiciary Law, requires confidentiality of the records in question, except as otherwise provided in that statute. Specifically, subdivision (10) of §90 states that:

> "[A]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed

> private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of the subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

In view of the language quoted above, I believe that the denial was proper.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3168

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

January 11, 1984

Mr. Barth Jeter
83-A-5063
Box 149
Attica, NY 14011

Dear Mr. Jeter:

Your letter addressed to the Department of State has been forwarded to the Committee on Open Government, a unit of the Department responsible for advising with respect to the Freedom of Information Law.

Your letter pertains to "employment airlines applications", and you have requested from the Department of State "records or portions thereof pertaining to American Airlines, Eastern Airlines, United Airlines, Trans World Airlines for month of August, 1982, John F. Kennedy Airport Van Wyck Expressway, Queens New York".

I have contacted various units of the Department of State on your behalf in order to determine whether the Department maintains records that fall within the scope of your request. Based upon those inquiries, I do not believe that the Department maintains any records regarding the airlines identified that concern the period of August, 1982. Please note that the Department does not regulate either airlines or employment practices. Further, it would appear that the only records regarding air carriers in possession of the Department would be incorporation papers filed for the purpose of doing business in New York.

In short, the New York State Department of State does not maintain the records sought.

For future reference, I would like to point out that §89(3) of the Freedom of Information Law requires that an applicant for records reasonably describe the records sought. As such, when making a request, it is suggested that as much detail as possible be provided, including names, dates, descriptions of events, locations and similar information that might enable agency officials to locate 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3169

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

January 11, 1984

Mr. Demetri Kolokotronis
[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. Kolokotronis:

I have received your letter of December 29 concerning a request made under the Freedom of Information Law.

Specifically, it appears that you unsuccessfully requested "the names, addresses where they actually have their offices, and their telephone numbers for all the members of the New York State Bridge Authority". As such, you requested that I "direct" the Bridge Authority to comply with your request.

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

First, neither myself nor the Committee has the legal authority to "direct" an agency or its representatives to comply with the Freedom of Information Law. It is the responsibility of this office to advise, and I will do so by forwarding a copy of this opinion to Gordon Cameron, Executive Director of the Authority.

Second, in my opinion, the names and office addresses of officers or employees must be made available. One of the few instances in the Freedom of Information Law in which an agency must prepare a record pertains to payroll information. Section 87(3) requires that:

> [E]ach agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

Based upon the language quoted above, it is reiterated that the Authority in my view is required to prepare and make available a record that contains the names and "public office" addresses of all of its officers or employees.

Third, with respect to the telephone numbers of the Authority's employees, if such a record exists, it would be subject to rights of access granted by the Freedom of Information Law. Further, any such record or directory of employees' office phone numbers would in my opinion be accessible. While §87(2)(b) of the Freedom of Information Law enables an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy", I do not believe that an office phone number could be withheld on that basis. In addition, such a listing or directory would likely constitute factual data accessible under §87(2)(g)(i) of the Freedom of Information Law.

Lastly, since you wrote that the information was not made available "in the required time", 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 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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: Gordon Cameron, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3170

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

January 11, 1984

Mr. Richard Havens
78-A-109
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. Havens:

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

Specifically, you wrote that, in order to prepare for litigation, you need various court papers. When you wrote to the court clerk in Kings County, you were informed that copies of the papers would cost approximately twelve hundred dollars. Since you are incarcerated, you lack the capacity to pay for copies.

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

First, copies of records accessible under the Freedom of Information Law are generally available for a fee not in excess of twenty-five cents per photocopy. However, the Freedom of Information Law does not include the courts and court records within its scope. The Freedom of Information Law applies to records of an "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 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, it is reiterated that court records fall outside the requirements of the Freedom of Information Law.

Second, under the circumstances, it is suggested that you contact a representative of a legal aid group or Prisoners' Legal Services, for example. I am sure that attorneys for those organizations have more expertise than I in situations such as that which you described.

Third, enclosed for your consideration are copies of §§1101 and 1102 of the Civil Practice Law and Rules, which pertain to a motion for permission to proceed as a poor person.

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-3171

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

January 11, 1984

Ms. Jody Adams
[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. Adams:

I have received your letter of December 30, as well as a copy of an appeal attached to it.

Your inquiry concerns a request directed to the Town of Riverhead for records pertaining to an arrest that was reported in a local newspaper. The request was apparently unanswered, and you are fearful that there will be no response to the appeal. As such, you have requested that I "send a refresher course on procedure and responsibility" under the Freedom of Information Law to various Town officials and to you.

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

First, according to your appeal, your initial request for a form to be completed for the purpose of making a request was made with recalcitrance. I would like to point out that the Freedom of Information Law does not require that an agency must prepare such a form, or that an applicant for records must complete a form prescribed by an agency. Section 89(3) of the Freedom of Information Law permits an agency to require that a request be made in writing. Further, the same provision requires that

the request "reasonably describe" the records sought. Consequently, it has been consistently advised that rights of access can neither be delayed nor denied due to a failure to complete a form prescribed by an agency. On the contrary, in my opinion, a request made in writing that reasonably describes the records sought should suffice.

Second, §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 case, the Town Board, to adopt regulations consistent with the Law and the regulations of the Committee.

Third, the Freedom of Information Law and the regulations contain prescribed time limits for responses to requests. Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 NYS 2d 774 (1982)].

Fourth, you asked that I check my records to determine whether the Town of Riverhead has "in the past few years forwarded any appeals" to this office. In all honesty, although I can recall having had contact with the Town, the appeals are filed chronologically, and it would be extremely difficult and time consuming to locate such appeals.

In any case, as you requested, copies of the Freedom of Information Law, the regulations promulgated by the Committee, and model regulations will be sent to the Town officials that you designated. The model regulations enable an agency to adopt appropriate procedures by filling in the appropriate blanks. The same materials have been attached 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: Town Board
Town Attorney
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3172

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

January 11, 1984

Mr. Joseph Hatch
83-A-1017 H-1-22
Box B
Dannemora, NY 12929

Dear Mr. Hatch:

I have received your letter of January 2.

You have requested information regarding the Freedom of Information Law with respect to your ability to obtain records from state and city agencies, the courts, offices of district attorneys, city hospitals and other institutions.

In this regard, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee, which govern the procedural aspects of the Law, and an article regarding the Freedom of Information Law that may be useful to you.

It is noted that 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 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, virtually all units of state and local government are subject to the Freedom of Information Law. However, it is emphasized that the courts and court records are excluded from the definition. Consequently, although the courts are subject to provisions of the Judiciary Law and various court acts, the Freedom of Information Law does not apply to court records.

When making a request under the Freedom of Information Law, §89(3) requires that an applicable "reasonably describe" the records sought. Consequently, when you request records from agencies, it is suggested that you provide as much detail as possible, such as names, dates, index, docket and identification numbers, 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3173

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

January 11, 1984

Mr. William Rodney
[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. Rodney:

I have received your letter of December 24, in which you requested advice regarding denials of access to records by two police departments.

According to your letter and the materials attached to it, you were arrested in New York City in 1982. At that time, jewelry, which was later determined to have been stolen, was taken from you. When it was ascertained that the property had been stolen in Nassau County, you were apparently charged with burglary in Nassau County. You added that the Court ordered that the records sought be produced at a Huntley hearing. Nevertheless, the records have not apparently been made available.

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

First, it is recommended that you discuss the matter with an attorney.

Second, althouhg the Freedom of Information Law (see attached) provides substantial rights of access, depending upon the nature of the records sought, it is possible that some might justifiably be withheld [see e.g., §87 (2)(e)] under that statute. Perhaps rights granted under provisions regarding discovery in the Criminal Procedure

Law would be more relevant, more useful and broader in terms of access than the Freedom of Information Law. As such, it is recommended that, if possible, you review and discuss with your attorney the provisions of Article 240 of the Criminal Procedure Law pertaining to discovery.

Third, under §89(4)(a) of the Freedom of Information Law, within thirty days of a denial, you have the right to appeal to the head or governing body of an agency, or whomever has been designated to render a determination on appeal.

Further, the provision that you cited in your requests is the federal Freedom of Information Act. That statute applies only to records of federal agencies. The New York Freedom of Information Law applies to records of units of state and local government in New York. Although the New York Freedom of Information Law might be applicable to the records in question, it is stressed that you should in my view 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3174

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

January 11, 1984

Mr. John P. Howland
[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. Howland:

I have received your letter of January 4, as well as the correspondence attached to it. Your inquiry concerns a response to a request made under the Freedom of Information Law by Richard F. Heller, Superintendent of the Phelps-Clifton Springs Central School District.

According to the correspondence, in your initial request, which was sent to the District Clerk, you indicated that you were a member of the Board of Education of the Dundee Central School District and identified the District Superintendent. The Clerk indicated that she forwarded your request to the Superintendent, who serves as the District's "Access Information Officer". On December 28, Mr. Heller wrote that your statement regarding your affiliation with the Dundee Board of Education led him to believe that your letter represented official School District business. In addition, Mr. Heller suggested that it was inappropriate to involve yourself in the affairs of another district and raised a question as to the reason for making such a request. In your letter to this office, you wrote that your request was unrelated to your past affiliation with the Dundee School District.

You have asked for my opinion concerning Mr. Heller's response to your request. In this regard, I would like to offer the following comments.

First, although your reason for identifying yourself as a member of a board of education is unclear, it is in my view irrelevant. As a general matter, any person may request records under the Freedom of Information Law, 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]. Moreover, while §2116 of the Education Law provides rights of access to records to "qualified voters" of a district, the Freedom of Information Law broadens the category of those who may assert rights of access to district records to "any person" [see Duncan, Matter of, 394 NYS 2d 362]. Consequently, your status as a member of a board of education or a non-resident of the District in my view has no bearing upon your capacity to request records under the Freedom of Information Law.

Second, in terms of the request itself, you asked for "the original papers filed" by a named individual against the Phelps-Clifton Springs Central School District. You cited an index number and referred to a settlement. Based upon that information, it appears that you requested papers concerning a lawsuit. Since I know nothing about the substance of the suit, I cannot offer specific direction regarding rights of access. However, as a general matter, if the same records are filed with and available from a court clerk (see Judiciary Law, §255), I believe that they would be equally available from the District if the District continues to maintain 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

cc: Richard F. Heller, Superintendent

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

January 12, 1984

Mr. Lewis E. Swann
[redacted]

Dear Mr. Swann:

I have received your letters of January 4 in which you appeared to have expressed a need for records of the Farmers Home Administration.

To be honest, it is difficult to determine from your letter exactly the kinds of records that you are seeking. It is noted, however, that the Committee on Open Government is a New York State agency responsible for advising with respect to the state Freedom of Information Law. As such, this office has no authority to require any agency to make records available. Further, this office does not maintain possession or control of the records in which you are interested.

I would also like to point out that the Farmers Home Administration is a federal agency. Consequently, rights of access to its records are not governed by the New York Freedom of Information Law, but rather by the federal Freedom of Information and Privacy Acts. A request under the federal Freedom of Information Act should be made in writing and reasonably describe the records in which you are interested. In an effort to assist you, I have contacted the Farmers Home Administration to determine the identity of the person to whom a request should be sent. In this regard, the Regional Director for that agency is Pierre L. Labourette. His address is James M. Hanley Federal Building, Room 871, 100 South Clinton Street, Syracuse, NY 13260. It is suggested that inquiries or requests regarding the Farmers Home Administration should be addressed to Mr. Labourette.

You also made reference to a county agency. If records sought are in possession of the County, the New York Freedom of Information Law is applicable to those records. Again, any request to the County should be made in writing, reasonably describing the records sought. Enclosed is a copy of the New York Freedom of Information Law for your consideration.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3176

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

January 12, 1984

Mr. Craig Morris
[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. Morris:

I have received your letter of January 2 in which you requested assistance regarding your capacity to obtain records.

Specifically, according to your letter, you requested medical records pertaining to you from the Niagara County Sheriff. Since you are presently incarcerated and indigent, you apparently lack the resources to pay for copies. You also indicated that you requested various court records, but that no response had been given as of the date of your letter.

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

First, an agency subject to the Freedom of Information Law, such as the office of the County Sheriff, may charge up to twenty-five cents per photocopy [see attached, Freedom of Information Law, §87(1)(b)(iii); §89(3)]. Further, although the federal Freedom of Information Act contains provisions regarding a waiver of fees, the New York Freedom of Information Law contains no similar provision. As such, an agency may assess a fee for copies of records sought under the Freedom of Information Law.

Second, the Freedom of Information Law specifically excludes the courts from its coverage [see definition of "agency", §86(3) and "judiciary", §86(1)]. Nevertheless, various provisions of law grant access to certain court records.

Lastly, it is suggested that you discuss the issue with your attorney. I would conjecture that, under the circumstances, vehicles other than the Freedom of Information Law, might result in greater success in obtaining the records in which you are interested, and that you attorney could provide substantial help to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3177

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

January 12, 1984

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 December 30 and the materials attached to it.

According to the correspondence, in October of 1983, you questioned the fees for copies of police reports furnished by the City of Syracuse. In response, you were informed that an ordinance adopted by the City in 1980 established a fee of seven dollars per report. Specifically, §19-4 of the Revised General Ordinances of City of Syracuse entitled "Furnishing copies of police records, photographs, fingerprint cards; fees therefor" states that:

> "[F]or the issuance and delivery of transcripts or certified copies of accident reports or certified copies of other records or reports on file with said department, which may be lawfully given, a fee of seven dollars ($7.00) per report."

You have requested my opinion regarding such a fee in view of an amendment to the Freedom of Information Law. 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, an ordinance, a local law or a regulation, for example, 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 police accident reports, but rather fees charged for copies of records in general. From my perspective, although the twenty-five cents limitation may pertain to police 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 Depart-

ment 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, you asked if there is "any provision in the Law for filing suit against a governmental body that fails to comply with the Law". Although §89(4) makes reference to the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules due to a denial of access to records, I believe that such a proceeding may be initiated under the same provisions with respect to the issue that you have raised.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3178

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

January 17, 1984

Mr. William Rodney
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rodney:

I have received your letter of January 5 in which you requested assistance regarding access to records.

Specifically, you wrote that you requested documents from the Tenth Judicial District Grievance Committee. In response, you were informed that the records were confidential. You have asked for information regarding "any remedies" that may be available to you.

Although you did not specify the nature of the records sought, since the matter involves a Grievance Committee, it is assumed that the records pertain to the status of an attorney.

In this regard, although the Freedom of Information Law generally grants broad rights of access to records, one of the exceptions to rights of access pertains to records that "are specifically exempted from disclosure by state or federal statute". Under the circumstances, a statute, §90 of the Judiciary Law likely requires the confidentiality of the records in question. Specifically, subdivision (1) of §90 states that:

> "[A]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attoreny and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or

> attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of the subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

In view of the language quoted above, if your request involved an inquiry regarding the conduct of an attorney, it appears that the denial was appropriate.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3179

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

January 17, 1984

Ms. Ann Piznak
[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. Piznak:

I have received your letter of January 4, in which you raised a variety of questions regarding the Freedom of Information Law.

The first area of inquiry concerns a request made orally that was followed by an oral denial. Specifically, you wrote that an individual orally requested inspection of a record on December 28. When he was refused an opportunity to examine the record and was asked to submit a written request, he was also informed that the Assessor, who maintained the record sought, would be away for two weeks. Consequently, he sought an "appeal hearing" on the same day. The Town Supervisor informed the applicant, however, to return in two weeks. As such, no appeal hearwas held.

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

It is noted at the outset that, while an agency may accept an oral request, §89(3) of the Freedom of Information Law and §1401.5 of the regulations promulgated by the Committee, which govern the procedural aspects of the Law, enable an agency to require that a request be made in writing. Therefore, an agency may respond to an oral request, but it may require that a request be made in writing.

In the event of a denial, whether it is made pursuant to an oral or a written request, such denial must in my view be made in writing stating the reason therefor, and advising the person denied of his or her right to appeal [see regulations, §1401.7(b)].

As you are likely aware, both the Freedom of Information Law, §89(3) and the regulations, §1401.5(d), require that a response to a request be made within five business days of the receipt of the request. Therefore, under the circumstances, it appears that a failure to provide the records sought on the date on which the request was made would not necessarily constitute a denial, for five business days had not yet transpired.

It is noted, however, that a response would have to be given within the appropriate time, notwithstanding the absence of the Assessor. Section 89(1)(b)(iii) of the Freedom of Information Law requires that the Committee develop procedural regulations. In turn, §87(1) requires the governing body of a public corporation, in this instance, the Town Board, to adopt regulations consistent with the Law and the regulations promulgated by the Committee. One of the requirements of the regulations involves the designation of one or more records access officers [see regulations, §1401.2]. The records access officer is responsible for coordinating an agency's response to requests for records. Therefore, even though records might be in possession of the Assessor, and even though the Assessor might be absent for a period of two weeks, the records access officer would in my view nonetheless have the duty to respond within the requisite time limits.

Another issue to which you alluded in your letter involves determinations on appeal. As you are aware, if an agency denies access in writing or constructively due to a failure to respond within the time limits set forth in the Law and the regulations, a person may appeal such a denial. Section 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."

It appears that an "appeal hearing" is held within seven business days of the submission of an appeal. However, it also appears that, in a situation where the appeals body determines that the records are accessible, the records are not made physically available until a typewritten determination is prepared. In my view, within seven business days from the receipt of an appeal, the agency must either fully explain in writing its reasons for denial or make the records available. Stated differently, if the appeals body determines that the records are accessible, I believe that they must be made available within seven business days of the receipt of an appeal, not when a written transcript of the hearing is prepared.

The remaining problem that you described involves a request "to see the updated list of records". You cited Public Officers Law, §88, in relation to the list. Please be advised that §88 deals solely with records of the State Legislature. Assuming that you are referring to the list of records that must be prepared by the Town, §87(3)(c) requires that the Town 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."

Since your request was made on December 23 and no response was given as of the date of your letter, it would appear that an appeal would be proper. It is noted, too, that the subject matter list required to be prepared under §87(3)(c) is in my view clearly accessible under the Law and should be available on a continual basis.

Lastly, you asked who has jurisdiction regarding the destruction of records "insofar as the clerk and assessor offices are concerned". The State Education Department through §65(b) of the Public Officers Law has responsibility with respect to the destruction of records at the municipal government level.

To obtain additional information on the subject, it is suggested that you write to the State Archives, Local Records Section, Cultural Education Center, Empire State Plaza, Albany, NY 12230.

Enclosed for your consideration are copies of the Freedom of Information 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
Exeuctive Director

RJF:jm

Encs.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3180

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

January 18, 1984

Kenneth Huemmer, Supervisor
Town of Greenville
P.O. Box 38
Greenville, NY 12083

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 Supervisor Huemmer:

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

Specifically, attached to your letter is correspondence from a person who is seeking the names and addresses of people who receive traffic tickets, or who are arrested for any reason, for the purpose of publication in a local newspaper. She also requested that the disposition of any infractions or crimes be printed.

You have requested advice regarding the procedure for responding to the request. You wrote further that, currently, a monthly report apparently does not identify individuals by name but rather by means of numbers.

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

First, 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 that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, the Law is broad in terms of its scope, for §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."

Consequently, any documents, such as tickets, summonses, booking records, police blotters and similar information would constitute "records" subject to rights of access granted by the Freedom of Information Law.

Third, a recent decision rendered by the Appellate Division, Third Department, involved a request for records "reflecting the identity of persons arrested for speeding" in a particular county [see Johnson Newspapers Corp. v. Stainkamp, App. Div., 463 NYS 2d 122 (1983)]. Enclosed is a copy of that decision, which, in its conclusion, found that "copies of speeding tickets and lists of traffic violations", including the identities of the subjects of those records, must be made available to the public. If after having reviewed the enclosed judicial decision, questions remain regarding rights of access to the records in question under the Freedom of Information Law, please do not hesitate to contact me.

Fourth, I would like to point out that the Freedom of Information Law includes within its scope records of an "agency". Section 86(3) defines "agency" to mean:

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

In turn, §86(1) defines "judiciary" to include:

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

As such, the courts and court records in my view fall outside the scope of the Freedom of Information Law.

Nevertheless, there are various provisions of the Judiciary Law and other court acts that grant significant rights of access to court records. Under the circumstances, perhaps most relevant to your inquiry is §2019-a of the Uniform Justice Court Act, a copy of which is enclosed. In brief, the cited provision states that the records and dockets of a justice court are accessible, unless otherwise provided by law, and shall be open for inspection to the public at reasonable times.

Fifth, it is noted that §89(3) of the Freedom of Information Law states that, as a general rule, an agency is not required to prepare a record in response to a request. Therefore, if, for example, the Town does not prepare a list of those who received summonses or speeding tickets which includes the identities of those persons, a new list would not have to be prepared in response to a request. However, as indicated earlier, based upon the decision rendered in Johnson, supra, I believe that individual summonses or speeding tickets are accessible for inspection and copying.

Lastly, with regard to procedure, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to develop 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 Board, to adopt regulations consistent with the Freedom of Information Law and the Committee's regulations.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, and model regulations 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-3181

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

January 19, 1984

Mr. Demetri Kolokotronis
[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. Kolokotronis:

I have received your recent letter in which you requested advice under the Freedom of Information Law and asked that I direct the New York State Bridge Authority to comply with your request.

As indicated in recent correspondence, the authority of the Committee is advisory only. Consequently, this office does not have the capacity to "direct" an agency to grant or deny access to records. It is noted, however, that I have spoken with Mr. Gordon Cameron, Executive Director of the New York State Bridge Authority. Based upon our conversation, I believe that Mr. Cameron is making every effort to comply with the Law.

Although the Freedom of Information Law grants broad rights of access, I would like to point out that not every record of an agency is available in its entirety. For instance, in one or your requests, you apparently sought home addresses of Authority employees. In my view, home addresses could generally be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. Moreover, §89(7) of the Freedom of Information Law states that nothing in the Freedom of Information Law shall require the disclosure of the home address of current or former public employees.

It is also important to note that §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, for example, you seek information that does not exist in the form of a record or records, the Authority would not in my view be obliged to create a new record in response to a request.

Your questions involve how you can be assured that all of the records sought are in fact made available, and that records sought are not removed or destroyed.

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

First, I believe that agencies generally respond to requests in good faith.

Second, if in response to a request, some records are made available while other records or portions of records are denied, the agency is required to provide the reasons for denial in writing and inform the applicant of the right to appeal [see attached, regulations, §1401.7; Freedom of Information Law, §89(4)(a)].

Third, §89(3) of the Law states in part that, if a record is requested, and the agency asserts that no such record is maintained, the agency shall, on request, certify "that is does not have possession of such record, or that such record cannot be found after diligent search".

Lastly, with respect to destruction of records, a state agency can only destroy or dispose of its records in accordance with §186 of the State Finance Law. Therefore, I do not believe that an agency may destroy a record to avoid responding 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
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3182

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

January 19, 1984

Mr. Albert Merget
[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. Merget:

I have received your letter of January 9 and the correspondence attached to it.

Your inquiry concerns a request for records dated February 18, 1983, that was directed to the New York City Board of Education. The receipt of the request was acknowledged on February 24. In the written acknowledgment, it was indicated that more than five days would be needed to ascertain whether the records sought exist and to determine rights of access to extant records. It was also stated that the anticipated date of response would be June 6, 1983. As of the date of your letter to this office, despite "numerous inquiries into the delay", you have received neither the materials, nor a response denying your request.

You have asked for advice regarding compliance with the Freedom of Information Law. In this regard, I would like to offer the following comments.

First, as a general matter, I am aware that the Board receives a great number of requests made under the Freedom of Information Law. Further, I believe that efforts are made to comply with its provisions.

Second, however, a failure to respond following the acknowledgment of the receipt of your request within the time period specified in my view is reflective of a constructive denial of access. As such, I believe that you may appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law.

For your information, the person to whom an appeal should be directed is John Nolan, Secretary to the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3183

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

January 20, 1984

Mr. John Franzese
[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. Franzese:

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

Among the five questions raised in your letter, four deal with the destruction of police records. While I cannot provide specific responses to your questions, I would like to offer the following remarks.

First, there are several provisions of law dealing with the destruction of records. With respect to state agency records, §186 of the State Finance Law prohibits a state agency from destroying or disposing of its records without following the procedure prescribed by that statute. In conjunction with that provision, retention schedules have been developed regarding some records. With regard to municipal agencies other than New York City, §65-b of the Public Officers Law prohibits those agencies from destroying records without the consent of the Commissioner of Education. In turn, the Commissioner has developed detailed schedules for the retention and disposal of specific types of records. With respect to New York City, records may not be destroyed except in conjunction with §3005 of the New York City Charter. Under the Charter, schedules are developed by the Department of Records and Information Services.

I have no knowledge of the retention periods established under those statutes regarding police records.

Your remaining question involves how an applicant for records may "gain access to his records if someone states that it is a routine police departmental procedure to dispose of records after 10 years." In short, there may be no way of obtaining the records.

It is noted that the Freedom of Information Law applies to existing records of an agency. Further, §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. As such, if a request is made for a record that no longer exists, the Freedom of Information Law would not in my view require that the agency create or prepare a new record in response to a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3184

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

January 23, 1984

Mr. Louis N. Kash
Corporation Counsel
City of Rochester
Department of Law
City Hall
30 Church Street
Rochester, NY 14614

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. Kash:

I have received your letter of January 11 in which you requested an advisory opinion. Your interest in complying with the Freedom of Information Law is much appreciated.

According to your letter:

> "...the Council of the City of Rochester is presently considering legislation which would require owners of alarm systems in the City of Rochester to obtain a permit for their system. This proposed legislation has many purposes, the most important of which are to reduce the number of false alarms in the City and to provide the City with the names of responsible people to contact in the case of activation of an alarm.
>
> "The proposed legislation will require the owner of an alarm system to fill out a permit application. Such application will require the name, home address and telephone number of the person applying for a permit, the address of the premises upon which the alarm system is located, and the

> name and telephone number of two other persons who are authorized to open the premises upon which the alarm system is located. The proposal legislation provides that such information shall be kept confidential by the City and that the information shall be used by the City only for law enforcement purposes."

It is your view that the information required to be included in the permit application may be withheld under the Freedom of Information Law for several reasons described in your letter.

I am in general agreement with your contentions, and in this regard, I would like to offer the following remarks.

Although the Freedom of Information Law is clearly based upon a presumption of access, the Law permits an agency to withhold records or portions thereof to the extent that one or more grounds for denial may appropriately be cited. Further, several grounds for denial are based upon potentially harmful effects of disclosure. Under the circumstances, it would appear that three of the grounds for denial may be relevant to the records in question.

First, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records the disclosure of which would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) lists various examples of unwarranted invasions of personal privacy. While none of the examples appearing in §89(2)(b) could in my view clearly be cited to withhold the records in question, I believe that those examples represent five among innumerable potential unwarranted invasions of personal privacy. For instance, §89(2)(b)(iv) and (v) state respectively that an unwarranted invasion of personal privacy includes:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

While the records in question would be relevant to the work of the agency that maintains them, it might be contended that the information disclosed to the agency is "of a personal nature" and is also "reported in confidence to the agency". Similarly, disclosure of the personal information contained on the application might if disclosed result in economic or personal hardship to the applicant. Since the provisions of §89(2)(b) are illustrative and not the only instances in which disclosure would constitute an unwarranted invasion of personal privacy, disclosure could in my view potentially result in an unwarranted invasion of personal privacy.

A second ground for denial of potential significance 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 and procedures..."

According to your letter, the applications would be compiled for law enforcement purposes. In my opinion, the only provision of §87(2)(e) that might be applicable is subparagraph (iv) pertaining to those records compiled for law enforcement purposes which if disclosed would reveal non-routine criminal investigative techniques or procedures. If the procedures and techniques are made known by means of the legislation, it might be argued that they are routine in nature and that, therefore, §87(2)(e) could not be cited as a basis for withholding.

Nevertheless, in discussing §87(2)(e)(iv), the Court of Appeals in Fink v. Lefkowitz stated that:

> "The purpose of the exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains

> its information...However beneficial its thrust, 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.
>
> "To 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 those requirements...
>
> "Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel..." [47 NY 2d 568, 572 (1979)].

While the specific contents of the permits or applications for permits might not reveal written non-routine criminal investigative techniques and procedures, disclosure might nonetheless enable an individual to evade or cicumvent effective law enforcement. If that is so, it is possible that a court might consider appropriate a denial on the basis of §87(2)(iv).

The third ground for denial of significance is §87 (2)(f), which permits an agency to withhold records or portions thereof when disclosure would:

> "if disclosed would endanger the life or safety of any person..."

As you contended in your letter, it appears that the release of information relating to the location of alarm systems or to the persons identified on an application could "endanger the life or safety" of a person or persons.

As a general matter, it is my view that a license or permit, for example, is generally accessible, for the purpose of such a document is to enable the public to know that an individual is qualified to engage in particular activity or vocation. However, the Court of Appeals appears to have inferred that the contents of an application for a license, even when approved, might not always be accessible to the public. In Kwitny v. McGuire [422 NYS 2d 867, aff'd 77 AD 2d 839, aff'd 53 NY 2d 968 (1981)], it was determined that approved pistol license applications must be made available. However, rights of access were not determined on the basis of the Freedom of Information Law, but rather due to the specific language of §400.00(5) of the Penal Law. In discussing the issue, it was found that "whether as a matter of sound policy disclosure of the contents of applications should be restricted is a matter for consideration and resolution by the Legislature" (id.). Consequently, if the Legislature had not by means of §400.00(5) of the Penal Law required that an approved pistol license application be made available, it would appear that the applications, at least in part, might justifiably have been withheld under various grounds for denial appearing in the Freedom of Information Law.

In sum, although I am unaware of any judicial determination dealing with rights of access to records analogous to those described, it appears that they could be withheld based upon one or more of the grounds for denial discussed in the preceding paragraphs.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3185

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

January 23, 1984

Mr. Richard Groesbeck
80-D-0134
Cell Location 3/2/16
Box 367
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. Groesbeck:

I have received your letter of January 7 in which you requested advice concerning access to medical records.

Specifically, you are interested in obtaining medical records pertaining to you that are in possession of the Albany Medical Center. In this regard, I would like to offer the following comments and suggestions.

First, the coverage 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 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 rights of access granted by the Freedom of Information Law apply to agency records, and since the Albany Medical Center is not a governmental entity, I do not believe that the Freedom of Information Law can be cited to request or obtain medical records from the Albany Medical Center.

Second, there is no provision of law of which I am aware that enables a patient to directly obtain medical records pertaining to him or her. Relevant, however, is §17 of the Public Health Law. Although that statute does not grant rights of access to medical records to a patient, it permits a patient to designate a physician to request and obtain medical records on his behalf. Enclosed is a copy of §17 of the Public Health Law for your consideration.

It is suggested that you contact a physician in order that he or she can, acting on your behalf, request and obtain the records in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3186

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

January 23, 1984

Mr. Joseph Sluzar
Becker, Card & Levy, P.C.
141 Washington Avenue
P.O. Box 60
Endicott, NY 13760

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. Sluzar:

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

According to your letter, the policies of some agencies appear to be more restrictive than the Freedom of Information Law permits. Specifically, with respect to accident reports filed with the Department of Motor Vehicles by the State Police, you wrote that you must pay a fee of $5.50, even though most accident reports are only one page long. You wrote further that you often cannot obtain a copy of an accident report until at least sixty days after the event and that the report is not provided unless the name, address and date of birth of the operator of the motor vehicle are included in a request.

You have asked whether the policies of the Department of Motor Vehicles are consistent with 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 the statute generally applicable to rights of access to government records. However, the Vehicle and Traffic Law contains provisions applicable only to records, pro-

cedures and fees of the Department of Motor Vehicles. Since the Vehicle and Traffic Law pertains to specific documents, I believe that its provisions supersede the Freedom of Information Law. Relevant under the circumstances is §202 of the Vehicle and Traffic Law, which states in part that:

> "2. Fees for searches. The fee for a search shall be two dollars except, that a fee of one dollar shall be charged if the request for information is submitted in a form and manner which shall permit the request to be machine processed rather than manually processed by personnel of the department, and receipt and distribution costs are borne by the requester. The commissioner shall prescribe the form and procedure to be used in order for a request to be eligible to be processed for such one dollar fee. If certification of a search is requested, there shall be an additional fee of fifty cents.
>
> "3. a. Fees for copies of records and documents. The fees for copies of records and documents, other than accident reports, shall be one dollar per page. A page shall consist of either a single or double side of any document. The fee for a copy of an accident report shall be three dollars and fifty cents. If certification of a copy of a record or document is requested, there shall be an additional fee of fifty cents. The fee for a copy of any such record or document shall be in addition to any fee for the search or searches required to be made in conjunction with such request."

It is noted that the fee for copies of accident reports is $3.50, not including any additional fees that may be assessed for searching and certification. Consequently, I believe that the fees assessed by the Department of Motor Vehicles are valid, although different from those that may be imposed under the Freedom of Information Law.

Second, as you may be aware, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". Without knowledge of the specific forms or procedures developed by the Commissioner of the Department of Motor Vehicles, I could not conjecture as to whether the requirements for making a request for records are inconsistent with the Freedom of Information Law.

Third, another source of motor vehicle accident reports may be a local agency or police department. In many instances, accident reports may be kept by several agencies, including the Department of Motor Vehicles, the Division of State Police, and a local police department or agency. In this regard, §66(a) of the Public Officers Law 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, I believe that accident reports may be available not only from the Department of Motor Vehicles but also from various other units of government that maintain the same records.

Further, it has been advised that the requirements concerning fees assessed by the Department of Motor Vehicles under §202 of the Vehicle and Traffic Law apply only to accident reports in possession of that state agency. If, for example, an accident report is made available by a different agency, the fee in my view may be no more than twenty-five cents per photocopy up to nine by fourteen inches pursuant to §87(1)(b)(iii) of the Freedom of Information Law. Moreover, the Freedom of Information Law does not permit the assessment of a search fee, unless such a fee is prescribed by statute.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3187

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

January 23, 1984

Mr. James D. Paige
[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. Paige:

Your letter addressed to Attorney General Abrams has been forwarded to the Committee on Open Government, which is responsible for advising with respect to the Freedom of Information Law.

According to your letter, you requested a copy of a State Police report regarding an incident in which you were "threatened by a man with a loaded shotgun on November 14, 1983". You were informed that all reports were forwarded to the District Attorney. Having discussed the matter with a representative of the District Attorney's office, you were told that "the case had been closed with no prosecution intended". Nevertheless, records regarding the incident were withheld.

You have requested assistance in obtaining copies of records concerning the incident that are in possession of the District Attorney. In this regard, I would like to offer the following comments.

First, 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. Further, many of the grounds for denial are based upon potentially harmful effects of disclosure.

Second, without knowledge of the contents of the records in question, I cannot advise with certainty as to the extent to which they may be available or deniable. However, it appears that three of the grounds for denial might relate to the records sought.

One such ground if §87(2)(b) which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". There may be considerations of personal privacy regarding the subject of an investigation, as well as witnesses, for example, who may have been questioned.

Another ground for denial, the ground most often applicable to records of law enforcement agencies, is §87(2)(e). That provision 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..."

Under the circumstances, it is questionable in my view whether the records could be withheld on the basis of the provision quoted above, for it appears that the investigation has ended. However, it is possible that the records might refer to confidential sources. To that extent, §87(2)(e)(iii) might be applicable.

The remaining ground for denial of possible significance is §87(2)(g), which permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is 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. Conversely, to the extent that such materials are reflective of advice, opinion, or recommendations, for example, they may in my view be withheld.

Third, it is suggested that you submit a written request for the records to the office of the District Attorney. Please note that §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. As such, when making a request, it is recommended that you include names, dates, descriptions of events and similar information in order to enable agency officials to locate the records sought.

Lastly, in the event of a denial, the reasons should be stated in writing. Further, you should be apprised of your right to appeal the denial. Section 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 records sought.

Enclosed for your consideration are copies of the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law.

I hope that I 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-3188

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

January 24, 1984

Mr. Howard Jacobson
80-A-3899
Great Meadow Correctional Facility
Box 51
Comstock, New York 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. Jacobson:

I have received your letter of January 16, in which you requested assistance.

According to your letter, you have unsuccessfully attempted to gain access to records from the New York City Police Department. In this regard, I would like to offer the following comments and suggestions.

First, although you indicated that gaining access to police records would demonstrate a violation of your fourth amendment rights, you did not indicate the nature of the records sought. Without additional detail regarding the nature of the records in which you are interested, I cannot provide specific direction, but rather only general advice.

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, in the context of records concerning a law enforcement investigation, there may be several applicable grounds for withholding. To the extent to which those grounds for denial might appropriately be cited is in my view dependent upon the specific contents of the records.

For example, one of the grounds for denial indicates that an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy". Perhaps persons other than yourself are identified in the records. In such cases, there may be privacy considerations regarding those people.

Another ground for denial of possible significance 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 is based upon potentially harmful effects of disclosure. If, for instance, you were arrested and convicted, it would appear unlikely that disclosure at this juncture would interfere with an investigation or deprive a person of a right to a fair trial. However, records might contain information regarding confidential sources, for example.

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person". The application of the language quoted above in the preceding sentence is dependent upon specific facts. Consequently, I could not conjecture as to whether it might appropriately be cited.

A final ground for denial of possible relevance is §87(2)(g), which permits an agency to withhold records that:

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

Under the language quoted above, those portions of inter-agency or intra-agency materials reflective of opinion, advice, or recommendation, for example, may in my view justifiable be withheld under the Freedom of Information Law.

Third, it is noted that §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". Consequently, when making requests, it is suggested that you supply as much information as possible, including names, dates, identification numbers, descriptions of events and similar information that would enable agency officials to locate the records sought.

Lastly, in the event of a denial, you may appeal to the head or governing body of an agency. Specifically, §89(4)(a) of the Freedom of Information Law states in part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall

> within seven business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3189

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

January 24, 1984

Ms. Josephine Kent
Town Assessor
Town of Deerpark
Drawer A
Huguenot, NY 12746

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. Kent:

I have received your letter of January 11, as well as the materials attached to it.

As Town Assessor for the Town of Deerpark, you have received a series of requests for information. In conjunction with those requests, you have asked for an advisory opinion under the Freedom of Information Law.

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

First, having reviewed your letter and the correspondence, it appears that applicants who have submitted requests to the Town as well as Town officials may have misconceptions regarding various aspects of the Freedom of Information Law.

Second, the central issue in the controversy in my opinion involves requests for information that does not exist. In conjunction with those requests, you have asked, for example, whether you are required "to prepare special records" sought by an applicant, whether you must "explain" your workbook to applicants for records, whether you must "explain exactly how [you] arrive at an assessment", and whether there are statutes concerning exactly the types of records that you must maintain.

It is emphasized that §89(3) of the Freedom of Information Law states in part that, unless otherwise specifically required, an agency is not obliged to create or prepare a record in response to a request. Therefore, if, in the context of your letter, information is sought from your office which is not kept by your office or which has been discarded, I do not believe that you are required to create or prepare a new record in response to a request.

You indicated that in the process of arriving at an assessment, you use various tabulations which are discarded when you are finished using them. If adding machine tapes, notes containing breakdowns and similar records no longer exist, you would not in my opinion be required to prepare new records on behalf of an applicant.

With respect to records that must be kept by an assessor, it is suggested that you contact the Division of Equalization and Assessment, for I am unfamiliar with specific recordkeeping requirements.

It is noted, too, that the Freedom of Information Law pertains only to rights of access to records. Therefore, although you may explain your workbook or the means by which you arrive at an assessment to the public, the Freedom of Information Law does not require that you take such steps. In short, the responsibility under the Freedom of Information Law involves granting or denying access to existing records.

In sum, unless I misunderstood the correspondence, the person who has made the requests which led to your letter to this office has sought information from you which does not exist. If that is so, it is reiterated that you do not in my opinion have the duty to create or compile new records in order to respond to his requests.

Third, if I understand the facts correctly, after having informed the applicant that records sought do not exist, the applicant sought an appeal on the ground that the information was denied. In my view, an appeal made pursuant to §89(4)(a) of the Freedom of Information Law involves only those situations in which existing records are denied. Although an applicant might not have received the information sought because the information does not exist, I do not believe that a failure to provide such information constitutes a denial that may be appealed under the Freedom of Information Law. Again, an appeal in my view may be made only when existing records have been withheld.

As an alternative, an applicant may seek a certification pursuant to §89(3). The cited provision states in part that 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". Therefore, in a situation in which an applicant requests information that does not exist in the form of a record or records, he or she may seek a certification in which an agency official must assert that the records sought do not exist or cannot be found after making a diligent search.

Fourth, in terms of procedure, it is noted that §89(2)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations governing the procedural aspects of the law. In turn, §87(1) requires the governing body of a public corporation, in this instance, the Town Board, to adopt "uniform rules and regulations for all agencies in such public corporation" consistent with the Freedom of Information Law and the regulations promulgated by the Committee.

One aspect of the regulations promulgated by the Committee involves the designation of one or more records access officers. Section 1401.2(a) of the regulations promulgated by the Committee 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."

I am unaware of whether the Town Board of the Town of Deerpark has designated one or more records access officers. If, however, only one records access officer has been designated, that person is in my view responsible for coordinating the Town's response to requests for records. As such, if you, as Assessor, have not been designated a records access officer with respect to the records of your office, I do not believe that you would be responsible for dealing with requests directly, for the designated records access

officer would bear that responsibility. If I interpret the correspondence correctly, the applicant for records believes that you are directly responsible for responding to requests made under the Freedom of Information Law for records in possession of your office. While you may be most familiar with those records, if one records access officer other than yourself has been designated, that person would in my view be responsible for responding to requests for records in your office, and any other office within Town government.

Lastly, I have over the course of years received from the Town of Deerpark various transcripts of "appeal hearings" that followed denials of access. In this regard, while I do not believe that an "appeal hearing" conflicts with the Freedom of Information Law in any way, the Town of Deerpark is the only agency of which I am aware that prepares a transcript of such a hearing. Again, while I do not believe that the practice is in any way violative of the Freedom of Information Law, the preparation of a transcript may be unnecessary. In addition, it is possible that the preparation of a transcript might delay the process.

With respect to appeals, §89(4)(a) 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 records sought."

As I interpret the language quoted above, when an appeal is made, the head or governing body of the agency must either deny access to the records sought, with a full explanation in writing of the denial, or provide access to the records within seven business days of the receipt of the appeal. It appears from the correspondence that re-

cords determined to be available by the appeals body might not be made available until a transcript of the hearing is prepared. It also appears that the transcript may be completed more than seven business days following an appeal. In my view, if the appeals body determines that the records are accessible, they must be made available when such a determination 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

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3190

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

January 25, 1984

Mr. Joseph Silverman
Personnel Consultant
[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. Silverman:

I have received your letter of January 14 and the correspondence attached to it.

According to the correspondence, you have requested from Ontario County a record consisting of "the names, work addresses, county deparmtent or governmental unit, and zip code of all employees" of the County".

Your initial request was denied on the ground that disclosure would, under the circumstances, constitute an unwarranted invasion of personal privacy pursuant to §89 (2)(b) of the Freedom of Information Law, for it was assumed that the records would be used for commercial or fund-raising purposes. Following your appeal, Elwyn C. Herendeen, the Ontario County Administrator, affirmed the denial, citing the same provision of the Freedom of Information Law as well as a provision of the New York State Constitution that prohibits a unit of government from making a gift or loan for a private undertaking. Mr. Herendeen also cited Resolution 614 of 1977 adopted by the County Board of Supervisors, which apparently states that "there shall be no sales or solicitations for sales of any kind within the County building during office hours, except for solicitation by persons intending to sell items to the County of Ontario".

You have requested an advisory opinion regarding rights of access to the information sought as well as the effect of the resolution cited by the County Administrator.

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

First, as you may be aware, the Committee is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. Consequently, any advice offered concerning the resolution cited earlier would in my view be beyond the scope of the Committee's jurisdiction.

Second, with respect to 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 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, as a general rule, an agency, such as Ontario County, is not required to create a record in response to a request. Section 89(3) of the Freedom of Information Law states in 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."

Relevant to your request, however, is paragraph (b) of subdivision (3) of §87 of the Freedom of Information Law, which states that each agency shall maintain:

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

In view of the language quoted above, I believe that the County is required to prepare a record analogous to the information sought.

The provision of the Freedom of Information Law cited as a basis for denial, §89(2)(b)(iii), is one among five examples of unwarranted invasions of personal privacy. The specific language of that provision indicates 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..."

Although I am unfamiliar with any judicial determination dealing with a request for the payroll record required to be compiled when it is sought for a commercial purpose, it is my view that §87(3)(b) concerning salary information is intended to ensure that such information must be compiled and made available to any person.

It is noted, too, that §89(6) of the Freedom of Information Law states that:

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

Consequently, nothing in the Freedom of Information Law may be cited to restrict rights of access granted by other statutes or by means of judicial determination. In this regard, prior to the passage of the Freedom of Information Law in 1974, it was determined judicially that the type of information that you are seeking was accessible to any taxpayer under §51 of the General Municipal Law, which also applies to the County as a municipality. In Winston v. Mangan, which dealt in part with a request for the names and salaries of employees of a municipal park district, it was found that:

> "[T]he names and pay scales of the park district employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" [338 NYS 2d 654, 662 (1972)].

Further, as early as 1960, it was determined that payroll records of municipal employees are "public records" subject to inspection [Chambers v. Kent, 201 NYS 2d 439].

In a more recent decision dealing with a request for a computer tape, the contents of which had previously been accessible in a paper format, it was stated that:

> "...it would be anomalous to permit the statute to be used as a shield by government to prevent disclosure. In this regard, Public Officers Law §89 subd. 5 specifically provides: 'Nothing 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.' (See also 21 NYCRR 1401.1(d); St. Joseph's Hospital Health Center v. Axelrod, 74 A.D.2d 698, 425 N.Y.S.2d 669; Orange and Rockland Utilities, Inc. v. Town of Clarkstown, 64 A.D.2d 919, 408 N.Y.S.2d 132; City of New York v. BusTop Shelters, Inc., 104 Misc.2d 702, 428 N.Y.S.2d 784 (Supreme Court, New York County).
>
> "It should be noted in conjunction with the above that cases dealing with the question of government disclosure of lists of names and addresses invariably involve instances where the names and addresses sought were not public information prior to the request (see Westchester News v. Kimball, 50 N.Y.2d, 575, 430 N.Y.S.2d 574, 408 N.E.2d 904; Teachers Assn. v. Ret. System, 71 A.D.2d 250, 422 N.Y.S.2d 389; Wine Hobby U.S.A. v. United States Internal Revenue Service, 3d Cir., 502 F.2d 133; Disabled Officers v. Rumsfeld, D.C., 428 F.Supp. 454; but cf. Person-Wolinsky v. Nyquist, 84 Misc.2d 930, 377 N.Y.S.2d 897). Here, however, the records in question can be viewed by any person, and presumably copies of portions obtained, simply by walking into the appropriate town office" [Szikszay v. Buelow, 436 NYS 2d 558, 563 (1981)].

In this instance, I believe that the type of payroll information that you are seeking had long been available to the public generally under §51 of the General Municipal Law, that it is currently made available under the Freedom of Information Law as a matter of common practice, and that it remains accessible.

The other basis for withholding involves Article VIII, §1 of the New York State Constitution concerning gifts or loans made by municipalities for a private undertaking. I believe that a similar argument was made in a situation in which a request was made for salary and fringe benefit data submitted by a series of school districts to a BOCES. It was argued that "disclosure would constitute an unlawful contribution of public funds contrary to section 1 of Article VIII of the Constitution" [see Doolan v. BOCES, 48 NYS 2d 341, 345 (1979)]. In response, the Court of Appeals found that:

> "The public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY2d 567, 571, supra). Nothing said in Cirale v. 80 Pine St. Corp. (35 NY2d 113) was intended to suggest otherwise. No greater weight can be given to the constitutional argument, which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting basis. Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" (id. at 347).

Therefore, it appears that the state's highest court has found that compliance with the Freedom of Information Law by producing records does not represent an unconstitutional gift.

I hope that I 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: Elwyn C. Herendeen, Ontario County Administrator
John Park, Ontario County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3191

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

January 25, 1984

Mr. Walter Williams
82-A-6088
354 Hunter Street
Ossining, NY 10562

Dear Mr. Williams:

I have received your letter of January 23 in which you requested from this office copies of "medical and institutional" 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 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 and suggestions.

First, §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 Freedom of Information Law. In turn, §87(1) requires each agency to adopt regulations in conformity with the Freedom of Information Law and the Committee's regulations.

In this regard, the Department of Correctional Services has adopted procedural regulations regarding access to its records. The regulations, a copy of which has been enclosed, indicate that a request for records kept at a correctional facility should be directed to the facility superintendent.

Second, it is emphasized that §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. It is possible that a request for "medical and institutional" records, without additional description, would not reasonably describe the records sought. Therefore, when making a request, it is suggested that you include as much information as possible, including dates, identification numbers, descriptions of events or medical treatments, and similar information that might enable agency officials to locate the records in which you are interested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3192

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

January 25, 1984

Mr. Omie Saunders
78-A-2121
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. Saunders:

I have received your letter of January 15, which pertains to requests made under the Freedom of Information Law.

Specifically, you wrote that on November 20, you requested a copy of an autopsy report from the office of the Suffolk County Medical Examiner. On December 4, you requested a "ballistic report" from the "Criminalistics Laboratory" in Hauppauge. As of the date of your letter, you had not received a response to either request. As such, you have requested assistance in obtaining the records or instructions regarding the course of action that might be taken.

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

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, this office does not have the capacity to require an agency to make records available.

Second, I do not believe that the Freedom of Information Law is the appropriate vehicle for obtaining a copy of an autopsy report. The first basis for withholding records under 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 pertains to autopsy reports. Specifically, §677(3)(b) of the County Law 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 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 that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the language quoted above, it appears that a court order would be needed to obtain a copy of an autopsy report.

Third, with respect to the ballistics report, I believe that it would be accessible or deniable based upon the facts relative to the investigation. Of possible relevance is §87(2)(e) of the Freedom of Information Law, 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..."

If, for example, the investigation has been completed, it would appear that the ballistics tests would be accessible. Although the records involve criminal investigative techniques and procedures, those techniques and procedures would in my view be "routine" [see Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979)].

Lastly, it is noted that the Freedom of Information 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agnecy 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 [see Floyd v. McGuire, 108 Misc. 2d 536, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

I believe that the person designated to render determinations on appeal regarding Suffolk County is the County 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3193

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

January 27, 1984

Mr. Angelo Dero
83-A-3649
P.O. Box 618
135 State Street
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. Dero:

I have received your letter of January 12 concerning a fee assessed under the Freedom of Information Law.

According to your letter, you requested from the Auburn Correctional Facility copies of commitment papers pertaining to you. You indicated that the commitment papers consisted of four pages and that you were charged a fee of $1.60 for the copies. It is your contention that the fee was excessive and that, under the circumstances, inmates should not be required to pay fees for copies.

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

First, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to assess a fee of up to twenty-five cents per photocopy for copies up to nine by fourteen inches.

Second, although the federal Freedom of Information Act enables a federal agency subject to its provisions to waive fees for photocopying, the New York State Freedom of Information Law contains no similar provision.

Third, based upon your letter, it was inferred that you were charged forty cents per page for the copies made available to you. Since that fee appeared to be excessive, I contacted the Department of Correctional Services on your behalf to obtain more information. I was informed that the commitment papers consisted of four pages, but that two side of each page were copied. Consequently, eight photocopies were made at a cost of twenty cents per photocopy. Therefore, I believe that the fees assessed were appropriate.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3194

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

January 26, 1984

Mr. J.N. Milnes
Executive Director
Association for Neighborhood
Rehabilitation, Inc.
The Arcade, Ogdensburg Mall
Box 629
Ogdensburg, NY 13669

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. Milnes:

As you are aware, I have received your letter of January 17 in which you requested an advisory opinion under the Freedom of Information Law.

The question involves the status of the Association for Neighborhood Rehabilitation, Inc. According to your letter and the materials attached to it, which include correspondence, incorporation papers, and an advisory opinion prepared by this office in 1979, the Association for Neighborhood Rehabilitation, Inc. is a not-for-profit corporation. The Corporation engages in contractual relationships with various units of government, both state and local. It is apparently the contention of a local newspaper that the Corporation is subject to the Freedom of Information Law and, therefore, is required to grant access to its records in accordance with the provisions of the Freedom of Information Law. I disagree with that contention.

The Freedom of Information Law is applicable to records of an agency. In this regard, §86(3) of the Law defines "agency" to mean:

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

Based upon the language quoted above, and in view of the materials that you forwarded, the Corporation in question is not in my opinion a "governmental entity". Consequently, I do not believe that it is an "agency" required to comply with the Freedom of Information Law.

In some instances, due to specific statutory functions or direction, it has been advised that certain not-for-profit corporations are essentially extensions of government and that, therefore, they are subject to the requirements of the Freedom of Information Law. In this instance, however, I do not believe that any analogous statutory functions or directions apply to the Corporation. For example, it has been advised that a local development corporation, a not-for-profit corporation, which under the Not-for-Profit Corporation Law performs "an essential governmental function" and a majority of whose membership was designated by government, falls within the requirements of the Freedom of Information Law. The degree of governmental control or relationship in this case is dissimilar. Therefore, I do not believe that the Corporation is an "agency" required to comply with the Law.

It is emphasized that due to its contractual relationships with government, when records are submitted to agencies, the records become subject to the Freedom of Information Law. Under those circumstances, records submitted by the Corporation to the Division of Housing and Community Renewal or municipalities, for example, would be subject to extant rights of access when they are in possession of of those agencies. Further, accessible records pertaining to the Corporation maintained by those agencies would be available to any person.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Macreena Doyle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3195

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

January 27, 1984

Mr. Jean B. Treacy
[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. Treacy:

I have received your letter of January 19 in which you raised questions concerning the Freedom of Information Law.

According to your letter, the Business Manager of Clinton Central School District:

> "...indicates that there are procedures necessary to follow in seeking to examine the salary schedule by names and salary. He indicates that this would not be allowed and has attached restrictions on what information one can obtain even when these procedures are used. In any event, he indicated that one could not obtain complete information including names and salaries as stated above."

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

First, in terms of procedure, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the Law. In turn, §87(1)

requires the governing body of a public corporation, in this instance, the School Board, to adopt procedural regulations in conformity with the Freedom of Information Law and the regulations promulgated by the Committee.

Further, when making a request, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency may require that a request be made in writing for a record "reasonably described". As such, in my opinion, any written request that reasonably describes the record sought should suffice.

Second, the payroll information in which you are interested is in my view clearly available to any person. While the Freedom of Information Law as originaly enacted in 1974 appeared to require that salary information be made available only to members of the news media, the current Freedom of Information Law makes no distinction regarding the rights of the news media and the public generally.

Moreover, while the Freedom of Information Law generally does not require an agency to create a record, an exception in the Law pertains specifically to payroll information. Section 87(3)(b) of the Law requires that each agency, including a school district, shall maintain:

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

Therefore, I believe that the District is required to prepare and make available a record containing the information in which you are interested.

It is noted, too, that §1401.7 of the Committee's regulations requires that a denial of a request must be made in writing stating the reasons and identifying the person or body to whom an appeal may be directed. In the event of a denial, §89(4)(a) of the Freedom of Information Law states that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within seven business days of the receipt of such appeal fully explain in writing to the person request-

> ing the record the reasons for further denial, or provide access to the record sought."

With respect to judicial review of a denial, one must exhaust his or her administrative remedies prior to the initiation of a judicial proceeding. Consequently, there must be a denial pursuant to an appeal before a suit could be brought. Specifically, §89(4)(b) of the Freedom of Information Law provides 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."

Further, §89(4)(c) states that a court may, in certain circumstances, award reasonably attorney fees to a person who has substantially prevailed in a challenge to a denial of access.

Your second area of inquiry involves a denial of access to records by the Town Justice. In my view, the Freedom of Information Law does not apply to such records.

The scope of the Law is determined in part by the term "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."

Therefore, the courts and court records fall outside the requirements of the Freedom of Information Law.

Nevertheless, provisions of the Judiciary Law and various court acts grant broad rights of access to court records. For instance, enclosed is a copy of §2019-a of the Uniform Justice Court Act, which is applicable to records of a Town Justice Court. In brief, that statute provides that, except as otherwise prescribed by law, the records and dockets of a justice court are accessible.

Enclosed for your consideration are copies of the Freedom of Information Law and the regulations promulgated by the Committee. Those documents and a copy of this opinion will be forwarded to the Business Manager of the School District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Business Manager, Clinton Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3196

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

January 30, 1984

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:

As you are aware, I have received your letter and various related materials concerning access to information regarding housing rehabilitation grants in the City of Utica.

Although an advisory opinion on the same subject was rendered on October 13, 1983, you indicated information crucial to the opinion was not made available to me at that time. Consequently, you have requested that I review the materials in order to advise accordingly based upon the content of those materials.

In October it was advised that a disclosure permitting the public to determine the general income level of a participant in the program would likely constitute an unwarranted invasion of personal privacy and that, therefore, the information could be withheld.

However, based upon a review of a description of the housing rehabilitation program prepared by the City of Utica, several types of grants were available. Some are dependent upon income qualifications and guidelines; others are based upon the location of housing, the size of a dwelling, and whether an owner lives on the premises. In those latter situations, it does not appear that any

income qualification must be demonstrated. If that is so, while it is reiterated that disclosure of the names of persons in receipt of grants based upon income guidelines would in my view constitute an unwarranted invasion of personal privacy, the remaining records reflective of those in receipt of grants whose applications would not reveal any particular income level should in my view be made available. Under those circumstances, since no income level is indicated by means of their participation in the program, I do not believe that the degree of invasion of privacy is as significant as in those cases in which a grant is based upon an income level.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles Brown, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3197

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

January 31, 1984

Mr. Ronald F. Rizzo
20536-053 - Unit 2-A
P.O. Box 1000
Otisville, NY 10963

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. Rizzo:

I have received your letter of January 22 in which you requested assistance concerning the use of the Freedom of Information Law.

Specifically, you requested the names and addresses of the individuals to whom appeals may be sent. You indicated that several agencies have refused to provide the information and others have not acknowledged receipt of your requests.

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

First, this office does not maintain any general agency list of persons to whom appeals should be sent. The Freedom of Information Law includes within its scope thousands of units of state and local government. Further, when an administration or staff changes, the persons designated to respond to requests and appeals under the Freedom of Information Law may also change.

Consequently, it is suggested that your appeal be sent to the head or governing body of the agency involved. In an effort to ensure that an appeal is processed quickly and that it is directed to the appropriate person, it is also recommended that the outside of the envelope containing an appeal be marked "Freedom of Information Law appeal".

Second, 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 to requests and appeals.

Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reaons, 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-980
FOIL-AO-3198

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

January 31, 1984

Mr. Michael N. Wright
[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. Wright:

I have received your letter of January 18, which again pertains to the deliberations of and investigation by the Grievance Committee for the Tenth Judicial District.

Without reiterating the provisions of §90(10) of the Judiciary Law, which was quoted in full in the opinion of January 11, it appears that the only way in which you can learn more of the grievance would involve an effort to seek disclosure through the Appellate Division. In this instance, I believe that the Appellate Division, Second Department, would have jurisdiction. Further, in view of the provisions of the Judiciary Law, the Freedom of Information Law in my view neither applies to nor can be cited as a vehicle for obtaining records of a grievance committee.

With respect to the deliberations of a grievance committee, I would also like to point out that the Open Meetings Law, which is generally applicable to public bodies, would not in my opinion apply to the deliberations of either a grievance committee or a court. Section 103(1) of the Open Meetings Law exempts from the provisions of the Law "judicial or quasi-judicial proceedings..." Consequently, the deliberations of the Grievance Committee and the Appellate Division would in my view fall outside the requirements of the Open Meetings Law.

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-3199

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

February 1, 1984

Mr. Evans Herman
[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. Herman:

As you are aware, your letter of January 14 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 you have "the right to look at the Job Applications or Personal History Resumes of police officers, whether annualized or seasonal, who have been hired by the Bolton Town Board".

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

First, rights of access to records of state and local government are generally determined by the provisions of the Freedom of Information Law, a copy of which is attached.

Second, although the Freedom of Information Law provides substantial rights of access to the records of a town, it is likely in my opinion that the resumes or job applications may be withheld, at least in part, due to considerations of personal privacy.

In brief, the Freedom of Information Law states that all records are accessible, except to the extent that records or portions thereof fall within one or more grounds for denial listed in §87(2). Relevant under the circumstances is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Further, §89(2)(b) lists five examples of unwarranted invasions of personal privacy, the first of which pertains to:

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

Based upon the provisions quoted above, those portions of a resume or job application reflective of one's employment or medical history, for example, or information involving one's age, social security number, marital status and similar personal details could in my view likely be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

If, however, in an announcement of a position, there is an indication that specific requirements be met (i.e., educational degree, a certain number of years experience), I believe that those portions of the records in question indicating those requirements would be accessible. In those cases, disclosure would in my opinion constitute a permissible rather than an unwarranted invasion of personal privacy.

Third, there may be another vehicle be which you can obtain relevant information regarding police officers hired by the Town. If a condition of being hired involves passing a civil service examination, those who pass the exam are generally identified by name and grade on an "eligible list". If there is an eligible list for the positions filled, I believe that it would be accessible.

Lastly, in an effort to obtain more information on the subject, I have researched the Town Law; which contains a provision regarding the qualifications of town police officers. Section 151 of the Town Law states that:

> "[N]o person shall be eligible to appointment or reappointment to such police department, nor continue as a member thereof, who shall not be a citizen of the United States, who has

> been convicted of a felony, who shall be unable to read and write understandingly the English language or who shall not have resided within the state of New York one year, and in any town or village in the county in which such town is situated for six months next preceding his appointment."

As such, particularly in the case of seasonal police officers, the qualifications for appointment may be somewhat minimal.

I hope that I 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-3200

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

February 1, 1984

Mr. Wallace S. Nolen
Suite 201
881 Gerard Avenue
Bronx, NY 10452

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. Nolen:

I have received your letter of Janaury 10, as well as the correspondence attached to it.

You have requested my comments regarding rights of access to records required to be kept pursuant to §§916 through 919 of the County Law. Your correspondence indicates that your requests made pursuant to the cited provisions that were directed to the County Clerk of Bronx County have not been answered.

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

First, the focal point of your inquiry concerns §916 of the County Law which states that:

> "[I]t shall be the duty of clerks of the counties comprising the city of New York to keep an exact and detailed account of all moneys actually received by them or their subordinates for any services rendered in their official capacity, and of all moneys which such

> county clerks or their subordinates shall be entitled to demand and receive for any such services. Said county clerks shall deposit monthly with the commissioner of finance any and all such sums of money received. Such account shall show when every such service shall have been performed, its nature and the money charged therefor, and shall at all times, during office hours, be open to the inspection, without any fee or charge therefor, of all persons desiring to examine the same, and such accounts shall be deemd a part of the records of the office in which they shall be kept, and shall be preserved therein as other books of record are until they have been audited by the comptroller of the city of New York and his approval given to their destruction but in any event for not less than ten years."

Although the language of the cited provision appears to be clear, it is emphasized that the Committee is authorized to advise with respect to the Freedom of Information Law. Consequently, I do not believe that it would be appropriate to provide specific direction regarding the responsibility of the County Clerk pursuant to §916 of the County Law.

Nevertheless, it is noted that §89(6) of the Freedom of Information Law states that:

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

Based upon the language quoted above, nothing in the Freedom of Information Law could be cited to restrict rights of access granted by a different provision of law, including §916 of the County 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-3201

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

February 1, 1984

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 January 25, as well as the correspondence attached to it.

According to the materials, you requested from the City of Binghamton "the test results from the Testing Laboratory in Chicago, Illinois re their study of brick crosswalks on Court Street, Binghamton, New York". In response, you were informed that the tests were prepared for litigation and that, therefore, they would be denied. Following your appeal, Mayor Crabb upheld the denial on the ground that the records in question were exempted from disclosure under §87(2)(a) of the Freedom of Information Law due to the provisions of §3101 of the Civil Practice Law and Rules.

You have requested that I review the materials and render an advisory opinion regarding the denial.

In my opinion, the denial was likely appropriate.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Nevertheless, there may be situations in which records may justifiably be withheld.

The provision of the Freedom of Information Law cited by Mayor Crabb, §87(2)(a), indicates that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute". The other provision that was cited by the Mayor, §3101(d) of the Civil Practice Law and Rules, pertains to "material prepared for litigation" and states that:

> "[T]he following shall not be obtainable unless the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship:
>
> 1. any opinion of an expert prepared for litigation; and
>
> 2. any writing or anything created by or for a party or his agent in preparation for litigation."

Based upon the contents of the correspondence, it appears that the test results constitute material prepared for litigation and that, consequently, the records are exempted from disclosure by statute.

You referred to a situation that occurred last year in which an advisory opinion rendered by this office was useful in obtaining records regarding an accident. It is noted that specific statutory provisions deal with records of motor vehicle accidents, such as §66-a of the Public Officers Law and §3101(g) of the Civil Practice Law and Rules. In my opinion, those statutes would not be applicable to the records in which you are interested and could not appropriately be cited in relation to rights of 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

cc: Mayor Crabb
Toni Grekin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3202

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

February 1, 1984

Mr. David Elliott
83-A-1217
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. Elliott:

I have received your letter of January 21 in which you requested advice regarding your rights under the Freedom of Information Law.

According to your letter, you contacted your institutional counselor in an effort to examine the institutional folder pertaining to you. You wrote, however, that you were informed that you have no right to inspect the records and that you could schedule an appointment "to see insignificant portions" of the folder. Further, you apparently requested that you be given an index of the contents of the folder that specifies the documents that you are not permitted to inspect. As of the date of your letter, you had apparently received no response to that request.

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

First, §89(1)(b)(iii) of the Freedom of Information Law requires that the Committee on Open Government promulgate regulations regarding the procedural aspects of the Law. In turn, §87(1) requires each agency to adopt regulations in conformity with the Law and the regulations of the Committee. The Department of Correctional Services has adopted such regulations, and I have enclosed a copy for your consideration.

Second, under the Department's regulations, a request for records kept at a facility should be directed to the facility superintendent.

Third, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. A vehicle that might enable you to reasonably describe the records in which you are interested is the "subject matter list" or "master index" kept at the facility (see enclosed regulations, §5.13). I would like to point out that §5.13 of the regulations is based upon §87(3)(c) of the Freedom of Information Law, which requires an agency to maintain:

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

Based upon the language quoted above, each agency is required to maintain a list in reasonable detail, by category, of the types of records maintained by the agency. Therefore, the Department is not in my opinion required to prepare an index of the specific records contained within your institutional folder. Nevertheless, a review of the Department's master index might enable you to determine the types of records contained within your institutional folder.

Lastly, 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 your folder, I could not provide specific direction regarding rights of access to records contained in the folder. However, I have enclosed a copy of the Freedom of Information Law for your consideration. It is suggested that you closely review the Freedom of Information Law and the Department's regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3203

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

February 2, 1984

Mr. Demetri Kolokotronis
[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. Kolokotronis:

I have received a third in a series of letters from you in which you asked whether this office has contacted the New York State Bridge Authority concerning your requests made under the Freedom of Information Law.

In this regard, as stated in my letter to you of January 19, I have indeed discussed the implementation of the Freedom of Information Law with Mr. Gordon Cameron, Executive Director of the Authority. I believe that Mr. Cameron and the staff of the Authority are engaging in good faith efforts to comply with the Law.

With your letter, you attached a copy of a request for "all interoffice and intraoffice memorandum concerning access for bicycles over the Kingston-Rhinecliff Bridge". 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, under the circumstances, I believe that §87 (2)(g) is relevant to your request. The cited provision states that an agency may withhold records that:

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

Based upon the language quoted above, if, for example, the Authority maintains in its possession statements of policy, determinations, instructions to staff that affect the public and similar materials regarding access by bicycles on the Kingston-Rhinebeck Bridge, I believe that such records would be available. However, to the extent that the memoranda in question are reflective of opinion, advice, recommendation or suggestion, for example, I believe that they may justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gordon Cameron

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3204

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

February 3, 1984

Mr. Michael Albergo
[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. Albergo:

I have received your letter of January 22 in which you raised a series of questions that relate to the judicial process, as well as an apparent denial of access to records sought from a court.

Please be advised that the Committee on Open Government is responsible for oversight of the Freedom of Information and Open Meetings Laws. Several of the questions that you raised do not deal with either of those statutes and consequently fall beyond the scope of the Committee's advisory jurisdiction.

Further, I do not believe that the records that you are seeking, if they exist, fall within the coverage of the Freedom of Information Law.

In this regard, the Freedom of Information Law is applicable to records of agencies. 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."

Based upon the provisions quoted above, the Freedom of Information Law in my view does not apply to the courts or court records. As such, the records in which you are interested, which are maintained by a court, do not appear to fall within the scope of rights of access granted by the Freedom of Information Law.

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

FOIL-AO-3205

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

February 3, 1984

Mr. Edward MacKenzie
83-A-1817
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. MacKenzie:

I have received your letter of January 27, in which you requested assistance regarding the use of the Freedom of Information Law.

Having reviewed your letter and the materials attached to it, I would like to offer the following comments and suggestions.

First, since the problems you have encountered focus upon timeliness of responses to your requests, it is noted that the Freedom of Information Law and the regulation 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 taken one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged

in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 appears that, in some instances, your requests may have been somewhat vague. In this regard, I would like to point out that §89(3) of the Freedom of Information Law requires that a request must "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 might enable agency officials to locate the records sought.

Enclosed for your consideration are copies of the Freedom of Information Law and the regulations adopted by the Department of Correctional Services pursuant to the Freedom of Information Law. In addition, in order to attempt to enhance compliance with the Law, a copy of this opinion will be sent to Mr. Moody, the Inmate Records Coordinator at your facility.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Rodney Moody

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 986
FOIL-AO- 3206

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

February 6, 1984

Mr. Carl Litt
[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. Litt:

I have received your letters of January 25 and January 28, as well as the materials attached to them. You have raised a series of issues with respect to the implementation of the Open Meetings Law by the Northport-East Northport School District Board of Education.

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

First, there appears to be fundamental misunderstanding of key aspects of the Open Meetings Law. The notices and agendas enclosed with your correspondence are reflective of the pattern whereby the Board of Education meets at 7 p.m., immediately enters into an executive session and at 8:15 schedules an adjournment of the executive session for the purpose of reconvening an open meeting.

It is emphasized that the term "meeting" as defined in §97(1) of the Open Meetings Law has been expansively construed by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the term "meeting" includes any gathering of a quorum of the 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 [see Orange County Publications v.

Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Consequently, if the meetings are scheduled at 7 p.m., §99 of the Law would require that notices of the meetings indicate that they commence at 7 p.m. It would appear that no such notice is given, for a school lunch menu attached to your letters, which included an indication of "coming events at the Board level", stated that scheduled meetings of the Board would commence at 8:15 p.m. With respect to those meetings, executive sessions began at 7 p.m. and were followed by open meetings scheduled for 8:15.

Second, the phrase "executive session" is defined in §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Consequently, an open meeting must always be convened prior to entry into an executive session by a public body.

Third, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before a public body may enter into an executive session. Specifically, §100(1) states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, 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 opinion that, before entry into an executive session, a motion for executive session must be made during an open meeting which identifies in general terms the topic or topics to be discussed, and the motion must be carried by a majority vote of the total membership.

Fourth, also in conjunction with the language of §100(1), in a technical sense, I do not believe that a public body can schedule an executive session in advance of a meeting. Since the Law requires that a motion be made during an open meeting prior to entry into an executive session, it cannot technically be known in advance of a meeting whether such a motion will indeed by carried by a majority of the total membership of a public body.

Fifth, it is reiterated that the motion for entry into an executive session must indicate generally the subject or subjects to be considered. Several of the agendas merely indicate that executive sessions were held; no mention is made of the subject matter discussed.

In a related vein, you enclosed a list of executive sessions held in the recent past to consider "personnel". While I could not conjecture as to the validity of those executive sessions without additional information regarding the specific topics that may have been discussed, judicial interpretations of the Open Meetings Law indicate that a motion to enter into an executive session to discuss "personnel", without additional information, is inadequate.

The so-called "personnel" exception 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..." [§100(1)(f)].

It has been held that a motion to enter into an executive session relative to the provision quoted above should contain reference to two elements. It should include the term "particular" to indicate that the discussion involves a specific person or corporation; and it should refer to one or more of the topics listed in §100(1)(f) [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; and Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981]. As such, a motion to discuss "the employment history of a particular person" or a "matter leading to the appointment of a particular person" would in my view be appropriate; a motion to discuss "personnel" without more would not.

One of the issues that you raised, the rotation of principals, in your view could not have been discussed under §100(1)(f) during an executive session. In my opinion, if the issue involved only a matter of policy, I would agree that no ground for executive session could justifiably have been cited. On the other hand, to the extent that the discussion focused upon the employment histories of incumbent principals, §100(1)(f) could in my view justifiably have been cited to enter into an executive session.

Sixth, the Board apparently convened executive sessions to discuss chemical analyses of contaminants that might be present at the schools. According to your letter, the basis for entry into executive session was "to discuss a matter affecting health, safety and welfare". Nevertheless, the Board and the Superintendent contended that public safety has not been "imperiled". In this regard, the first ground for executive session permits a public body to close its doors to discuss:

> "matters which will imperil the public safety if disclosed..."[§100(1)(a)].

If public discussion would not imperil the public safety, it would appear that no ground for executive session was present.

Seventh, you indicated that the District hired a testing laboratory and a medical consultant to prepare the analyses to which reference was made in the preceding paragraph. You also wrote that there was never a motion or formal action to expend public monies in public. When you questioned whether such action had been taken, you were informed that Counsel advised the Board that those "steps need not be taken due to the provisions of §103(4) of the General Municipal Law."

In brief, §103(1) requires that advertisements be made for bids prior to the purchase of goods or services. Section 103(4) states that:

> "[N]otwithstanding the provisions of subdivision one of this section, in the case of a public emergency arising out of an accident or other unforeseen occurrence or condition whereby circumstances affecting public buildings, public property or the life, health, safety or property of the inhabitants of a political subdivision or district therein, require immediate action which cannot await competitive bidding, contracts for public work or the purchase of supplies, materials or equipment may be let by the appropriate officer, board or agency of a political subdivision or district therein."

It appears to be the view of the Board that, under the circumstances, the usual competitive bidding process need not have been accomplished. In my view, based upon the facts that you have provided, it is questionable whether an emergency existed. Further, although I am not an expert with respect to the General Municipal Law, it would appear that, even though the bidding process might in some instances be waived, the Board of Education would nonetheless be required to authorize an expenditure during an open meeting. As stated earlier, §100(1) requires that action to appropriate public monies must be accomplished during an open meeting.

Lastly, having reviewed agendas and minutes, there are references to motions "unanimously" carried. Other references merely state "motion carried". Here I would like to point out that §87(3)(a) of the Freedom of Information Law requires that a record of votes be prepared that identifies each member who voted in every instance in which a vote is taken. Specifically, the cited provision states that each agency shall maintain:

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

Therefore, if a motion is carried unanimously, a breakdown of the means by which votes were cast need not be included. However, if a motion is not carried unanimously, I believe that a record must be prepared that identifies each member who voted affirmatively as well as each member who voted in the negative.

I hope that I 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-3207

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

February 6, 1984

Ms. Tracey C. Ingleston
[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. Ingleston:

I have received your letter in which you requested assistance regarding your capacity to obtain hospital records pertaining to yourself and your children.

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

First, since the Committee deals with the Freedom of Information Law, it is noted that the Freedom of Information Law applies only to records of units of state and local government. Therefore, if, for example, the hospital is private, the Freedom of Information Law would not apply to its records.

Second, there is no law in New York that provides a patient or parent of an infant patient with direct rights of access to medical records. However, §17 of the Public Health Law states, in brief, that a patient may authorize the physician of his or her choice to request medical or hospital records on behalf of the patient. Further, when authorization is given, a hospital or physician must forward to the doctor of your choice medical records pertaining to you or your children. As such, it is suggested that you contact a physician, perhaps your family doctor, in order that the records in question may be obtained on your behalf.

Enclosed for your review is a copy of §17 of the Public Health 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3208

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

February 7, 1984

Mr. James Callaghan
News 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 February 2 and appreciate your kind words. It is obvious to me that open government is an issue in Staten Island and I hope that my presentation was valuable.

Your question involves the fee sought to be assessed by the Department of State for a six page document. According to the schedule attached to your letter, the Department seeks to charge three dollars for a copy of the document. You have asked whether the fee is "in keeping" with the Freedom of Information Law.

In my view, the fee in question is legal.

As you may be aware, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". In this instance, there is a statute which requires the Department of State to assess in excess of twenty-five cents per photocopy. Specifically, §96(3) of the Executive Law requires the Department of State to collect the following fee:

> "[F]or a copy of any paper or record not required to be certified or otherwise authenticated, fifty cents per page."

As such, a statute other than the Freedom of Information Law, in this instance the Executive Law, requires that the Department of State assess a fee of fifty cents per page for the records that you are seeking.

With respect to the means by which the fee may be paid, I am unaware of any provision that deals specifically with how a fee may be paid. Having spoken with Mr. Adami on your behalf, I was informed that people are discouraged from sending cash due to the possibility of theft. He also informed me that when a charge is less than ten dollars, a personal check will be accepted.

I hope that I 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-3209

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

February 8, 1984

Ms. M.J. Torney
[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. Torney:

I have received your letter of January 31, as well as the correspondence attached to it.

According to your letter and the materials, on January 2, you submitted a request under the Freedom of Information Law to the New York City Conciliation and Appeals Board. As of the date of your letter to this office, no response has been offered.

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

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 business days to grant or deny access. Further, if no response is given within five business days or 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 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 day 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)].

Your second area of inquiry involves a request directed to the Division of Code Enforcement of the New York City Department of Housing Preservation and Development. In response to that request, you were informed that you would have to go to the office in order to seek records.

In my opinion, so long as a written request reasonably describes the records sought, an applicant for records cannot be required to travel to a governmental office to make a request under the Freedom of Information Law. Consequently, I disagree with the breadth of the response offered by Mr. Catalano of the Division of Code Enforcement.

Having reviewed your letter to the Division, however, you raised a series of questions and did not necessarily request records. It is noted in this regard that the Freedom of Information Law is not a vehicle that requires an agency to respond to questions; on the contrary, it is a statute that requires an agency to respond to a request for records. It is also noted that

§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. Consequently, it is suggested that you might want to resubmit a request under the Freedom of Information Law in which you request records rather than raise questions.

I hope that I 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: Vito A. Catalano, Division of Code Enforcement
NYC Conciliation and Appeals Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3210

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

February 8, 1984

Mr. Michael Walsh
[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. Walsh:

I have received your letter of February 5 concerning the Freedom of Information Law.

You have asked whether:

> "[W]hen applying for public information and citing the Law, to a local government department, is it possible to be charged with harassment?"

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

First, I am unaware of any judicial determination that pertains to a situation in which a request or a series of requests made under the Freedom of Information Law resulted in a charge of harassment.

Second, there is a decision rendered long before the enactment of the Freedom of Information Law that involved a question of whether requests for records resulted in "mere inconvenience" as opposed to harassment. In that case, it was found that "[M]ere inconvenience resulting from inspection cannot be equated with public detriment, nor be construed as inimical to the public welfare, or against public policy [NY Post Corp. v. Moses, 12 AD 2d 243 (1961)]. In another decision involving a similar issue, it was found that no clear line of demarcation could be drawn between mere inconvenience and harassment and that such judgments must of necessity be made on a case by case basis [Sorley v. Lister, 218 NYS 2d 215 (1961)].

The only decision rendered under the Freedom of Information Law of which I am aware in which it was contended that a request was overbroad resulted in a finding that a shortage of manpower to comply with the request was no defense, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)].

Lastly, without knowledge of the nature of requests, it would be impossible to provide specific direction. However, it is noted that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described".

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.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3211

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

February 14, 1984

Mr. D. Loggins
[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. Loggins:

I have received your letter of January 23, which reached this office on February 7. Please note the address of the Committee as indicated above.

You have requested a copy of the Freedom of Information Law, which is enclosed, and raised the following question:

> "would a statistical summary of test scores based upon proposed key answers released by the NYC Dept. of Personnel be available under the Law, or could that agency deny [your] request based on the fact that these are proposed key answers subject to change if candidates taking the exam file lawsuits or protests".

In this regard, since the nature of the records sought is not entirely clear, I would like to offer the following general comments.

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.

Second, perhaps the most relevant ground for denial in conjunction with your question is §87(2)(h), which permits an agency to withhold records or portions thereof that:

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

If the record in which you are interested contains examination questions or answers, and if the questions will be used in the future, to that extent, I believe that §87(2)(h) could be asserted as a basis for a denial. However, if the records merely contain statistical information, and no specific reference to examination questions or answers, it does not appear that §87(2)(h) would be applicable.

Third, it is possible that another ground for denial may be relevant to your inquiry. Specifically, §87(2)(g) of the Freedom of Information Law states that an agency may withhold records that:

> "are inter-agency or intr-agency materials which 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.

Lastly, although the nature of the record sought is unclear, it is noted that there is a judicial determination regarding so-called "validity studies" prepared by a board of examiners in connnection with particular examinations. In that decision, Public Education Association v. Board of Examiners of the Board of Education of the City of New York [93 AD 2d 838 (1983)], it was held that the validity studies could be withheld under §87(2)(g). The decision has been appealed.

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-3212

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

February 14, 1984

Ms. Jody Adams
[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. Adams:

I have received your letter of January 21. Please accept my apologies for the delay in response.

One of your complaints is that "politicians", elective local government officials, often appear to "have little knowledge of the law", and that municipal attorneys generally grant "greater access" to records. As such, you suggested that our "procedures should stipulate some intelligence and some involvement of the local or town attorney".

Based upon my experience, I cannot fully agree with you, for I believe that the degree of expertise and knowledge of the law varies among municipal officials, elected or otherwise, including municipal attorneys. Further, the Freedom of Information Law itself requires the governing body of a municipality to promulgate procedures in conformity with the Law. Nothing in the Law requires the involvement of an attorney, although, as a matter of practice, I believe that many local government officials consult regularly with their attorneys.

With respect to your appeal for records of the Town of Southold, the issue regarding access to records appears to be moot, for the determination indicates that the records sought do not exist. However, the materials indicate the appeal was made on January 3, and was determined during a

"hearing" on January 31. I would like to point out that §89(4)(a) of the Freedom of Information Law requires that a determination on appeal must be rendered within seven business days of the receipt of an appeal. Further, while a hearing itself is not in my view objectionable, I believe that hearings are rarely held in order to determine an appeal made under the Freedom of Information Law. More often, an individual, such as a mayor, town supervisor, or a municipal attorney renders a decision on appeal.

Enclosed is a new publication that summarizes the Freedom of Information and Open Meetings Laws. If you feel that it would be useful to local government officials, I would be pleased to send additional copies to you to distribute.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3213

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

February 17, 1984

Mr. Barry Brown
[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. Brown:

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

Your question is whether the College of New Rochelle or its School of New Resources would constitute an "agency" subject to the requirements of the Freedom of Information Law. Since both of the institutions to which you referred receive state and federal funds and in your view perform a governmental function by providing an education, it is your contention that they are "agencies" that fall within the scope of the Law.

I disagree with your contentions.

As you are aware, §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."

While the institutions in question might receive government funding, I do not believe that they are "governmental" entities. As such, I do not believe that they fall within either the definition of "agency" or, therefore, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3214

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

February 17, 1984

Mr. Cyprian Stewart
82-B-615
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. Stewart:

I have received your letter of February 14 pertaining to a request directed to the New York City Police Department under the Freedom of Information Law.

Since you are incarcerated and indigent, you requested that this office "waive the fees as allow [sic] by Law".

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

First, the Committee on Open Government is responsible for advising with respect to the New York Freedom of Information Law. Consequently, this office neither has custody 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, although the federal Freedom of Information Act, which is applicable to records of federal agencies, contains provisions whereby a federal agency may waive fees for search and duplication of records, there is no similar provision in 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-3215

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

February 17, 1984

Ms. Dagmar P. Nearpass
Ms. Dolores A. Werner
[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. Nearpass and Ms. Werner:

I have received your letter of January 30, as well as the materials enclosed with it. Please note that the correspondence reached this office on February 10.

Through the materials, you have raised a series of issues concerning rights of access to records of the Romulus Central School District. The focal point of the correspondence involves access to policies, procedures, and statistics that may be in possession of the District. In addition, ancillary issues have been raised. In this regard, I would like to offer the following remarks.

It is noted at the outset that many of the ensuing comments are intended to serve as an explanation of law, notwithstanding the fact that you may have received some of the records that you requested or to which reference will be made.

First, it is important to stress that the Freedom of Information Law (see attached) is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, as a general rule, the Freedom of Information Law does not require an agency, such as a school district, to create or prepare a record in response to a request [see §89(3)]. Consequently, unless otherwise provided in the Freedom of Information Law, there is no requirement that the District create a record on your behalf in response to a request for information.

Third, with respect to policies and procedures generally, I believe that such records are clearly accessible. I direct your attention to one of the grounds for denial, which, due to its structure, requires that policies, procedures and statistics must be made available. Specifically, §87(2)(g) states that an agency may withhold records that:

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

It is 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.

Fourth, several aspects of your correspondence pertain to student records. It is emphasized in the regard that access to records identifiable to a particular student or students is not governed by the Freedom of Information Law, but rather by the provisions of the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g). In brief, the federal Act states that any "education record", a term that is broadly defined in the regulations promulgated by the United States Department of Education, that identifies a particular student is accessible to the parents of the student, but confidential with respect to any third

party. Further, the Act states that only the parents can waive the right to confidentiality of student records. In conjunction with your request to the District regarding students and student records, assuming that the parents of students who are the subject of the records waive confidentiality and confer their rights of access upon you or another person so designated, I believe that you would enjoy the same rights to the students' records as the parents. In the alternative, records might be accessible if identifying details are deleted to the extent that a student's identity could not be ascertained.

In a related area, one of your requests involves specific policies regarding access to records. Apparently the Superintendent, Mr. Hoagland, received from this office updated information regarding the Freedom of Information Law and its requirements. It is noted that, in addition, under the Family Educational Rights and Privacy Act, a school district is required to give parents of students attending the schools within the District an annual notice of rights granted by the Act. In order to enable you and officials of the District to become more familiar with the requirements of the Family Educational Rights and Privacy Act, I will enclose for you and Mr. Hoagland copies of the federal regulations developed under the Act.

Fifth, the correspondence indicates that there may be a misunderstanding regarding the use of a form for the purpose of seeking records under the Freedom of Information Law. The Committee has never devised a form for the purpose of seeking records. Moreover, since §89(3) of the Freedom of Information Law merely requires that a written request reasonably describe the records sought, it has consistently been advised that any request made in writing that reasonably describes the records sought should suffice. If has also been advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for delaying or denying access to records.

Moreover, the form used by the District including in your correspondence is in my opinion out of date. In the section where boxes may be marked for the purpose of indicating reasons for a denial, the reasons are based upon the provisions of the Freedom of Information Law as originally enacted in 1974; they are inconsistent with the

grounds for denial that appear in the current Freedom of Information Law, which became effective in 1978. Further, one aspect of the form concerns who an applicant might represent when he or she requests records. As a general matter, if a record is accessible, it must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Therefore, the identity of a person, association or firm represented by an applicant in my view is largely irrelevant.

Sixth, another apparent controversy concerns your requests for payroll information. Although it was stated earlier that the Freedom of Information Law does not generally require an agency to create a record, one of the exceptions to that rule involves salary 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..."

Therefore, the School District is required to prepare and maintain on an ongoing basis a payroll list containing the information described in the provision quoted above.

In conjunction with the same issue, it was apparently contended that salary information might not be disclosed if the records containing that information make reference to employees' home addresses or social security numbers. I would like to point out in this regard that the Freedom of Information Law in §87(2) requires that all records be made available, except records "or portions thereof" that may justifiably be withheld under one or more of the grounds for denial. As such, I believe that there may be situations in which a single record may be both available and deniable in part. For instance, if a record contains a name of an employee, that person's salary, and a social security number, the name and salary in my opinion would clearly be accessible; however, that portion of the record specifying the employee's social security number could in my view be deleted on the ground that disclosure of the social security number would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)].

Lastly, 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Robert Hoagland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3216

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

February 21, 1984

Mr. William Scott
83-A-6316 - X507
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. Scott:

Your letter addressed to the Commissioner of the Division of Criminal Justice Services 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, a request made under the Freedom of Information Law in late December and directed to Donald Maloney of the Department of Correctional Services was not answered. You have requested advice regarding the steps that you might take and asked to become familiar with the appropriate procedures.

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 asepcts 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 required by §87(1) of the Freedom of Information Law, the Department of Correctional Services has promulgated regulations under the Freedom of Information Law regarding access to its records. I have enclosed a copy of the Department's records. Please note that when records sought are maintained at a facility, the 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3217

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

February 21, 1984

Ms. Maryann Sorese, News Editor
Record Newspapers
222 East Main Street
P.O. Box 248
Port Jefferson, New York 11777

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. Sorese:

I have received your correspondence of February 10 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter:

> "[O]n December 21, 1983, Port Jefferson Mayor Harold Sheprow wrote a letter to Mobil Oil Corporation, which owns waterfront property on the east side of Port Jefferson Harbor, requesting that the company outline its future plans for its oil and gasoline terminals in the village. In interviews with The RECORD, Mr. Sheprow has confirmed that he wrote the letter to Mobil, but has declined public comment on its content. He has only said that they matter may 'ultimately lead to a legal matter.'"

You also wrote that having contacted Mobil, you were informed that Mobil had received the letter from the Village and replied in writing on January 20. Moreover, Mayor Sheprow apparently agreed on behalf of the Village that no action would be taken "until 90 days after the date of the letter" and "added that until Mobil releases the village from that agreement, village officials would not comment publicly on the contents of the letter..."

Following a denial of your initial request for the letter, a determination on appeal sustained the denial. Specifically, Gordon P. Thomsen, Village Clerk, wrote that:

> "[T]he Board denied the appeal because the information in the letter is proprietary and confidential at this time due to the fact that disclosure could result in substantial economic or personal hardship to the subject party. Further, such disclosure could cause substantial injury to the competitive position of the subject enterprise."

Based upon the foregoing, I would like to offer the following comments.

First, 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.

Second, the denial on appeal by the Board appears to be grounded upon two of the bases for denial.

The statement that disclosure could result in "substantial economic or personal hardship to the subject party" appears to relate to provisions in the Freedom of Information Law concerning personal privacy. In this regard, §87(2)(b) of the statute permits an agency, such as the Village, to withhold records which:

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

In turn, §89(2)(b) of the Freedom of Information Law provides five examples of unwarranted invasions of personal privacy, one of which involves:

> "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..." [§89(2)(b)(iv)].

From my perspective, any reliance upon the provisions concerning personal privacy is misplaced. Although Mobil, as a corporation, is considered a "person" in a variety of contexts, I believe that §87(2)(b) and §89(2)(b) are intended to enable an agency to protect the privacy of a natural person, and not a corporate entity. Further, the language of §89(2)(b)(iv) indicates that a denial may be justified if "such information is not relevant to the work of the agency requesting or maintaining it". Under the circumstances, it appears that the letter in question is clearly relevant to the work of the Village. Based upon the preceding rationale, I do not believe that the provisions of the Freedom of Information Law regarding personal privacy could appropriately be cited to withhold the letter sent by the Mayor to Mobil.

The other ground for denial to which allusion is offerred in Mr. Thomsen's letter involves a contention that the letter is "proprietary" and "disclosure could cause substantial injury to the competitive position of the subject enterprise".

Reference was apparently made to §87(2)(d) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that:

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

In my view, the exception quoted above generally pertains to records submitted by a commercial enterprise to an agency rather than a record prepared by an agency, such as the letter to Mobil. Further, viewing the elements of §87(2)(d) in terms of its components, I do not believe that the letter could be characterized as a trade secret, for, again, it was prepared by the Village. Similarly, assuming that the Village is not a regulatory agency, I do not believe that a copy of the letter could be claimed to be maintained for the regulation of commercial enterprise. In short, based upon the facts that you presented, neither §87(2)(d) nor any other ground for denial could in my opinion justifiably be asserted to withhold the letter sent by the Mayor to Mobil.

Third, you indicated that the Village made what may be characterized as a promise of confidentiality regarding the Mayor's letter to Mobil. In my opinion, such a promise of confidentiality may be all but meaningless. Prior to enactment of the Freedom of Information Law, the courts held on several occasions that a request for or a seal of confidentiality or privilege regarding records submitted to government by third parties is largely irrelevant. "[T]he concern...is with the privilege of the public officer, the recipient of the communication" [Langert v. Tenney, 5 AD 2d 586, 589 (1958); see also People v. Keating, 286 App. Div. 150 (1955); Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1975)]. The language of the Freedom of Information Law as amended confirms this principle by placing the burden of defending secrecy on the agency, the custodian of records, rather than a third party. Although the decision in Cirale, supra, has been cited as a basis for asserting the governmental privilege regarding "official information", more recent case law has apparently overruled Cirale and abolished this governmental privilege. Specifically, in Matter of Doolan v. BOCES (48 NY 2d 341), the Court of Appeals held that:

> "The public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which the law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571, supra). Nothing said in Cirale v. 80 Pine Street Corp. (35 NY 2d 113) was intended to suggest otherwise" (Doolan at 346).

As such, if records sought do not fall within one or more among the eight grounds for denial appearing in the Freedom of Information Law, they must in my view be made available, notwithstanding a promise of confidentiality [see also, Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Harold Sheprow, Mayor
Hon. Gordon P. Thomsen, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3218

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

February 21, 1984

Ms. Betty Nichols
[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. Nichols:

I have received your letter of February 2, which reached this office on February 16.

Attached to your letter is a blank form, a "Report of Personnel Change", which is sent to the Troy Civil Service Commission when personnel changes occur. You have requested a "ruling" concerning rights of access to the contents of the form. Please note that the Committee does not issue "rulings" but rather advisory opinions.

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

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

Second, I would like to point out that the introductory language of §87(2) states that an agency may withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. Consequently, I believe that an agency in receipt of a request must re-

view a record sought in its entirety in order to determine which portions, if any, may justifiably be withheld. Further, due to the language of the Law, it is clear in my view that there may be situations in which a single record might be both accessible and deniable in part.

Third, having reviewed the form in question, I believe that some aspects might justifiably be deleted, while the remainder would be accessible.

Of significance is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Under the circumstances, I believe that the home address of an employee who is the subject of the form may be deleted prior to disclosure. Similarly, the employee's social security number could in my opinion be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. Neither the home address nor the social security number would be relevant to the performance of the employee's official duties.

The only other items that might be deleted due to considerations of privacy would involve veteran status or status as volunteer fireman. If, however, the equivalent information is contained on an eligible list, for example, which is accessible, that information would also be available as it appears on the form. Otherwise, it is possible that disclosure of that type of information might result in an unwarranted invasion of personal privacy.

The other ground for denial of potential relevance is §87(2)(g). The cited provision 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 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, virtually all of the information on the top two-thirds of the form is reflective of factual data. Consequently, I do not believe that §87(2)(g) could be cited as a basis for withholding. The last portion of the form entitled "Remarks" might, however, consist of advice, recommendation, or an opinion. To that extent, I believe that it could be deleted under §87(2)(g).

Lastly, I would like to add that various aspects of the information contained on the form are routinely made available by means of a different record required to be prepared and made available under the Freedom of Information Law. 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..."

I hope that I 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: Troy Civil Service Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 990
FOIL-AO- 3219

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

February 22, 1984

Ms. Katherine Kerrigan
[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. Kerrigan:

I have received your letter of February 7, which was sent to the Committee at the suggestion of a representative of the Attorney General's office.

Your initial area of inquiry is whether there is an agency that can assist citizens in Waverly in asserting their rights under the Freedom of Inforation and Open Meetings Laws. As a general matter, the Committee on Open Government, which was created by the enactment of the Freedom of Information Law in 1974, provides assistance to any person having a question regarding either of the statutes to which you referred. It is noted, however, that an opinion rendered by this office is advisory only, and is not binding upon an agency.

According to your letter, various meetings and deliberations are being conducted regarding the expansion of the Waverly Sewage Treatment Plant. However, those gatherings apparently have consistently been held at a site more than a hundred miles from Waverly. As a consequence, you and others in Waverly have had difficulty in keeping abreast of information that may be developed in the deliberative process relative to the Sewage Treatment Plant.

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

First, of potential significance is the Open Meetings Law, which applies to meetings of public bodies. The term "meeting" has been expansively construed judicially and 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The phrase "public body" is defined in §97(2) of the Open Meetings Law 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, if, for example, the Mayor of the Village, representatives of state agencies and a firm meet to discuss the issue, the Open Meetings Law would not in my opinion be applicable, for a quorum of a public body would not be present. On the other hand, if the Village Board of Trustees consists of five members and three of the members meet with representatives of state agencies and a firm, such a gathering in my view would constitute a meeting of a public body subject to the Open Meetings Law in all respects. In short, if a quorum of the Board of Trustees, or any other public body, convenes to conduct public business, the Open Meetings Law would in my view clearly apply.

In that type of situation, the meeting would have to be preceded by notice given in accordance with §99 of the Open Meetings Law. In brief, §99 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 prior to all meetings.

Second, although the Open Meetings Law does not refer specifically to the site of a meeting, §98(a) of the Law states that "[E]very meeting of a public body shall be open to the general public..." Moreover, the first sentence of the statement of legislative intent (§95) provides 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 by 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."

In view of the foregoing, while the Open Meetings Law does not indicate where meetings must be held, I believe that every law, including the Open Meetings Law should be given a reasonable interpretation. In this instance, I believe that it would be unreasonable for a public body to conduct a meeting at a location far from the Village.

Third, the other statute to which you referred, the Freedom of Information Law, might serve as a useful vehicle for obtaining records in situations in which people might be unable to attend meetings or where gatherings of less than a quorum of a public body fall outside the scope of the Open Meetings Law.

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

Further, although the Freedom of Information Law is not a vehicle that requires government officials to answer questions, it applies to all records of an agency and contains a broad definition of "record". Section 86(4) of the Freedom of Information Law defines "record" to include:

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

Consequently, records in possession of the Village or the Department of Environmental Conservation fall within the scope of rights of access granted by the Freedom of Information Law.

It is suggested that you might want to request records under the Freedom of Information Law from the Village and the Department of Environmental Conservation, as well as any other agency that might be involved in the issue. Section 89(3) of the Freedom of Information Law requires that an applicant submit a request that "reasonably describes" the records sought. In addition, under the regulations promulgated by the Committee, each agency, including the Village or a state agency, must designate a "records access officer" who is responsible for dealing with requests made under the Law. A records access officer must respond to a request made in writing that reasonably describes the records sought within five business days of the receipt of such a request. If for any reason any aspect of the request is denied, the reason for the denial must be given in writing and the applicant must be informed of the identity of the person or body to whom an appeal may be directed.

With respect to Village records, it is suggested that an initial point of contact regarding a request would be the Village Clerk, who is the custodian of Village records. To request records from the Department of Environmental Conservation, you could contact the regional office of the Department in order to determine who at the office would be responsible for handling requests made under the Freedom of Information Law. In the alternative, I believe that a request could be directed to the Department's Records Access Officer in Albany. That person is Mr. Graham Greeley, whose address is 50 Wolf Road, Albany, NY 12233.

Enclosed for your consideration are copies of the Freedom of Information and Open Meetings Laws, an explanatory pamphlet dealing with both laws, and a pocket guide that summarizes the laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Board of Trustees, Village of Waverly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3220

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

February 22, 1984

Mr. Greg D. Lubow
Public Defender
Greene County
Court House
Catskill, NY 12414

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. Lubow:

As you are aware, I have received your letter of January 30 and the correspondence attached to it.

According to the correspondence, as Public Defender of Greene County, you are involved in representing persons incarcerated at the Coxsackie Correctional Facility. Most recently, you were assigned to represent various inmates against whom criminal charges were initiated. Consequently, you requested reports and various records of proceedings pertaining to your clients from Superintendent Fogg at the Facility. The records sought included:

> "[I]nmate record card; inmate disciplinary record; Superintendent's or Tier III proceeding including adjustment committee reports statement of all witnesses, all inmate misbehavior reports, supplementary sheets for inmate misbehavior reports, unusual incident reports, physical force reports, disposition of Superintendent's proceedings or adjustment committee proceedings, Tier III statement of witnesses interviewed, formal charges, notice and assistance forms, record sheet, accident investigation reports; reports

> of employee injury; medical records of the Facility doctor or nurse examining and/or treating injured employee; medical records of the Facility doctor or nurse examining and treating any other injured party including the defendant; the tape recording of the Tier III or Superintendent's Proceeding; and any other written material pertaining to this incident."

In response to your requests, Superintendent Fogg denied access, stating that:

> "...in order to be consistent with practices in maximum security facilities in New York State I must request that you use the subpoena process as provided in C.P.L. Section 610.20 and 2307 of the Civil Practice and Rules."

It is your view that Superintendent Fogg's denial "is based on a procedure that is not mandated or required by statute or regulation". Moreover, following an appeal of the initial denial, Counsel to the Department of Correctional Services affirmed, stating that:

> "[S]uch records are confidential pursuant to Public Officers Law §87(2)(e)(i) as having been compiled for law enforcement purposes and which if disclosed would interfere with law enforcement investigations or judicial proceedings.
>
> "Additionally, CPL §610.20(3) and CPLR §2307 provide for the specific procedure to be used in obtaining such records."

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

It is noted that I am unaware of any judicial determination that deals squarely with the issue presented, which involves the use of the Freedom of Information Law as opposed to other discovery devices in a situation where criminal charges have been made. There are, however, several decisions pertaining to the relationship between the Freedom of Information Law and other disclosure statutes, as well as the rights of a litigant who seeks records under the Freedom of Information Law.

I would like to point out, too, that there appears to be disagreement between the Appellate Divisions regarding the use of the Freedom of Information Law as opposed to discovery by a litigant.

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., 94 AD 2d 576, 578 (1983)].

If Farbman, supra, represents an accurate interpretation of the Freedom of Information Law, it would appear that the discovery statutes cited by the Superintendent, rather than the Freedom of Information Law, represent the appropriate means of seeking disclosure.

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]. 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 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, 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 one's 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 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.

With respect to the ground for denial cited under the Freedom of Information Law by Counsel in response to your appeal, the stated basis for withholding may be overbroad. The provision in question, §87(2)(e)(i) 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..."

Having reviewed your request for records sent to Superintendent Fogg, it appears that many of the records sought were prepared not for law enforcement purposes, but rather in the ordinary course of business. To that extent, I do not believe that §87(2)(e) of the Freedom of Information Law could justifiably be offered as a basis for withholding.

Assuming that some of the records sought were compiled for law enforcement purposes, a question of fact arises as to the extent to which disclosure of the records would indeed "interfere with law enforcement investigations or judicial proceedings". I would conjecture that the contents of many of the requested records have been disclosed to your clients. If that is so, it is difficult to envision how disclosure at this juncture would "interfere" with an investigation, which has apparently ended. Similarly, without knowledge of the contents of the records, I could not advise as to the degree to which disclosure would interfere with a judicial proceeding. Nevertheless, in my opinion, the extent to which §87(2)(e)(i) of the Freedom of Information Law could appropriately be asserted is questionable. I believe, however, that since §87(2)(e)(i) is based upon potentially harmful effects of disclosure, a denial based upon a conclusory assertion, without greater amplification regarding the nature of interference with an investigation or a judicial proceeding, is likely overbroad [see Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978); 46 NY 2d 906 (1979)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Judith LaPook, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3221

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

February 22, 1984

William Goldman, Esq.
407 Metcalf Plaza
P.O. Box 417
144 Genesee Street
Auburn, New York 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. Goldman:

I have received your letter of February 8 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, a request has been made "for the absentee record of an employee of a school district" that you represent. The request involves the 1982-83 school year and the current school year to date. You wrote that the Clyde-Savannah Central School District has denied the request "under the exemption to the Freedom of Information Law considering that this information pertains to employment and medical histories of the employee."

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, as you intimated, the relevant provisions regarding the capacity to withhold the information in question are §§87(2)(b) and 89(2)(b) of the Freedom of Information Law. The former provides that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". The latter describes a series of examples of unwarranted invasions of personal privacy. The first example, §89(2)(b)(i), states that an unwarranted invasion of personal privacy includes:

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

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].

From my perspective, an attendance record that merely indicates the number of days or amount of time of an employee's absence would be relevant to a public employee's official duties. Contrarily, those portions of a record that explain why sick time might have been used, such as description of an illness or medical problem, or perhaps a reason for the use of personal time, could in my view justifiably be withheld under the privacy provisions described earlier.

It is noted, however, that in a decision involving a request for the number of sick time hours accumulated by each employee of a particular city department, it was held that disclosure of such records would constitute an unwarranted invasion of personal privacy [see Bahlman v. Brier, 462 NYS 2d 381 (1983)]. Without greater knowledge of the specific information requested or the format in which it is kept, I could not advise with certainty that the decision cited above involves the same information. I have enclosed a copy of the decision for your review in order that a clear determination can be made by the School District.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3222

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

February 22, 1984

Mr. Richard Hodza
Attorney at Law
Route 35
South Salem, NY 10590

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. Hodza:

I have received your letter of February 11, as well as the materials attached to it. Due to a denial on appeal by the Secretary to the Public Service Commission, you have requested an advisory opinion under the Freedom of Information Law.

In brief, you requested a record from the Public Service Commission, which was denied on the ground that "the document you seek is an intra-agency memorandum which transmits the opinion and advice of its author". It was also indicated that the document in question is not a "public record" within the meaning of §16(1) of the Public Service Law. One of your contentions apparently is that if the document is an "inter-office memorandum", you believe that you are entitled to it since §87(2)(g) "uses different language" by referring to "inter-agency and intra-agency materials".

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

If indeed the document in question consists of opinion and advice, I believe that the denial was justified. The provision in question, which constituted the basis for the denial, §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. However, those portions of inter-agency or intra-agency materials consisting of advice, opinion, suggestion, and the like may in my view justifiably be withheld.

I disagree with your opinion that an "inter-office memorandum" does not fall within the scope of §87(2)(g). In brief, I believe that intra-agency materials consist of communications between or among officials of a particular agency. Inter-agency materials consists of communications made among or between agencies. If, for example, an inter-office memorandum is transmitted from an employee of an agency to another employee of the same agency, although it might be characterized as an "inter-office memorandum" I believe that it could also be considered as "intra-agency material".

Lastly, since the jurisdiction of the Committee involves providing advice with respect to the Freedom of Information Law, it would be inappropriate to conjecture as to the scope of rights of access to records granted 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
Executive Director

RJF:jm

cc: John J. Kelliher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3223

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

February 23, 1984

Mr. William Piznak
[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. Piznak:

I have received your letter of February 11, which reached this office on February 15, the day of my trip to Port Jervis. Consequently, it was impossible to provide you with a copy of my letter addressed to the Deerpark Town Assessor, Josephine Kent. Enclosed is a copy of that opinion.

You have asked that I review the "list of subject matter" in order to advise whether it is "reasonably detailed".

In terms of background, §87(3)(c) of the Freedom of Information Law requires that each agency, including a town, 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, §1401.6 of the regulations promulgated by the Committee, which govern the procedural aspects of the Law as well as the subject matter list, states in relevant part that:

> "(b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.

(c) The subject matter list shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list."

From my perspective, the "subject matter list" that you enclosed is not sufficiently detailed to permit identification of the category of a record sought. For instance, I do not believe that a heading entitled "All records pertaining to department and business in the Town of Deerpark" would enable a member of the public with minimal knowledge of the nature of records kept by the Town to determine the category of records that might be requested.

Although I have not seen the latest retention schedule developed by the Department of Education regarding town records, it has been suggested in the past that such a schedule might be used as the basis for the development of an appropriate subject matter list.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Shirley Zeller, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3224

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

February 23, 1984

Mr. Tyrone M. Murphy
81-D-276 A-9-32
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. Murphy:

I have received your letter of February 12 in which you requested assistance in gaining access to records.

Specifically, you indicated that you have attempted without success to obtain records from the Albany County Clerk relative to a proceeding in which you were involved in 1972.

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

First, the Freedom of Information Law is applicable to records of an "agency". 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) of the Freedom of Information Law defines "judiciary" to mean:

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

Based upon the provisions quoted above, I do not believe that the records in which you are interested are subject to the requirements of the Freedom of Information Law.

Second, although the Freedom of Information Law does not include the courts or court records within its scope, various provisions of the Judiciary Law and court acts often grant significant rights of access to court records. For instance, enclosed is a copy of §255 of the Judiciary Law, which generally deals with the responsibility of a court clerk regarding access to records.

Third, it is suggested that you might want to contact a representative of a legal aid group or Prisoners' Legal Services. Perhaps one of those organizations could provide you with the help 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3225

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

February 27, 1984

Mr. Edward MacKenzie
83-A-1817
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. MacKenzie:

I have received your letter of February 8, in which you requested assistance concerning rights of access to records.

In brief, according to your letter, some time ago you requested records under the Freedom of Information Law, which were denied by Rodney Moody, the Inmate Records Coordinator at the Clinton Correctional Facity. Following your appeal to Counsel to the Department of Correctional Services, it was determined that part of your request should have been granted. However, you have not yet apparently obtained the records determined to be accessible to you.

To obtain more information regarding the problem, I have contacted the Office of Counsel at the Department of Correctional Services on your behalf. From my perspective, it appears that there may be a misunderstanding or perhaps an absence of communication.

It is noted that §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 not in excess of nine by fourteen inches. Further, under §89(3), the agency may in my view require payment for photocopies before they are made available to an applicant.

Under the circumstances, it appears that the determination on appeal rendered by Counsel confirmed your right to obtain a copy of a a certain record or records; however, copies need not be made available until the appropriate payment for photocopying is made.

It is suggested that you discuss the matter of payment with Mr. Moody.

As you requested, enclosed are the materials that you sent to this office on January 27.

I hope that I 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: Rodney Moody

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3226

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

February 27, 1984

Mr. Michael John Gabel
81-D-93
Attica Correctional Facility
Box 149
Attica, NY 14011

Dear Mr. Gabel:

I have received your letter of February 22 in which you requested various materials, as well as assistance from this office.

Your request involved the Freedom of Information booklet and "cases for access..." Although the nature of the information in which you are interested is not clearly stated, enclosed are copies of an explanatory pamphlet, a pocket guide that summarizes the Freedom of Information Law, and the Committee's most recent annual report. The report contains summaries of judicial determinations rendered under the Freedom of Information Law.

Since you also expressed an interested "in obtaining court room transcripts", I would like to point out that the Freedom of Information Law would not in my view apply to such records. The Freedom of Information Law includes within its scope records of an "agency". In this regard, §86(3) defines "agency" to include:

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

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 would not apply to the courts or court records.

It is noted, however, that various provisions of the Judiciary Law and court acts often provide significant rights of access to court records. For example, enclosed is a copy of §255 of the Judiciary Law, which deals with the responsibilities of a court clerk regarding access to court records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3227

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

February 28, 1984

Mr. C. Douglas O'Malley
[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. O'Malley:

I have received your letter of February 15, as well as the correspondence attached to it.

You requested my comments regarding a denial of access to a record by Schenectady County.

In terms of background, you requested from the County a letter apparently sent to the County Manager, Robert D. McEvoy, by Edward J. Kuriansky, the Special Prosecutor for Medicaid Fraud. Your initial inquiry involved a request for the letter, which was dated "approximately July 22, 1983" and signed by Edward J. Kuriansky. The appeal apparently referred to the same letter dated "approximately July 27, 1982". In response, the County Manager wrote that there is no such letter dated "approximately July 27, 1982" and that even if such a letter did exist, it would be confidential on the ground that it constitutes material prepared for litigation and exempt from disclosure under §3101 of the Civil Practice Law and Rules. Following the appeal, you wrote to Mr. McEvoy indicating that it was clear that a typographical error had been made. Further, you referred to a newspaper article indicating that the County Manager had received a letter from Mr. Kuriansky. You asked the County Manager at that time if such a letter exists and questioned the accuracy of the article, which stated in part that:

> "Kuriansky confirmed last July that he had included his decision in a letter to the county manager, but he said that a possible lawyer-client relationship made it inappropriate for him to announce his decision or to discuss the contents of the letter."

In this regard, without additional knowledge of the matter to which the letter in question relates, it is all but impossible to provide specific direction. Nevertheless, I would like to offer the following general 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 indicated in the correspondence, the first ground for denial in the Freedom of Information Law, §87(2)(a), refers to records that are "specifically exempted from disclosure by state or federal statute". One such statute that exempts records from disclosure is §3101(d) of the Civil Practice Law and Rules, which states in part that "any writing or anything created by or for a party or his agent in preparation for litigation" may be considered confidential [see §3101(d)(2)]. If indeed the letter in question consists of material prepared for litigation, it would appear that it may justifiably be withheld.

Third, with respect to the statement appearing in the newspaper attributed to Mr. Kuriansky, which indicates that disclosure would be inappropriate due to "a possible lawyer-client relationship", it is difficult to envision the manner in which such a basis for withholding could be justified. In short, based upon the correspondence, it does not appear that Schenectady County is the client of the Special Prosecutor. If the County is not the client, I do not believe that a privileged relationship would exist or that a denial could be based upon a contention that the letter constitutes privileged material falling within the scope of an attorney-client relationship [see Civil Practice Law and Rules, §4503].

Fourth, it is possible that a different ground for denial might be present. Specifically, §87(2)(g) of the Freedom of Information Law states that an agency may withhold records that:

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

Under the circumstances, a communication from the Special Prosecutor to Schenectady County could in my view be characterized as "inter-agency material". In viewing §87(2)(g) independently and notwithstanding the application of a different basis for withholding, rights of access to the letter would be dependent upon its specific contents.

Lastly, with regard to the existence of the letter, I believe that the County is required to inform you whether it maintains the letter in its possession, regardless of rights of access. Section 89(3) of the Freedom of Information Law states in part that upon request, an agency "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 request a certification from the County in order to ascertain whether the County maintains possession of the record 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: Robert D. McEvoy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3228

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

February 29, 1984

Mr. James K. Anderson
Personnel Officer
Rockland County Personnel Office
County Office Building
New City, New York 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. Anderson:

I have received your letter of February 16 in which you requested an advisory opinion under the Freedom of Information Law. Your inquiry apparently arose due to a decision rendered under the Freedom of Information Act, Core v. U.S. Postal Service, USCA 4, No. 83-1153, Jan. 6, 1984. Your question is whether there is a distinction in New York:

> "...between appointees and non-appointees with respect to the release of occupational and/or education information from the application of applicants for civil service examination or appointment, upon the request of a member of the general public for such information".

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

Second, it is emphasized that the introductory language in §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. From my perspective, the capacity to withhold portions of records results in two conclusions. I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Moreover, the cited language in my view requires that an agency must review records sought in their entirety to determine which portions, if any, fall within one or more of the grounds for denial.

Third, under the circumstances, the focal point of your inquiry in my opinion involves provisions regarding the protection of personal privacy. Section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

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

In turn, §89(2)(b) lists five examples of unwarranted invasions of personal privacy, the first of which includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..." [§89(2)(b)(i)].

Further, a new provision of the Freedom of Information Law dealing with names and home addresses states in part that:

> "[N]othing in this article 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; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment..." [§89(7)].

Consequently, if a person seeks public employment but is not hired, I do not believe that his or her name and home address must be disclosed under the Freedom of Information Law.

If a member of the public seeks to determine the qualifications of those who applied for a particular position, it may be possible to provide that information after identifying details have been deleted to protect privacy. Under such a circumstance, the qualifications or employment histories of applicants for a position would be accessible, so long as nothing in those records could identify the applicants.

In a situation in which a person is hired based upon his or her qualifications, it is possible that certain aspects of a resume or application might be accessible.

In my view, while §87(2)(b) and §89(2)(b)(i) of the Freedom of Information Law may be cited to withhold portions of an application or resume, I do not believe that they could be cited to withhold those documents in their entirety.

Although it is often difficult to determine whether disclosure of particular records would result in an unwarranted invasion of personal privacy, for subjective judgments must often be made regarding privacy, the courts have provided substantial guidance regarding the privacy of public employees. As a general rule, the courts have found in various contexts that public employees enjoy a lesser capacity to protect their privacy than others, for it has been found that public employees are required to be more accountable than others. Further, in terms of records that identify public employees, it has been held in essence that records which are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905, (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, to the extent that records identifiable to public employees are irrelevant to the performance of their duties, they may be withheld, for disclosure in such instances would result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Based upon the foregoing, it is possible that some aspects of both an application and a resume might be irrelevant to the performance of one's official duties. For instance, if either of those documents contain the home address, social security number, marital status, military service or other personal details regarding individuals' lives, those portions of the records likely are irrelevant to the performance of one's official duties. As such, those aspects of the records might justifiably be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

However, other aspects of the records relevant to their official duties might be available. If, for example, an individual must have certain types of experience or educational accomplishments as a condition precedent to serving in a particular position, those aspects of the records would in my view be relevant to the performance of the official duties of not only the individuals to whom the records pertain, but also the appointing agencies or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment.

One judicial determination of which I am aware involved somewhat similar considerations. Specifically, when teachers were given salary increases due to the completion of particular courses of study, records pertaining to the teachers were initially withheld by a school district on the ground that they were found within the teachers' personnel files. Nevertheless, the court found that records indicating approval for courses taken, the names of the courses and the verification of satisfactory completion of those courses were available, even though they identified particular employees and were found within the personnel files of those employees (see Steinmetz, supra).

I hope that I 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-3229

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

February 29, 1984

Ms. Gloria C. Downing
[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, unless otherwise indicated.

Dear Ms. Downing:

I have received your letter of February 14 in which you raised an issue regarding the scope of the Freedom of Information Law.

As I understand the situation, you requested a record from the Port Chester-Rye Volunteer Ambulance Corps pertaining to a member of your family who is now deceased. In response, you were informed that you could obtain a copy of the ambulance report only by means of subpoena.

The issue, in my view, is whether a volunteer ambulance corps and its records are subject to the requirements of the Freedom of Information Law. In this regard, since there are no judicial interpretations of law that deal squarely with the issue, it is unclear whether such an entity must grant access to its records pursuant to the Freedom of Information Law. Nevertheless, I would like to offer the following comments.

As a general matter, the Freedom of Information Law includes within its scope records of an agency. 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."

Based upon the language quoted above, it would appear that rights granted by the Freedom of Information Law pertain to records of a "governmental entity" that performs a governmental function.

Since the ambulance corps that maintains the record in which you are interested is a not-for-profit corporation, rather than a governmental entity, it might be contended that the corps and its records fall outside of the requirements of the Freedom of Information Law.

However, there is a precedent indicating that a similar type of not-for-profit corporation is an "agency" subject to the Freedom of Information Law. Specifically, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the Court of Appeals, the state's highest court, 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 objections 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" [id. at 579].

From my perspective, it might be contended that the duties of the volunteer ambulance corps, under the circumstances, bring its records within the coverage of the Law. As you indicated in your letter, the Port Chester-Rye Volunteer

Ambulance Corps maintains a contractual relationship with several municipalities. Further, in order to obtain additional information, I have contacted the Corps on your behalf. I was informed it exclusively provides emergency services for the City of Rye during specified hours of the da As such, it might be found, as in the case of a volunteer fire company, that this volunteer ambulance corps performs "an essential public service" and, therefore, is subject to the requirements of the Freedom of Information Law.

Assuming that the records in possession of the volunteer ambulance corps are subject to the Freedom of Information Law, it is likely, in my view, that the record that you are seeking would 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.

Of relevance under the circumstances is §87(2)(b), which enables an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". While a third party could in my opinion be denied access to a report containing medical information, since you are the next of kin, I do not believe that it could be withheld from you.

In sum, if the Volunteer Ambulance Corps is not subject to the provisions of the Freedom of Information Law, I would agree that the report in which you are interexted would be obtainable only by means of a subpoena. If, however, the Volunteer Ambulance Corps is considered an agency subject to the Freedom of Information Law, I believe that the record sought 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: Captain Joseph N. Romanello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3230

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

March 1, 1984

Mr. Gary D. Bastian
Village Trustee
Municipal Building
169 Mt. Pleasant Avenue
Mamaroneck, NY 10543

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. Bastian:

As you are aware, I have received your letter of February 16, in which you requested an advisory opinion under the Freedom of Information Law.

In your capacity as a Trustee of the Village of Mamaroneck, you have raised questions regarding rights of access to the contents of telephone bills identifiable to a particular Village official. Your view is that "if taxpayers money was used to pay these bills, which was the case, it is public information about what calls were made to what telephone number". However, in a letter addressed to you by the Village Attorney, it was suggested that the "actual dollar amounts of each telephone bill" would be accessible, but that "it is an unwarranted invasion of personal privacy to request the telephone toll charges which were made from the subject telephone".

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

First, when records are requested that identify individuals, as indicated by the Village Attorney, the central issue involves §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted

invasion of personal privacy". It is important to note that questions involving privacy are often perplexing, for it may be difficult to draw a line of demarcation between what might be considered an unwarranted invasion of personal privacy and a permissible invasion of personal privacy.

Second, although interpretations of the privacy provisions of the Freedom of Information Law might often necessitate the making of subjective judgments, I believe that there is a distinction with respect to the degree to which the privacy of public employees, as opposed to others, might justifiably be protected. There is a significant amount of case law pertaining to privacy relative to public employees. In brief, the courts have found that public employees enjoy a lesser degree of privacy than others, for they have a greater duty to be accountable than others. Moreover, it has been found in several cases that records relevant to the performance of one's official duties are available, for disclosure in such cases would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., October 30, 1980]. Conversely, if records are unrelated to the performance of one's official duties, disclosure might indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Third, if a call is made on a Village phone, or a phone where service is paid by the Village, it would appear that the number called as it appears on a phone bill might be deleted, at least in part, from a record under §87(2)(b), for disclosure of the number might identify the individual to whom the call was placed. Obviously, that individual would have no control over a listing of his or her phone number found within a telephone bill. It is possible, however, that a court might find that the remaining information, such as the date, time and length of the call, and the charge for the call, would be available, for without reference to the number called, the remaining aspects of the record would not if disclosed constitute an unwarranted invasion of personal privacy.

In short, I believe that a phone bill payable by the Village is accessible under the Freedom of Information Law, except to the extent that disclosure of identifying details would constitute an unwarranted invasion of personal privacy. Under the circumstances, it would appear that the phone bills are available, with the exception of the seven digit phone numbers that might identify the person called by a Village official.

I hope that I 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 Oppenheimer
Milton Berner, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3231

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

March 1, 1984

Mr. Robert L. Hemming
[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. Hemming:

I have received your letter of February 17, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you are interested in obtaining minutes of meetings of the Board of Trustees of the Village of Waterford for 1982 and 1983, as well as Village budgets from 1979 to the present.

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, I believe that minutes of meetings and budgets adopted by the Village are clearly accessible under the Freedom of Information Law. It is noted that minutes must be prepared and made available pursuant to §101 of the Open Meetings Law. Further, since budgets are reflective of both the policy of the Village as well as final determinations made by the Village Board of Trustees, they, too, would in my view be accessible under the Freedom of Information Law [see §87(2)(g)(iii).

Third, I would like to point out that §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy for records not in excess of nine by fourteen inches. Consequently, if you desire copies of the records in question and you are willing to pay the appropriate fee, I believe that the Village is required to prepare copies of the minutes and budgets in response to your request.

Fourth, in terms of procedure and time limits for a response to a request, both the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, contain guidance.

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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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: Robert W. Wager, Mayor
William E. Powers, Jr., Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3232

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

March 1, 1984

Mr. Demetri Kolokotronis
[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. Kolokotronis:

I have received your letter of February 3, which reached this office on February 17.

Once again, your comments concern your efforts in gaining access to records of the New York State Bridge Authority.

In all honesty, I found it difficult to determine from your letter exactly what you questions are. Nevertheless, in an effort to provide guidance, I would like to offer the following remarks.

First, it is emphasized that the Freedom of Information Law is not a statute under which an agency must respond to questions. Contrarily, it is a law that enables members of the public to request existing records. Further, as indicated to you in the past, as a general rule, the Freedom of Information Law does not require an agency to create or prepare a record in response to a request [see Freedom of Information Law, §89(3)]. Therefore, if, for instance, information is requested that does not exist in the form of a record or records, an agency would not in my opinion be obligated to create a record on behalf of an applicant.

Second, one of the issues apparently involves a request that records sought be made available to you by mail. In my view, assuming that records are accessible under the Freedom of Information Law, an agency would be required to prepare copies and mail them to an applicant upon payment of the requisite fees. It is noted that §87 (1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches. Further, pursuant to §89(3), I believe that an agency may require that payment be made in advance when photocopies are requested. Consequently, it is suggested that you might want to determine the scope of the records in which you are interested for the purpose of ascertaining the fee for photocopying that may be assessed. If you are willing to pay that fee, once again, I believe that the agency would be required to make them available to you by mail.

Lastly, you mentioned that the burden of proof under the Freedom of Information Law is on the agency. That is true in terms of a judicial proceeding initiated following a final denial of access to records by an agency [see Freedom of Information Law, §89(4)(b)]. However, prior to the initiation of such a proceeding, one's administrative remedies must be exhausted. In brief, if an initial request is denied, the reasons for the denial should be stated in writing and the applicant must be informed of the identity of the person at an agency to whom an appeal may be directed. With respect to an appeal, §89 (4)(a) 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 the person requesting the record the reasons for further denial, or provide access to the record sought."

Based upon the language quoted above, if you are denied access to records, it is suggested that you appeal the denial in accordance with §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: Gordon Cameron

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 993
FOIL-AO- 3233

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

March 1, 1984

Honorable Angelo R. Martinelli
Office of the Mayor
City Hall
Yonkers, NY 10701

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 Mayor Martinelli:

I have received your letter of February 21, which reached this office on February 27. Your interest in complying with the Freedom of Information and Open Meetings Laws is much appreciated.

Your initial question is whether "meetings of the City Council Rules Committee [are] subject to the Open Meetings and Freedom of Information Laws". In this regard, the scope of the Open Meetings Law is determined in part by §97(2), which defines "public body" to mean:

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

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 this 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 to indicate that committees, subcommittees and other advisory bodies should be subject to the 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.

Further, a review of the elements of the definition of "public body" in my opinion results in such a conclusion in the case of the City Council Rules Committee.

According to Rule VIII of the City Council Rules which are attached to your letter, the Committee in question consists of more than two members. I believe that it is required to conduct its business by means of a quorum, even though the Rules might not refer to any quorum requirement. 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, having reviewed the functions of the Rules Committee, it conducts public business and performs a governmental function for an agency, in this instance, the City of Yonkers.

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 committees and similar 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 means 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, Fourth Department, pertained to advisory bodies that were designated by an executive. The entities in question consisted of a committee and a task force designated by a mayor 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)].

In view of 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 Rules Committee is a "public body" subject to the Open Meetings Law.

Since the question also involved the application of the Freedom of Information Law, I would like to point out that, as a governmental entity performing a governmental function for the City, the Rules Committee's records would be subject to rights of access granted by the Freedom of Information Law [see definitions of "agency" and "record", Freedom of Information Law, §86(3) and §86(4) respectively]. Moreover, in the decision cited earlier, Syracuse United Neighbors, supra, it was held that minutes of meetings of advisory bodies were subject to the Freedom of Information Law.

Your second area of inquiry concerns "what specific requirements would have to be followed by the Rules Committee to comply with Public Notice and records of the Committee meetings".

With respect to notice, 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 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 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 regard to the records of meetings, §101 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Subdivision (1) of §101 concerns minutes of open meetings; subdivision (2) pertains to minutes reflective of action taken during an executive session; and subdivision (3)

requires that minutes of open meetings be prepared and made available within two weeks and that minutes of executive sessions be prepared and made available within one week of an executive session. It is noted that if a public body enters into an executive session and merely discusses an issue, but takes no action, minutes of the executive session need not be prepared.

Lastly, your remaining area of inquiry involves a situation in which the Rules Committee fails to comply with either the Open Meetings or the Freedom of Information Laws and whether:

> "...legislation resulting from such a Committee meeting presented to the City Council on its Agenda for action [would] be proper and legal, and if it were approved by the City Council, would such legislation be proper and legal".

In my view, a violation of the Freedom of Information Law would be irrelevant to any illegality that may have occurred regarding a closed meeting. However, the Open Meetings Law may be relevant, for §102 contains provisions regarding its enforcement. Specifically, §102(1) states that:

> "[A]ny aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action 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. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or dispostion of a bond issue or notes."

Based upon the language quoted above, the most significant penalty that could be imposed under the Open Meetings Law would involve a situation in which a public body took action behind closed doors which should have been taken during an open meeting. It is important to note, however, that there are judicial interpretations of the Open Meetings Law which indicate that action taken by an advisory body that may be accepted, rejected, or modifed by a governing body, for example, would not be reflective of action taken that could be nullified. Similarly, if a public body enters into an executive session in violation of the Law but takes action in public following the executive session, it has been found that there is no action to be nullified [see Woll v. Erie County Legislature, 83 AD 2d 792 (1981); and Dombroske v. Board of Education, West Genesee School District, 462 NYS 2d 146 (1983)].

In any event, I believe that an action by a public body, although perhaps accomplished in violation of the Open Meetings Law, remains valid unless and until a court determines otherwise.

Also of possible significance is subdivision (2) of §102 which states that:

> "[I]n any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party."

Enclosed for your consideration are copies of the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3239

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

March 2, 1984

Hon. Evangeline Motyl
[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. Motyl:

I have received your letter of February 22 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter:

> "[A]t our Town Board Meeting held on February 15, 1984 in the Town of Amsterdam, a letter dated February 8, 1984 from County Attorney Raphael, written to Supervisor Kwiatkowski was unveiled in a summarized version to the board, public and press."

Although you sought a copy of the letter, Supervisor Kwiatkowski denied the request.

As a member of the Town Board, it is your view that the letter should have been made available to you, for it "pertained to town matters".

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

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

Second, it appears that two of the grounds for denial may be relevant to your inquiry.

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. Contrarily, those portions of inter-agency or intra-agency materials reflective of advice, opinion or recommendation, for example, may in my view generally be withheld.

Under the circumstances, a letter sent by the County Attorney to the Town Supervisor would likely constitute "inter-agency material", and rights of access could be determined on the basis of its contents.

The other ground for denial of significance may be §87(2)(a), which concerns records that are "specifically exempted from disclosure by statute". When an attorney engages in communication with a client, the communication, depending upon the circumstances, may be considered privileged and exempt from disclosure [see Civil Practice Law and Rules,

§4503]. If, for example, the County Attorney communicated with the Supervisor due to the Supervisor's membership on the County legislative body, there might be an attorney-client relationship, which is privileged, and which ordinarily would result in a proper denial of access.

It is emphasized, however, that in a judicial determination dealing with what may have been similar facts, it was held that the communication sent by the attorney to his client was available under the Freedom of Information Law.

Matter of Austin v. Purcell (Sup. Ct., Nassau Cty., NYLJ, July 20, 1983) involved a situation in which Nassau County sought legal advice from a law firm hired by the County. The County Executive apparently disclosed various aspects of a legal memorandum to the public and the news media. The court found that §87(2)(g) could not be cited as a basis for withholding, for the law firm was not an "agency" as defined by §86(3) of the Freedom of Information Law. Most importantly, however, the court determined that the statements regarding the contents of the record made before the public and the news media constituted a waiver of the attorney-client privilege, stating that:

> "[W]here the client publicly reveals the contents of the communication outside of court, there appears to be no reason to protect him; he has shown no desire for confidentiality".

The decision also indicated that:

> "[E]ven if the material were deemed intra-agency in nature as urged by respondents and seemingly concurred in by petitioners and with which the court disagrees (see Minutes of Oral Argument, p.5), said exemption was lost with the disclosure by respondents of some of the contents of the report."

Based upon the decision cited above, it would appear that disclosure of "a summarized version" of the letter to the Town Board and to the public removed the capacity on the part of the Supervisor to deny access to the 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

cc: Supervisor Kwiatkowski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3235

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

March 5, 1984

Mr. Gregory J. Scammell
[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. Scammell:

I have received your letter of February 24 in which you requested advice regarding the Freedom of Information Law.

According to your letter and the correspondence attached to it, you requested various records from eleven municipalities, ten of which responded appropriately. In one case, a municipal official, the Town Clerk of the Town of Tully, failed to respond. The request sent to the Town Clerk involved:

> "1. A copy of the adopted 1984 town budget for the town of Tully,
>
> 2. A copy of a schedule of salaries, or a reasonable facsimile, if one is published, for 1984 (if not included in 1.),
>
> 3. The dollar amount of the most recent total assessed valuation of the town of Tully,
>
> 4. Your current New York State Equalization rate,
>
> 5. Your current tax rate per $1,000."

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

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 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 respect to rights of access to records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Third, to the extent that the records sought exist, I believe that they are accessible under the Law, for no ground for denial could justifiably be cited.

Lastly, with regard to your request for a "schedule of salaries", I would like to point out that §87(3)(b) requires that each agency shall maintain:

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

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to the Town Clerk of the Town of Tully.

I hope that I 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. William Hayes, Jr., Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3236

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

March 5, 1984

Mr. John B. Johnson, Jr.
Managing Editor
Watertown Daily Times
260 Washington Street
Watertown, NY 13601

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. Johnson:

I have received your letter of February 21 concerning access to court records.

Specifically, one of your reporters has apparently been denied access to motion papers filed with a county court. Further, denials of access to motion papers appear to be routine.

Enclosed are copies of statutes as well as a judicial determination which in my opinion indicate that the records in question should generally be made available.

It is noted, however, that the Freedom of Information Law does not include the courts or court records withing its scope. That statute is applicable to records of an "agency", which is defined to include:

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

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

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

Based upon the provisions quoted above, court records are excluded from the Freedom of Information Law.

Nevertheless, as indicated in the attached materials, there are various other provisions of law that grant broad rights of access to court records, such as §§255 and 255-b of the Judiciary Law. The former generally requires a clerk to search and make available the "files, papers, records, and dockets in his office". The latter refers to a "docket-book" kept by a clerk, which "must be kept open" during business hours "for search and examination by any person".

The decision that deals most directly with access to court records was rendered nearly twenty years ago, but it remains the most substantive determination of public rights of access to records of a court clerk [see attached, Werfel v. Fitzgerald, 23 AD 2d 306 (1965)]. Werfel cites a variety of statutes and decisions and has been cited in numerous cases, for it reflects:

> "...the general policy of our State 'to make available to public inspection and access all records or other papers kept 'in a public office' at least where secrecy is not enjoyed by statute or rule'".

It is suggested that you or your staff contact the clerk of the court in question for the purpose of informing him of the provisions of the Judiciary Law and their broad interpretation.

I hope that I 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-3237

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

March 5, 1984

Ms. Jody Adams
[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. Adams:

As you are aware, I have received your letter of February 18. Having responded earlier to several of the points made in your letter, the remaining substantive issue involves rights of access to traffic tickets and similar, related records.

In this regard, there is an Appellate Division decision rendered in 1983 which indicates that traffic and speeding tickets, and records of similar infractions are available under the Freedom of Information Law. In Johnson Newspaper Corp. v. Stainkamp (463 NYS 122, AD 3rd Dept., 1983), the petitioner requested "all arrest records of the State Police, infractions or otherwise" for Jefferson County during a particular period. Although the State Police denied access, the Appellate Division in its discussion of the issue wrote that:

> "[R]espondents contend that here the sought after documents are 'intra-agency' materials because the tickets and lists are used by supervisors to compile police records. This reading of the exemption renders many materials used by an agency for record-keeping purposes inaccessible and gravely impairs the presumption of

> accessibility. We choose, however, to read the exemption narrowly, as protecting only those materials involving subjective matters which are 'integral to the agency's deliberative process' in formulating policy (Matter of Miracle Mile Assoc., supra, p. 182, 417 N.Y.S. 2d 142). Copies of speeding tickets and lists of traffic violations are obviously not within this category, and as they provide the traffic violation information being requested, they should be made available to petitioner" (id. at 124).

As such, speeding tickets and similar records in possession of a municipality should in my view be made available.

With respect to the implementation of the Freedom of Information Law and knowledge of the Law by local government officials, I do not know what can be done in addition to what this office has attempted. As you are aware, the services of the Committee are available not only to members of the public, but also to representatives of government. Often municipal officials contact this office for the purpose of seeking advice. Further, I often engage in presentations before representatives of local government in order that they may become more familiar with the statutes within the Committee's jurisdiction.

You intimated that the procedure in the Town of Riverhead does not operate as it should. Assuming that the procedures are written, I would be pleased to review them and offer comments, which would be sent to you and to Town officials of your choice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3288

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

March 6, 1984

John Ray, Esq.
[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. Ray:

I have received your letter of February 27 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter:

> "[T]he Laurel, New York School Board (public school) hired a chief administrator/teacher last year, without disclosing to the public her prior experience, employment, certification(s) if any, professional association memberships, or anything about her whatsoever. Upon request for this information, they have refused to reveal anything respecting her application, background or any of the above items, claiming the privilege of confidentiality. She is a very important part of the tiny, common School District of Laurel."

Your questions are whether the Board must release any of the information described above.

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 in §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. From my perspective, the capacity to withhold portions of records results in two conclusions. I believe that the Legislautre envisioned situations in which a single record might be both accessible and deniable in part. Moreover, the cited language in my view requires that an agency must review records sought in their entiretly to determine which portions, if any, fall within one or more of the grounds for denial.

Third, under the circumstances, the focal point of your inquiry in my opinion involves provisions regarding the protection of personal privacy. Section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

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

In turn, §89(2)(b) lists five examples of unwarranted invasions of personal privacy, the first of which includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..." [§89(2)(b)(i)].

In my view, while §87(2)(b) and §89(2)(b)(i) of the Freedom of Information Law may be cited to withhold portions of an application or resume, I do not believe that they could be cited to withhold those documents in their entirety.

Although it is often difficult to determine whether disclosure of particular records would result in an unwarranted invasion of personal privacy, for subjective judgments must often be made regarding privacy, the courts have provided substantial guidance regarding the privacy of public employees. As a general rule, the courts have found in various contexts that public employees enjoy a lesser capacity to protect their privacy than others, for it has been found that public employees are required to be more accountable than others. Further, in terms of records that identify public employees, it has been held in essence that records which are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 37s 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 identifiable to public employees are irrelevant to the performance of their official duties, they may be withheld, for disclosure in such instances would result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Based upon the foregoing, it is possible that some aspects of both an application and a resume might be irrelevant to the performance of one's official duties. For instance, if either of those documents contain the home address, social security number, marital status, military service or other personal details regarding an individual's life, those portions of the records likely are irrelevant to the performance of one's official duties. As such, those aspects of the records might justifiably be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

However, other aspects of the records relevant to their official duties might be available. If, for example, an individual must have certain types of experience or educational accomplishments as a condition precedent to serving in a particular position, those aspects of the records would

in my view be relevant to the performance of the official duties of not only the individuals to whom the records pertain, but also the appointing agencies or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment.

Further, if, for example, the School District pays for membership in a professional association, I believe that records reflective of the employee's membership would be accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3239

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

March 6, 1984

Mr. Steve Bold
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. Bold:

I have received your letter of February 25, which reached this office on March 5.

In conjunction with your request, enclosed is a copy of the Committee's most recent annual report, which contains summaries of judicial decisions rendered under the Freedom of Information Law.

With respect to the issue raised in your letter, you wrote that you have been denied access "to information pertaining to new administrative policies being implemented" at the Greenhaven Correctional Facility.

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.

Second, one of the grounds for denial appears to be applicable to the records in question; however, due to its structure, written policies of an agency are in my opinion generally 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. Therefore, assuming that no other ground for denial is applicable, "final agency policy" would be accessible under §87(2)(g)(iii).

Third, I would like to point out that an agency may require that a request be made in writing [see attached, Freedom of Information Law, §89(3)]. Further, the cited provision indicates that a request must "reasonably describe" the records sought. Consequently, 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. It is also noted that, under the regulations of the Department of Correctional Services, a request should be directed to the facility superintendent or his designee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3240

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

March 6, 1984

Mr. Vernon Jackson
80-B-1689
Attica Correctional Facility
P.O. Box 149
Attica, New York 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. Jackson:

I have received your letter of February 28, which reached this office today.

You requested from the Committee copies of records containing transcripts of tier three superintendent's proceedings pertaining to you.

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 records generally, such as those in which you are interested, nor does it have the authority to compel an agency to grant or deny access to records. Nevertheless, I would like to offer the following suggestions.

First, requests for records should be directed to the agency that maintains them. Under the circumstances, since the records are in possession of the Department of Correctional Services, a request should be made in accordance with the Department's regulations.

Second, the regulations promulgated by the Department indicate that a request for records kept at a facility should be directed to the facility superintendent or his designee.

Third, §89(3) of the Freedom of Information Law requires that an applicant submit a request for records "reasonably described". Therefore, when making a request, you should include as much detail as possible in order to enable agency officials to locate the records sought.

Lastly, you wrote that you do not "have the funds to pay [for the records] at this moment". In this regard, I would like to point out that §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches. Moreover, §89(3) provides that an agency may seek payment prior to making photocopies available to an applicant. There are provisions in the regulations of the Department of Correctional Services (§5.36) which enable the custodian of records, in his discretion, to waive the fees for photocopying. As such, you might request a waiver of fees if the records are determined to be accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-947
FOIL-AO-3241

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

March 7, 1984

Hon. Charles V. Dobrescu
Member, City Council
City Hall
Glen Cove, NY 11452

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. Dobrescu:

I have received your letter of February 29, in which you requested an advisory opinion. Your continued interest in complying with the Freedom of Information and Open Meetings Laws is much appreciated.

According to your letter:

> "[I]n order to disseminate pertinent information of government, it has been the continuing policy of the City of Glen Cove to publish in our official newspaper, the City's legal notices advertising bids, schedule of meetings and the minutes of City Council meetings in toto.
>
> "Due to budgetary restrictions, it is the intent of the Mayor to dispense with the publication in the newspaper of the minutes of our Council meetings."

You wrote further that it is your "intent to continue to post in public, the minutes of [your] meeting and to make available to the public, copies of such meetings on a cost-free basis".

In my opinion, the measures that the Council seeks to adopt are consistent and in compliance with the Freedom of Information and Open Meetings Laws.

With regard to minutes, I direct your attention to §101 of the Open Meetings Law (see attached), which prescribes minimum requirements concerning the contents of minutes of open meetings in subdivision (1) and minutes of executive sessions in subdivision (2). Subdivision (3) of §101 states further that:

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of infomration 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."

Based upon the language quoted above, while minutes of meetings must be made available to the public, there is no requirement that they be published in a newspaper, for example.

In addition, while an agency, such as the City of Glen Cove, may provide copies of records free of charge under the Freedom of Information Law, §87(1)(b)(iii) enables the City to charge up to twenty-five cents per photocopy for records not in excess of nine by fourteen inches.

Lastly, in a related area, while §99 of the Open Meetings Law requires that notice of the time and place of meetings be given to the news media and to the public by means of posting, subdivision (3) of §99 states that:

> "[T]he public notice provided for by this section shall not be construed to require publication as a legal notice."

As such, a public body is not required to place a legal notice in its official newspaper regarding its meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3242

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

March 8, 1984

Mr. Maceo Stevenson
82-A-2382 - E-6-365
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. Stevenson:

I have received your letter of March 4 in which you requested from this office "personal records" that pertain to your life.

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 compel an agency to grant or deny access to records.

Nevertheless, I would like to offer the following comments and suggestions.

First, the Freedom of Information Law is applicable to records in possession of agencies of state and local government in New York. It is noted that 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 function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Second, a request for records should be directed to the "records access officer" at the agency or agencies that you believe maintain records pertaining to you.

Third, §89(3) of the Law requires that an applicant submit a request in writing that "reasonably describes" the records sought. Therefore, when making a request, it is suggested that you include as much detail as possible, including names, dates, identification numbers, descriptions of events, and similar details that might enable agency officials to locate the records in which you are interested.

Lastly, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches. As such, assuming that records sought are accessible, an agency may charge a fee for copying.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3243

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

March 13, 1984

Mr. Robert F. Baldwin, Jr.
Hancock & Estabrook
One Mony Plaza
Syracuse, NY 13202-2791

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. Baldwin:

I have received your letter of Feburary 24, which reached this office on March 5.

As attorney for the Village of Fayetteville, your inquiry was apparently precipitated by a request for police accident reports. You have requested advice concerning the"line between a legitimate request for informatio which covers a broad area and one which is overly broad in that it requires substantial research by Village personnel".

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

First, accident reports, as you are aware, are generally available under both §66-a of the Public Officers Law and the Freedom of Information Law.

Second, although the Freedom of Information Law is silent with respect to the number of records that might be requested, §89(3) of the Law indicates that an agency may require that a request be made in writing, and that the request "reasonably describe" the records sought.

As a general matter, if agency officials can, on the basis of a request, determine which records are requested, an applicant has likely met the burden of reasonably describing the records. However, in many instances, the capacity of agency officials to locate records is dependent upon the means by which records are kept or filed.

For example, if accident reports are kept chronologically or by name, it would appear that the most appropriate means of seeking the reports would involve a request identifying a date or time period, or the name of persons involved in accidents. With regard to the situation described in your letter, where a request was apparently made for reports indicating various degrees of personal injuries, for two reasons, I do not believe that Village personnel would be required to engage in "research" to respond to the request. If the reports are not kept or filed in such a way that those reports where certain types of personal injuries are noted could be identified, a request for those reports would not in my view reasonably describe the records sought. Further, Village officials could not in my opinion be required to review each record for the purpose of making subjective judgments regarding the extent or nature of personal injuries reported.

I hope that I 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-3244

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

March 13, 1984

Mr. Stephen E. Fraley
82-A-3166
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. Fraley:

I have received your letter of March 7 in which you requested materials regarding access to records.

Specifically, your request involves "regulations for acquiring access to records." You wrote further that "If there are specific regulations for each individual agency, [you are] interested in those pertaining to methadone clinics, hospitals, doctors, lawyers, coroners, courts and police departments."

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

First, 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 regulations adopted by various agencies.

Second, it is emphasized that the Freedom of Information Law is applicable to records of an "agency". Section 86(3) of the Freedom of Information Law defines "agency" to mean:

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

As such, the Freedom of Information Law is generally applicable to records in possession of state and local government in New York. It would not be applicable to records of a private methadone clinic, hospital, physician or attorney, for example.

Third, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations governing the procedural aspects of the Law. In turn, §87(1) requires each agency to adopt regulations in conformity with the Freedom of Information Law and consistent with those promulgated by the Committee. Therefore, while this office does not possess all agencies' regulations regarding access to records, the enclosed regulations of the Committee may serve as a useful guide in terms of the procedures that must be followed. Also enclosed is a copy of the Freedom of Information Law. It is suggested that you review §87(2), which states that all agency records are available, except those records or portions thereof that fall within one or more of the grounds for denial that follow.

With specific reference to records of hospitals or physicians, enclosed is a copy of §17 of the Public Health Law. That provision does not grant direct rights of access to medical records to a patient. It does, however, enable a physician designated by a competent patient to request and obtain medical records on behalf of the patient from a hospital or another physician.

Due to the definition of "agency" cited earlier, the courts and court records fall outside the scope of the Freedom of Information Law. Many court records are accessible under various other provisions, such as §255 of the Judiciary Law (see attached).

Reference is made to records of coroners in §677 of the County Law, a copy of which is also attached.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 3245

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

March 13, 1984

Mr. Jeffrey S. Crossley
[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. Crossley:

I have received your letter of February 29, as well as the correspondence attached to it.

The materials pertain to your unsuccessful attempts to gain access to records reflective of the hourly wage paid to substitutes employed by the Randolph Central School District. The District Records Access Officer and the Superintendent denied access on the ground that disclosure would constitute "an unwarranted invasion of personal privacy". You indicated that you are seeking the records in order to determine whether the District has engaged in discrimination, and it is your intent to "take this matter to the Human Rights Commission".

While I could not comment with respect to an issue concerning discrimination, I would like to offer the following remarks regarding rights of access to records under the Freedom of Information Law.

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.

Second, as indicated in the correspondence, one of the grounds for denial, §87(2)(b) of the Freedom of Information Law, provides that an agency may withhold records or portions thereof when disclosure would result in an unwarranted invasion of personal privacy. From my perspective, due to the specific direction given by the Freedom of Information Law as well as judicial interpretations of the Law, the information that you seek must be made available.

While the standard regarding the protection of personal privacy is flexible and in some instances involves making subjective judgments, there is a significant amount of case law regarding the privacy of public employees. In brief, it has been determined by the courts in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. Moreover, several judicial decisions rendered under the Freedom of Information Law indicate that records that are relevant to the performance of a public employee's official duties are accessible, for disclosure in such instances would constitute a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 37 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]. Under the circumstances, records reflective of the hourly wage paid to substitutes is in my opinion relevant to the work of the substitutes and the District officials who employ them.

Third, one of the rare instances in the Freedom of Information Law in which an agency must create a record is §87(3)(b) concerning payroll information. The cited provision requires that each agency shall maintain:

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

It is noted, too, that payroll information in possession of a municipality was determined to be accessible to the public prior to the enactment of the Freedom of Information Law. For example, in Winston v. Mangan, which involved a request for the names and wages of employees of a municipal park district, it was held that:

> "[T]he names and pay scales of the park district employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" [338 NYS 2d 654, 663 (1972)].

Based upon the direction in the Freedom of Information Law concerning payroll information as well as various judicial determinations regarding rights of access to that information, I believe that records indicating the wages or wage scales of substitutes employed by the District 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: Terry Blanchfield, District Records Access Officer
Raymond Leahy, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3246

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

March 14, 1984

Mr. Harrison J. Edwards
Village Attorney
Village of Freeport
46 North Ocean Avenue
Long Island, 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 Mr. Edwards:

I have received your letter of February 28 and appreciate receiving a copy of a stipulation of settlement effectively ending a dispute arising under the Freedom of Information Law.

You have asked for advice regarding an earlier letter of January 30 pertaining to the time in which records should be made available for inspection and copying. As I understand the situation that precipitated your correspondence, an applicant requested a voluminous number of records, some of which were ten years old. Further, many of the records were kept in storage, thereby necessitating a substantial use of time in locating, transporting and returning the records.

The questions raised involve whether a procedure exists whereby availability of records might be limited to particular hours or hours within a business day. You wrote that the purpose of such a restriction would be "to give the agency time to get the documents out as well as to return the documents to their regular storage area".

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

In my view, the existing provisions of the Freedom of Information Law and the procedural regulations promulgated by the Committee (see attached) permit sufficient flexibility to enable an agency to respond appropriately to even a voluminous request.

As you are aware, an agency may require that an applicant submit a request in writing [see Freedom of Information Law, §89(3)]. Further, from my perspective, an agency is not required to respond instantly to a request. 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 taken one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access.

In the case of a voluminous request, if more than five business days would be needed to locate the records, an acknowledgment of the receipt of a request would extend the time limit for response and/or production of the records. Moreover, I do not believe that all of the records sought must necessarily be made available at the same time. Perhaps groupings of requested records could be made available on a piecemeal basis within the time periods previously described.

I would like to point out that §1401.4 of the Committee's regulations indicating that requests should be accepted and records produced during regular business hours was based in part upon provisions of law in effect long before the enactment of the Freedom of Information Law. For example, §51 of the General Municipal Law, which has been in effect for decades, requires that records of a municipality "shall be open during all regular business hours". As such, the provisions in the regulations of the Committee are reflective of an obligation that was imposed on municipalities prior to the enactment of the Freedom of Information Law in 1974.

In the only judicial determination of which I am aware that dealt with a voluminous request, it was found that a shortage of staff could not be cited as a valid basis for denial. The court in United Federation of Teachers v. New York City Health and Hospitals Corporation, found that:

> "without merit is the argument that it would be difficult for HHC with its depleted and diminished staff, to sift through its records, locate the information sought, and redact, where necessary, any identifying personal details...Were the court to recognize the 'defense' of a shortage of manpower by the agency from which disclosure is sought, it would thwart the very purpose of the Freedom of Information Law and make possible the circumvention of the public policy embodied in the Act" [488 NYS 2d 823, 824 (1980)].

Due to the flexibility of the Freedom of Information Law and the regulations promulgated by the Committee, the statutory precedents regarding hours of inspection, and the determination cited above, it is doubtful in my opinion that the Committee would seek to amend its regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3247

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

March 14, 1984

Ms. Amelia Wood
Mr. Jonathan S. Chasan
The Legal Aid Society
Criminal Appeals Bureau
Prisoners' Right Project
15 Park Row - 7th 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. Wood and Mr. Chasan:

I have received your letter of February 17 in which you requested an advisory opinion under the Freedom of Information Law. Please note that the letter reached this office on March 5.

According to your letter:

> "[P]ursuant to the New York Freedom of Information Law, The Legal Aid Society's Prisoners' Rights Project requested infraction reports, unusual incident reports, use of force reports, and injury to inmate reports from the New York City Department of Correction, pertaining to incidents of alleged brutality involving three pretrial detainees at the House of Detention for Men ('HDM') and one detainee at the Anna M. Kross Center ('AMKC' or 'C-95')."

The requests were denied and, following an appeal, Mr. Robert D. Daley affirmed the denial for two reasons:

> "[F]irst, the Department took the position that the Public Officers Law exempts intra-agency materials, which are not statistical or factual tabulations or data, from FOIL requirements, and the requested materials fall within this exemption. Secondly, the Department maintained that because the individual detainees had each filed pro se a notice of claim against the City, this office was not entitled to access to the requested material. The Department cited Farbman and Sons, Inc. v. N.Y.C. Health and Hospitals Corp., 465 N.Y.S. 2d 28 (1983), to support the proposition that once litigation is commenced, FOIL may not be used as a discovery device."

Another request that was denied on December 23 was appealed on January 23. As of the date of your letter, no determination on appeal had been rendered.

It is your view that many of the records sought are accessible, for they contain factual information. Further, since you do not represent the detainees who have commenced litigation, you have contended that the holding in Farbman is inapposite.

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

First, as you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except 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 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. Consequently, I believe that the language of §87(2) indicates that an agency is required to review records sought in their entirety to determine which portions, if any, might justifiably be withheld pursuant to one or more of the bases for withholding [see e.g., Zanger v. Chinlund, 430 NYS 2d 1002 (1980)].

Third, with respect to the ground for denial in the Freedom of Information Law offered by Mr. Daley, which pertains to inter-agency and intra-agency materials, §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, it would appear that the records sought might appropriately be characterized as "intra-agency" materials. Nevertheless, as you suggested in your letter and as the statute provides, those portions of intra-agency materials consisting of statistical or factual information could not in my view be withheld on the basis of §87(2)(g). Moreover, as stated previously, I believe that the Department would be obliged to review the records in their entirety to determine which portions of intra-agency materials requested may properly be withheld.

I would like to point out that various judicial determinations indicate that intra-agency materials must be reviewed for the purpose of extracting portions considered to be factual, whether those aspects of the records containing facts appear in a numerical or narrative form. For instance, having reviewed an intra-agency report in camera, the Appellate Division in Ingram v. Axelrod stated that:

> "[T]hese pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective realty***'. Additionally, pages 7-11...should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 A.D.2d 176, 181, 417 N.Y.S. 2d 142, mot. for lv. to app. den. 48 N.Y.2d 706, 422 N.Y.S.2d 68, 397 N.E.2d 758). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion ***' (Matter of Polansky v. Regan, 81 A.D.2d 102, 104, 440 N.Y.S.2d 356 [emphasis added]). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [456 NYS 2d 146, 148, 90 AD 2d 568 (1982)].

Based upon the foregoing, it is reiterated that a blanket assertion that the materials in question may be withheld appears to be inappropriate, for the records should in my view have been reviewed for the purpose of extracting statistical or factual information accessible under §87(2)(g)(i).

Fourth, in good faith, it appears that there may be other grounds for denial not cited by Mr. Daley that could in part be applicable. For instance, §87(2)(e) permits an agency to withhold records compiled for law enforcement purposes based upon the harmful effects of disclosure described in subparagraphs (i) through (iv) of the cited provision. The extent to which the records sought were compiled for law enforcement purposes or, in the alternative, in the ordinary course of business, is unknown on the basis of your letter of Mr. Daley's denial. However, it is possible that portions of the records might be withheld on the basis of an unstated ground for withholding, such as §87(2)(e).

Fifth, with regard to your appeal of January 23, §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, 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, 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)].

Lastly, I agree with your contention that reliance upon Farbman, supra, is misplaced. Since you are not involved in the litigation that may relate to the same records, the holding in Farbman would not in my opinion be applicable. Further, even if you were involved in litigation, I would like to point out that there appears to be disagreement between the Appellate Divisions regarding the use of the Freedom of Information Law as opposed to discovery by a litigant.

As you are aware, 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 were 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 the 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., 94 AD 2d 576, 578 (1983)].

If Farbman, supra, represents an accurate interpretation of the Freedom of Information Law, it would appear that the discovery statutes, rather than the Freedom of Information Law, represent the appropriate means of seeking disclosure if there is litigation.

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]. 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 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, 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 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 procedure 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 one's status as a litigant, or the pendency of litigation.

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 in 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 material 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 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: Robert Daly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 3248

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

March 15, 1984

Mr. Herbert H. Klein
Town Clerk
Town of Boston
Town Hall
8500 Boston State Road
Boston, NY 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 March 2. Your continued interest in complying with the Freedom of Information Law is much appreciated.

Your inquiry concerns the law regarding the disposal of tape recordings of meetings.

Please be advised that the Freedom of Information Law does not deal with the authority of an agency to destroy or otherwise dispose of records. Enclosed for your consideration is a copy of §65-b of the Public Officers Law, which, in brief, provides that a unit of municipal government cannot dispose of records without having received the consent of the Commissioner of Education. In turn, the Commissioner has developed schedules containing reference to retention periods that must be met prior to the disposal of records.

I believe that the Local Records Section of the New York State Archives, which is a part of the Education Department, is in the process of reviewing and updating retention schedules that pertain to records in possession of local government.

For the purposes of determining whether a schedule exists regarding tape recordings of meetings or to obtain consent to destroy, it is suggested that you contact the New York State Archives, Local Records Section, Cultural Education Center, Empire State Plaza, Albany, NY 12230. If you would like to make your inquiry by phone, I recommend that you contact Mr. Bruce Dearstyne at (518) 473-8037.

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

Ens.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1000
FOIL-AO-3249

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

March 15, 1984

Mr. James C. Krol
Administrative Assistant
St. Lawrence County Board of
Legislators
County Court House
Canton, NY 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. Krol:

I have received your letter of March 1, in which you requested a "ruling" from this office.

According to your letter:

> "...the St. Lawrence County Commissioner of Social Services is in receipt of a letter from the Regional Director of the Western Regional Office of Audit and Quality Control for the New York State Department of Social Services. Mr. Robert E. Smith, the Regional Director, was asked if a scheduled exit conference prior to the release of a draft audit of the County Department of Social Services is a meeting which could be attended by various members of the County Legislature and the media in general. Mr. Smith's reply is as follows: 'An exit conference is an intricate part of the audit process where findings are orally presented to the auditee for discussion, understanding, and agree-

> ment/disagreement. Audit findings are subject to change and further review may be warranted. For these reasons, the information presented at the exit conference is not subject to public release. The exit conference is not designed to be a public hearing open to the general public or media, therefore, they are excluded. Also the exit conference is not the proper form for direct inquiries from local officials or concerned parties..."

In conjunction with the commentary presented in the preceding paragraph, your first question is whether the statement made by Mr. Smith is reflective of "a valid departmental policy in light of the Freedom of Information and Open Meetings Laws". The second question is whether a draft audit is subject to the Freedom of Information Law.

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

First, it is emphasized that the Committee on Open Government does not have the authority to render what might be characterized as a "ruling". On the contrary, the Committee is authorized under both the Freedom of Information and Open Meetings Laws to provide advice. Consequently, the ensuing comments should be considered as advisory.

Second, similar inquiries have arisen involving situations in which municipal officials have met with representatives of various state agencies. From my perspective, whether the provisions of the Open Meetings Law might be applicable to a particular gathering is dependent upon attendance at the gathering.

For instance, similar exit conferences are conducted between representatives of the Department of Audit and Control and local government officials. If, for example, an auditor meets only with a county department head or perhaps with other members of staff, the Open Meetings Law would not be applicable. On the other hand, if, due to the subject matter, a board or committee with expertiese regarding the subject attends, the Open Meetings Law would in my opinion apply.

The scope of the Open Meetings Law is determined in part by the phrase "public body", which is defined in §97 (2) to include:

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

Based upon the language quoted above, it is clear in my view that a governing body, such as a county legislature, as well as a committee designated by a governing body, would be subject to the Open Meetings Law.

In conjunction with the facts described in your letter, it is assumed that the "auditee" is the County, or a component of County government. From there, the question would be who attends or who should attend the so-called exit conference. If various members of the County Legislature constituting less than a quorum sought to attend, the Open Meetings Law would not have been applicable. In such a case, although there would be nothing to prohibit the members of the Legislature, the public or the news media from attending, there would be no right to attend. On the other hand, if a quorum of a legislative committee, such as a social services committee, sought to participate in the exit conference in the performance of its official duties, attendance by a quorum of such a committee would in my opinion bring the gathering within the scope of the Open Meetings Law. Further, if there is no ground for executive session, I do not believe that a representative of a state agency could insist upon the exclusion of members of the public or the news media from such a meeting of a public body.

I would like to point out that the Open Meetings Law is silent with respect to public participation. Therefore, it has been advised that although a public body may permit public participation at a meeting, there is no requirement that the public must be allowed to speak or otherwise participate at an open meeting. Consequently, even if the public and news media may attend a meeting, there

need not be disruptions or a grant of an opportunity to be heard as in the case of a public hearing.

Moreover, the statement made by Mr. Smith is in my view somewhat confusing and conflicting. He refers to findings presented to the auditee for discussion and yet concludes that an exit conference is not the proper forum for inquiries made by local officials. In this instance, if a county legislative committee is responsible, at least in part, for the appropriate functioning of a county department, it is difficult to understand how the work of such a committee could or should be severed from that of the agency for which it has oversight.

In sum, if a quorum of a public body confers with a state official for the purpose of conducting public business, such a gathering would in my view constitute a "meeting" subject to the Open Meetings Law. Further, since such a gathering is held by a public body with others, those others in attendance could not in my view insist upon closing the meeting.

With respect to your question involving the draft audit, I direct your attention to the Freedom of Information Law.

While a document might be characterized as a "draft", I believe that is 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 a draft audit constitutes a "record" accessible to the extent provided by the Freedom of Information Law by any agency that maintains it.

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 would be relevant to the record in question. Due to its structure, however, portions of the audit, even though considered "draft", would in my opinion likely be 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 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 I believe that a draft audit could properly be characterized as intra-agency material, or perhaps inter-agency material, since it is shared with the County, 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 auditor's 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.

I hope that I 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 E. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3250

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

March 15, 1984

Mr. Robert F. Reninger
[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. Reninger:

I have received your letter of March 3, in which you requested an opinion under the Freedom of Information Law.

Specifically, your question involves "the applicability of the FOIL legislation to situations where access to documents may be being withheld under the guise that the documents cannot be found."

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

First, as you may be aware, the Freedom of Information Law is applicable to existing records of an agency. Therefore, if records sought do not exist, an agency would not generally be required to create new records on behalf of an applicant [see attached, Freedom of Information Law, §89(3)].

Second, if, however, records requested do exist but cannot be found, §89(3) of the Freedom of Information Law states in part that, upon request, the agency "shall certify that it does not have possesion of such record or that such record cannot be found after diligent search."

Consequently, if records sought cannot be located, it is suggested that you seek a certification to that effect. It is noted that he regulations promulgated by

Committee, which govern the procedural aspects of the Freedom of Information Law, indicate that the designated records access officer should be responsible for preparing such a certification 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3251

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

March 19, 1984

Mr. Arthur Clarke
78-B-127
CCF 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. Clarke:

I have received your recent letter in which you requested the full name of a judge who presided over a proceeding in 1976.

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 that in which you are interested, nor does it have the authority to compel an agency to grant or deny access to records.

Moreover, the Freedom of Information Law is applicable to records of an "agency", which 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, incldуing any municipal or district court, whether or not of record."

Based upon the provisions quoted above, the Freedom of Information Law does not apply to the courts or court records.

There are, however, various provisions of the Judiciary Law and court acts that grant significant rights of access to court records. For example, enclosed is a copy of §255 of the Judiciary Law, which deals generally with the responsibilities of court clerks in terms of searching and providing access to records in their possession. It is suggested that you submit a request to the clerk of the court in which the proceeding was conducted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3252

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

March 19, 1984

Mr. George R. Wolff
Mackenzie, Smith, Lewis,
Michell & Hughes
600 Onondaga Savings Bank Building
Syracuse, New York 13202-1399

The staff of the Committee on Open Government is authorized to issue advisory opinions. The enusing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wolff:

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

According to your letter, the Workers' Compensation Board employs physicians to examine Workers' Compensation claimants. You wrote further that the "role of these physicians is to determine disability under subdivision 3 to section 15 of the Workers' Compensation Law".

In this regard, you stated that:

> "[A] great deal of 'mystique' surrounds a determination of disability and the degree of disability, by the State employed physicians. Supposedly, these physicians undergo training classes in New York City, at which they are instructed on how to determine percentages of disability of the whole body and of body members. Also, the State provides the physician with printed material, setting forth criteria for determining various degress of disability.

> "In Workers' Compensation hearings, where the degree of disability is an issue, the physicians refuse to divulge or produce the material used to evaluate and determine the amount and nature of the disability."

It is your view that the standards and criteria used by physicians employed by the Board should be accessible to the public "to ascertain whether the physician has properly applied the standards to the limitations found in each case, to reach a certain percentage of disability."

Your questions are whether you should be entitled to:

> "1. a copy of all printed material and notes, used by instructors to train physicians, employed by the Workers' Compenstation Board, for disability determinations;
>
> 2. a copy of all materials, provided to physicians, employed by the State of New York with the Workers' Compensation Board, used to make disability determinations in Workers' Compensation cases."

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

First, it is noted that the scope of the Freedom of Information Law is determined in part by the term "record" which is defined in §86(4) of the Law to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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 Workers' Compensation Board is an "agency" [see definition of "agency", §86(3)], written materials, such as criteria, standards, and instructions provided to physicians employed by the Board in my view constitute "records" subject to rights of access granted by the 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, under the circumstances, there appears to be a single ground for denial of relevance. However, due to the structure of that provision, the records in question in my opinion are accessible in part, if not in toto.

Specifically, §87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statisticial 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 informations, instructions to staff that affect the public or final agency policy or determinations must be made available.

From my perspective, the records that you are seeking could likely be characterized as "intra-agency" materials. However, it also appears that they are reflective of instructions to staff that affect the public that would be accessible under §87(2)(g)(ii) or the policy of the Board and, therefore, accessible under §87(2)(g)(iii). It

is noted further that, in a letter sent to me shortly after the passage of §87(2)(g) in 1977 by the Assembly sponsor of the legislation, it was stated that the intent of the cited provision was to ensure that the so-called "secret law" of an agency be made available. Assuming that Board physicians rely upon the standards and criteria contained in the records in question, I believe that they would constitute the "secret law" of the agency.

Lastly, the only determination of which I am aware that is somewhat similar to the facts described in your letter, although distinguishable, may be useful for the purpose of providing guidance. In Fink v. Lefkowitz [47 NYS 2d 568 (1979)] a request was made for a manual developed by the Special Prosecutor for Nursing Homes. The manual detailed the methods used for investigating nursing home fraud. Portions of the manual were withheld on the ground that they constituted records compiled for law enforcement purposes which if disclosed would reveal non-routine criminal investigative techniques and procedures [see Freedom of Information Law, §87(2)(g)(iv)]. The court found that disclosure of certain aspects of the manual would enable unscrupulous nursing home operators to evade effective law enforcement and stated that "The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 573). The records sought, however, were not likely compiled for law enforcement purposes. If that is so, §87(2)(e) would not be applicable as a basis for withholding. Moreover, it does not appear that a person involved in a proceeding before the Board could evade law enforcement or otherwise interfere with the process of decision making if the criteria and standards were to be disclosed.

In sum, for the reasons expressed above, I believe that that standards and criteria used by physicians employed by the Workers' Compensation Board are accessible under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Office of Counsel,
Workers' Compensation Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3253

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

March 19, 1984

Mr. Philip M. Ross
82-A-6365
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. Ross:

I have received your letter of March 14.

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 a pocket guide that summarizes the provisions of the Freedom of Information and Open Meetings Laws.

You wrote that you are attempting to obtain papers pertaining to you at your trial. In this regard, I would like to offer the following comments.

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 compel an agency to grant or deny access to records.

Moreover, the Freedom of Information Law is applicable to records of an "agency", which 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 or district court, whether or not of record."

Based upon the provisions quoted above, the Freedom of Information Law does not apply to the courts or court records.

There are, however, various provisions of the Judiciary Law and court acts that grant significant rights of access to court records. For example, enclosed is a copy of §255 of the Judiciary Law, which deals generally with the responsibilities of court clerks in terms of searching and providing access to records in their possession. It is suggested that you submit a request to the clerk of the court in which the proceeding was conducted.

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

Sincerely,

Robert J. Freeman
Executive Driector

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3254

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

March 20, 1984

Mr. Phillip Byers
77-A-1830
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. Byers:

I have received your letter of March 8 in which you requested assistance concerning your capacity to gain access to records pertaining to you.

According to your letter, following your transfer from Elmira to the Attica Correctional Facility, you requested copies of records stating the reasons for your transfer. As of the date of your letter, you received no response. You requested that this office "look into this matter" in order to have the Department of Correctional Services forward the records to you. You also sought assistance in receiving a copy of your "institutional record".

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

First, it is noted that the authority of the Committee is advisory. As such, the Committee does not have possession or control 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, with regard to a record indicating the reasons for your transfer, it is possible that such a record, if it exists, might justifiably be denied, at least in part. 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..."

While some aspects of inter-agency or intra-agency materials must be made available, others, such as those reflective of opinion, advice, or recommendation, for example, may in my view be withheld.

Under the circumstances, a record concerning your transfer could in my view be characterized as "intra-agency" material. Further, to the extent that it contains the deniable information described earlier, I believe that it could be withheld.

Third, §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 adopt regulations in conformity with the Law and consistent with the regulations promulgated by the Committee.

One of the requirements of the Committee's regulations involves the designation of one or more "records access officers". When records are in possession of a correctional facility, the regulations of the Department of Correctional Services indicate that a request for such records should be directed to the facility superintendent or his designee. The records access officer is required to respond to the request within five business days of its receipt. If a request remains unanswered within five business days, or if its receipt is not acknowledged within that period, you may consider the request to have been denied and submit an appeal. The appeal, under the Department's regulations, should be directed to Counsel to the Department in Albany.

With respect to a request for your "institutional records", it is noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Since the contents of an institutional record might be substantial, it is possible that a request for one's "institutional record" without greater detail might not "reasonably describe" the records sought. When making a request, it is suggested that you provide as much detail as possible, including names, dates, descriptions of events, identification numbers and similar information that would enable agency officials to locate the records sought.

To provide you with additional information regarding rights of access to records and the procedures that should be followed, enclosed are copies of the Freedom of Information Law and the regulations promulgated by the Department of Correctional Services regarding rights 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3255

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

March 21, 1984

Mr. William Everett Sternberg
[redacted]

Dear Mr. Sternberg:

I have received your letter of March 19, which involves a complaint regarding a request for information that you directed to the Credit Bureau of Oneonta, Inc.

Specifically, you wrote that information pertaining to you has been reported incorrectly and is adversely affecting you. Although you submitted a request to the Credit Bureau under the Freedom of Information Law, no response had been received as of the date of your letter. Consequently, you have "demanded" that action be taken by this office on your behalf.

Please be advised that the Freedom of Information Law applies only to records of government in New York. Under the Law, rights of access exist with respect to records of an "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 entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since a private credit bureau is not a government entity, rights granted by the Freedom of Information Law would not be applicable to such a corporation.

It is noted further that the Committee is authorized by law to advise with respect to the Freedom of Information and Open Meetings Laws. Consequently, this office has no capacity to compel an entity to grant access to records, even if it is subject to the requirements of the Freedom of Information Law.

Lastly, I believe that the New York Civil Liberties Union has published a brochure regarding the Fair Credit Reporting Act. Unless I am mistaken, the brochure is available for twenty-five cents and may be obtained by writing to the New York Civil Liberties Union, 84 Fifth Avenue, New York, NY 10011.

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-3256

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

March 21, 1984

Ms. Antoinette Witkowski
[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. Witkowski:

I have received your letter of March 9 and appreciate having an opportunity to read your most interesting newsletter.

Your inquiry pertains once again to records forwarded by a volunteer fire company to the District Attorney for the purpose of an investigation. The investigation has ended and you have apparently reviewed eighty among eighty-two checks that you requested. There is apparently no dispute regarding rights of access to the two checks, but rather an assertion by the Assistant District Attorney that they cannot be located.

You have asked whether there is any appropriate action that could be pursued.

In this regard, in a situation in which records are requested, but they cannot be found, §89(3) of the Freedom of Information Law provides that, on request, the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". As such, assuming that the records cannot be located, it is suggested that you request a written certification as described in §89(3).

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-3257

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

March 21, 1984

Ms. Chris Singer
Mr. Ross Jones
Co Chairs
Civil Service Comittee
NYS Public Employees Federation
P.O. Box 7248
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 Ms. Singer and Mr. Jones:

I have received your letter of March 9 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a request made under the Freedom of Information Law on December 15, 1983, to Ms. M. Elizabeth Lyon, Records Access Officer for the Department of Social Services. Although the receipt of your request was acknowledged in writing on December 22, no determination was made. Consequently, an appeal was sent to Commissioner Trent on February 6. That, too, remains unanswered.

The records sought involve sixty-four "project appointments" made by the Department of Social Services. The following information was requested with respect to each of those appointments:

> "1) duties statement and project description;
>
> 2) original start and end dates; revisions, if any;

3) extension requests and approvals, if any;

4) minimum qualifications;

5) work site and geographic location, if different, and Division, Office and Bureau assignment;

6) grade level or equivalent (such as salary);

7) competitive, non-competitive or N.S."

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. 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, to the extent that the information sought exists in the form of a record or records, it would in my view be subject to rights of access granted by the Freedom of Information Law. Conversely, if the information sought has not been prepared or is not contained in a record, the Department would be under no obligation to create a new record in response to a request made under the Freedom of Information Law.

Second, assuming that the information exists in the form of a record or records, I would like to stress 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)(g) through (h) of the Law.

Third, it is important to note that §87(2) in its introductory language refers to the capacity of an agency to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. Consequently, I believe that the Legislature envisioned situations in

which a single record might be both accessible and deniable in part. Therefore, even if a portion of a record might justifiably be withheld, the remainder would in my view be accessible. 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, might justifiably be withheld.

Fourth, with respect to the specific information sought, it appears that two of the grounds for denial in the Freedom of Information Law may be relevant. Nevertheless, it is unlikely, in my opinion, that either could justifiably be cited to withhold records reflective of the information that you are seeking.

Of potential relevance is §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold records that:

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

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

Under the circumstances, I believe that the records sought could be characterized as "intra-agency" materials. Nevertheless, various aspects of the information, such as "start and end dates", work locations, and similar documentation constitute factual information accessible under

§87(2)(g)(i). Other aspects of the information, such as a duty statement, a project description or the minimum qualifications for a position, would in my view be reflective of the policy of the agency and, therefore, would be accessible under §87(2)(g)(iii). Since the information is either factual in nature or reflective of policy, or both, I do not believe that §87(2)(g) could be cited as a basis for withholding.

The other 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". While the standard regarding privacy may require the making of subjective judgments in many instances, there is a significant amount of case law in which the courts have dealt with the privacy of public employees. In brief, the courts have found in a variety of 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, various judicial interpretations of the Freedom of Information Law indicate that records pertaining to public employees that are relevant to the performance of their official duties are available, for disclosure in such instances would constitute a permissible 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 21, 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 identifiable to public employees are irrelevant to the performance of their official duties, those portions of the records may be withheld [see 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].

From my perspective, the types of personally identifiable information that you requested are generally relevant to the performance of the duties of the employees as well as the Department. Consequently, it does not appear that §87(2)(b) could be cited as a basis for withholding.

Fifth, some of the aspects of the information that you are requesting must be kept and made available by means of a payroll record. Although it was mentioned earlier that an agency is not generally required to create a record under the Freedom of Information Law, an exception to that rule involves the creation of a payroll record. Section 87(3)(b) of the Freedom of Information Law requires that each agency shall maintain:

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

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee prescribe time limits within which an agency must respond to requests.

Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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: M. Elizabeth Lyon
Brooke Trent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3258

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

March 22, 1984

Mrs. Joan Grattan
[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. Grattan:

Your letter of March 12 addressed to the Secretary of State has been forwarded to the Committee on Open Government, which received the letter on March 22. The Committee, a unit of the Department of State of which the Secretary is a member, is responsible for advising with respect to the Freedom of Information Law.

You have requested a copy of the Freedom of Information Law, which is enclosed. You indicated, however, that you are "referring to child support payment records and Welfare Department records".

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

First, the Freedom of Information Law is applicable to records in possession of state and local government.

Second, the statute is based upon a presumption of access and generally provides broad rights of access to government records.

Third, if a different statute permits or requires that certain records be kept confidential, the Freedom of Information Law would not alter rights of access to those records. One of the grounds for denial in the Freedom of

Information Law, §87(2)(a), pertains to records "that are specifically exempted from disclosure by state or federal statute". In this regard, the Social Services Law, §136, generally requires the confidentiality of records that identify applicants for or recipients of public assistance. Similarly, §372 of the Social Services Law generally requires the confidentiality of records regarding social services provided to children. Consequently, records identifiable to particular individuals that pertain to public assistance are confidential in most instances. Enclosed for your review are copies of the cited provisions of the Social Services Law.

If you are a subject of the records or a member of a family involved in the receipt of public assistance, various regulations promulgated by the Department of Social Services may provide access to records to you. If such a circumstance is present, it is suggested that you contact the county department of social services that maintains the records in which you are interested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1002
FOIL-AO-3259

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

March 22, 1984

Mr. Michael F. Vogt
Executive Director
Private Industry Council
P.O. Box 62
Corning, NY 14830

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. Vogt:

I have received your letter of March 9, as well as the materials attached to it.

Your inquiry concerns the status of the Chemung, Schuyler, Steuben Private Industry Council, Inc. under the Freedom of Information and Open Meetings Laws. In this regard, I am unaware of any judicial determination dealing with a private industry council ("PIC") and its responsibilities under either of the statutes. Consequently, your question involves a matter of first impression.

With respect to the Open Meetings Law, the scope of that statute is determined in part by the phrase "public body", which is defined to include:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body" [see Open Meetings Law, §97(2)].

Based upon a review of the language quoted above in terms of its components, I believe that each condition necessary to a finding that a PIC is a "public body" can be met.

First, a PIC is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. Second, according to the by-laws attached to your letter, its board consists of more than two members. Third, Section 3.a. of the Certificate of Incorporation states that one of the purposes for which the Corporation is formed is:

> "[T]o administer programs for and on behalf of the Counties of Chemung, Schuyler and Steuben and other program sponsors under and pursuant to programs of the United States Government, as approved by the United States Department of Labor, pursuant to the terms and provisions of Public Law 97-300, as enacted on October 13, 1982, and as it may be amended from time to time, and other related or successor programs."

As such, it appears that the Board conducts public business and performs a governmental function for three public corporations, the counties of Chemung, Schuyler and Steuben.

If my reasoning is correct, the Board of the Corporation is a "public body" required to comply with the Open Meetings Law.

In terms of rights of access to records, it is not entirely clear in my view that a PIC falls within the coverage of the Freedom of Information Law.

As you may be aware, the Freedom of Information Law is applicable to records of an "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 governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since a PIC is a not-for-profit corporation, it is questionable whether it could be characterized as a "governmental entity", even though it might perform a governmental function.

On the one hand, as a not-for-profit corporation, the entity in question is private; on the other, in view of the statutory provisions leading to its creation, it might be contended that, despite its not-for-profit status, a PIC is an arm of government and is, therefore, a governmental entity.

The only judicial determination of which I am aware that dealt with a similar issue is Westchester-Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)]. In that decision, the Court of Appeals found that a volunteer fire company, also a not-for-profit corporation, was an "agency" in view of its functions, notwithstanding its corporate status. It is noted, too, that the decision stressed the statement of legislative declaration appearing in §84 of the Freedom of Information Law, which indicates that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." Consequently, although it is possible that the records of a PIC might be subject to the Freedom of Information Law, I believe that an unequivocal statement as to the applicability of the Freedom of Information Law remains to be determined judicially.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3260

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

March 26, 1984

Garry A. Luke, Director
Office of Employer-Employee
Relations
6820 Thompson Road
Syracuse, NY 13211

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. Luke:

I have received your letter of March 8, which reached this office on March 14.

You have requested an advisory opinion regarding the interpretation of §89(7) of the Freedom of Information Law and whether, pursuant to that provision, "a recognized or certified bargaining agency [may] be denied an employee's home address.

As you are aware, the introductory portion §89(7) states generally that the Freedom of Information Law does not require that an agency disclose the home address of a public employee. At the end of the cited provision, it states further that:

> "nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of an officer, employee or retiree of such employer, if such name or home address is otherwise available under this article."

In my opinion, the name of a public employee is clearly available under §87(3)(b) of the Freedom of Information Law, which requires that an agency shall maintain:

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

However, it has consistently been advised that a public employee's home address may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Further, I do not believe that a public employee's home address would be "otherwise available under this article", which refers to Article 6 of the Public Officers Law, the Freedom of Information Law.

In sum, in my opinion, since no provision of the Freedom of Information Law confers a right of access to public employees' home addresses upon a recognized or certified bargaining agent, home addresses need not 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3261

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

March 26, 1984

Ms. Pam Snook
Schenectady Gazette
332 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. Snook:

I have received your letter of March 13 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you are engaged in a "running battle" with a local official "who claims that [you] do not have the right to see reports, such as consultants' reports, until they are distributed and digested by the Town Board first".

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

First, the coverage of the Freedom of Information Law is determined in part by the term "record", which is defined in §86(4) of the Law to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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 breadth of the language quoted above, once a report is received by or in possession of an agency, such as a town, I believe that it is a "record" subject to rights of access granted by the Freedom of Information Law. The fact that a report might not be "digested" by a town board does not in my view alter or affect rights of access to the report. Moreover, the contents of the report do not change, whether or not it is reviewed and digested by a recipient.

Second, therefore, assuming that a report is accessible under the Freedom of Information Law, I believe that it would be available for review when it is received by an agency.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3262

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

March 26, 1984

Mr. Robert T. Ledger
[redacted]

Dear Mr. Ledger:

Your letter of March 3 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.

According to your letter, your application for a pistol permit was rejected. It is your understanding that you "have the right to know who refused [you] and why". As such, you have requested assistance regarding the means by which you might obtain such information.

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

First, the statute that pertains to licensing of firearms is §400.00 of the Penal Law.

Second, the cited provision of the Penal Law refers to a "licensing officer". Since that statute indicates that approved pistol licenses must be filed by the licensing officer with the County Clerk, it is suggested that you contact the Clerk in order to determine the identity of the licensing officer.

Third, with respect to the reason for rejection of your application, I direct your attention to §400.00(4-a) of the Penal Law, which is entitled "Processing of license applications" and states that:

> "Applications for licenses shall be accepted for processing by the licensing officer at the time of presentment. Except upon written notice to the applicant specifically stating the reasons for any delay, in each case the licensing officer shall act upon any application for a license pursuant to this section within six months of the date of presentment of such an application to the appropriate authority. Such delay may only be for good cause and with respect to the applicant. In acting upon an application, the licensing officer shall either deny the application for reasons specifically and concisely stated in writing or grant the application and issue the license applied for."

Consequently, it is suggested that you contact the licensing officer in order to attempt to determine the reason for the rejection of your application.

I hope that I 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-3263

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

March 27, 1984

Mr. James C. Pittman
81-C-762
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. Pittman:

I have received your letter of March 12 in which you requested assistance regarding the Freedom of Information Law.

Specifically, you wrote that you are "interested in obtaining copies of all information pertaining to [you] that is in possession of the Police Headquarters, Buffalo, New York".

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

First, it is emphasized that the Freedom of Information Law in §89(3) requires that an applicant request records "reasonably described". In my view, a request for all records pertaining to you, without greater description, would not "reasonably describe" the records sought. As such, when making a request, it is suggested that you provide as much detail as possible, including names, dates, identification, index and indictment numbers, descriptions of events and similar details that might enable agency officials to locate the records sought.

Second, although the Freedom of Information Law grants broad rights of access, records may be withheld in accordance with the grounds for denial appearing in §87 (2)(a) through (h) of the Law.

Enclosed for your consideration are copies of the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law.

I hope that I 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-3264

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

March 28, 1984

Ms. Suzanne Kelly
[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. Kelly:

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

The materials attached to your letter indicate that you unsuccessfully requested various records from the Village of Blasdell. According to a denial following an appeal, Mayor Michael W. McGuire rejected your requests for existing collective bargaining agreements between the Village and public employee unions, "conference reports" which pertain to conferences and similar events attended by Village officials, and records concerning claims for or the use of compensatory time.

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) of the Freedom of Information Law refers to the capacity of an agency to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. As such, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Moreover, the language indicates that an agency must review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, with respect to the materials sought, I believe that collective bargaining agreements are clearly accessible continually from the time that an agreement has been reached. Consequently, in my opinion, an existing collective bargaining agreement must be made available, even though it may be used in relation to ongoing collective bargaining negotiations. It is emphasized that, although §87(2)(c) of the Freedom of Information Law permits an agency to withhold records the disclosure of which would impair present or imminent collective bargaining negotiations, the Court of Appeals, the state's highest court, has held that existing collective bargaining agreements, as well as salary and fringe benefit data cannot be denied on the basis of §87(2)(c); on the contrary, it was found that such records must be made available under the Freedom of Information Law [Doolan v. BOCES, 48 NY 2d 341 (1979)].

The conference reports that you requested were denied by the Mayor on the ground that intra-agency materials can be withheld "where the communication is purely advisory in nature". Here I direct your attention to §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, I would agree with the Mayor that a memorandum or letter transmitted by a Village employee to another Village employee or board constitutes "intra-agency" material. I would also agree that, to the extent that such material may be advisory in nature, it is deniable. Nevertheless, as indicated earlier, records may be withheld to the extent that a basis for withholding applies. If, for example, a conference report summarizes the activities in which a public employee was involved at a conference, or reviews the nature of educational courses provided at a conference, such information would in my view be factual, and accessible on that basis. Consequently, to the extent that the conference reports contain factual information, I believe that they must be made available. Contrarily, to the extent that such reports are advisory, I would concur with the Mayor that those aspects of the reports may justifiably be withheld.

The last type of record that was withheld involves the use of "compensatory time off". The Mayor withheld the records sought on the ground that disclosure would result in "an unwarranted invasion of personal privacy".

One of the bases for withholding records under the Freedom of Information Law involves disclosures that would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)]. While the standard regarding privacy may require the making of subjective judgments in many instances, there is a significant amount of case law in which the courts have dealt with the privacy of public employees. In brief, the courts have found in a variety of 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, various judicial interpretations of the Freedom of Information Law indicate that records pertaining to public employees that are relevant to the performance of their official duties are available, for disclosure in such instances would constitute a per-

missible 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); Genevea Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 21, 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 identifiable to public employees are irrelevant to the performance of their official duties, those portions of the records may be withheld [see 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].

From my perspective, records indicating the use of compensatory time would not generally involve information regarding the personal details of the life of a public employee. Moreover, it would appear that such records are relevant to the performance of one's official duties. For instance, if an employee attended a conference during a weekend, perhaps that employee would be entitled to compensatory time. In that type of situation, records merely indicating the acquisition or use of compensatory time would in my view be relevant to the performance of that person's duties and would not contain any details so personal that the records could 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

cc: Hon. Michael W. McGuire, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3265

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

March 28, 1984

Mr. John W. Hopkins
80-D-226
Box B
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opiniions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hopkins:

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

Specifically, you wrote that you have unsuccessfully sought to obtain a list of jurors present during a criminal trial in which you were the defendant.

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

First, the Freedom of Information Law is applicable to records of an "agency", which 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, except the judiciary or the state legislature."

In turn, §86(1) of the Law defines "judiciary" to mean:

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

Assuming that the list in question is kept by a court, the Freedom of Information Law would not in my view be applicable.

Second, although the Freedom of Information Law does not include the courts or court records within its scope, various provisions of the Judiciary Law and other court acts often grant broad rights of access to court records. For example, enclosed is a copy of §255 of the Judiciary Law, which deals generally with the responsibilities of court clerks to search and make available records in their possession. Further, as a general matter, I believe that Article 16 of the Judiciary Law makes available the names of jurors. Consequently, it is suggested that you contact the clerk of the court for the purpose of making a request. It is recommended that you provide sufficient detail, such as names, dates, docket numbers, and similar information, to enable the clerk to locate 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3266

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

April 2, 1984

Mr. Martin E. Lynch
Records Access Officer
Village of Fayetteville
Fayetteville, NY 13066

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. Lynch:

I have received your letter of March 14 and the materials attached to it.

Your inquiry concerns a request made by a law firm for records of the Police Department of the Village of Fayetteville. It is your understanding that similar requests have been sent to all police agencies in Onondaga County.

The request involves "the first page (containing name and address) of all accident reports showing accidents resulting in personal injuries; copies of a weekly press release summarizing policy/criminal activity for the week which local newspapers pick-up at the Police Department." You wrote further that "This request is for future reports and would involve department personnel compiling copies of forms into a report which is not now a report function of the Department.

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

First, as you are aware, motor vehicle accident reports are generally available under §66-a of the Public Officers Law, as well as the Freedom of Information Law. The exception to the general rule of access stated in

§66-a concerns the authority to "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".

Second, from my perspective, both the Freedom of Information Law and §66-a of the Public Officers Law grant rights of access to existing records. It appears that the request involves not only reports now in possession of the Village, but also reports of accidents that have not yet occurred. In my opinion, any agency is not required under the Freedom of Information Law to grant access to records before the records exist. Stated differently, although an agency may agree to furnish records on an ongoing basis, I believe that it may require that an applicant submit a request for records following the receipt or preparation of records by an agency.

Third, enclosed is a copy of Goodstein v. Shaw [463 NYS 2d 162 (1983)], which involved a situation in which an attorney requested the names and addresses of persons who submitted complaints to the New York State Division of Human Rights. Under the circumstances, it was found that the complainants' first names and addresses would if disclosed constitute an unwarranted invasion of personal privacy and, therefore, could be withheld. Since accident reports are generally available, it does not appear that they could be withheld on the same basis as that described above in Goodstein. Nevertheless, it was also found that the request was made for commercial purposes in that the applicant "seeks to inform a segment of the public of the availability of legal representations [id. at 163]. As a consequence, it was found that a "balancing test" should be utilized and that the intended use of the information was such that the interest in protecting privacy was greater than the need for disclosure. While I could not advise with certainty that the same result would occur in the case of a request for motor vehicle accident reports, perhaps the Goodstein decision will be useful for review.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3267

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

April 4, 1984

Mr. Russell Wimberly
78-A-2007
P.O. Box 338
Napanoch, NY 12458

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. Wimberly:

I have received your letter of March 20 in which you indicated that your requests directed to the New York State Commission of Investigation have not been answered. You have asked that I forward to that agency appropriate information regarding its responsibilities under the Freedom of Information Law.

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

First, although the Freedom of Information Law is based upon a presumption of access and provides broad rights of access, one of the grounds for denial pertains to records that are "specifically exempted from disclosure by state or federal statute". While I am unfamiliar with the records that you are seeking, §7505 of the Unconsolidated Laws indicates that many of the records in possession of the State Commission of Investigation must be kept confidential. If your request involves those records, the Freedom of Information Law would not in my opinion be applicable.

Second, it is noted, however, 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 business 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 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 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)].

In order to attempt to assist you, a copy of this opinion will be sent to the Commission.

I hope that I 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: Office of Counsel,
State Commission of Investigation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3268

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

April 5, 1984

Mr. John Jacobs
E-3-3
Nassau County Correctional
Facility
C.S. 1072
Hicksville, NY 11802

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. Jacobs:

I have received your letter of March 17 in which you requested assistance regarding the Freedom of Information Law.

According to your letter, you requested your medical and dental records from the Nassau County Correctional Facility. However, the request was denied.

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

First, the Freedom of Information Law (see attached) is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, it would appear that one of the grounds for denial would be applicable. Nevertheless, due to its structure, various aspects of the records sought should in my view be made available to you.

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, those aspects of medical or dental records consisting of factual information, such as laboratory test results and similar data are in my view accessible to you under the Freedom of Information Law. Those aspects of the records reflective of advice or diagnostic opinion, for instance, might justifiably be withheld under §87(2)(g).

In sum, I believe that agency officials are required to review the records sought in their entirety to determine which portions may be factual in nature and which portions might be reflective of advice or opinion.

Lastly, §89(4)(a) of the Freedom of Information Law provides that, within thirty days of a denial, you have the right to appeal to the head of the agency or whomever has been designated to render determinations on appeal. As such, it is suggested that you attempt to learn the identity of the person to whom an appeal may be directed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Sgt. Williams, Nassau County Correctional Facility

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3269

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

April 5, 1984

Mr. George Manno
[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. Manno:

I have received your letter of March 17 in which you requested assistance regarding a request to the Delaware Valley Central School District.

According to your letter, you requested "a list of names of parents with addresses" in the District. In response, Ms. Elvira Brey, Business Manager of the District, wrote that the information sought "is kept on our school census along with non-public information such as telephone numbers, student numbers and handicapped identification". She wrote further that no separate list of names and addresses is kept and that, as a consequence, your request would be denied.

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

It is noted at the outset that rights of access to the information sought are not likely governed by the provisions of the New York Freedom of Information Law, but rather by federal law. Specifically, the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment", deals with rights of access to student records. In brief, the Buckley Amendment states that any "education record", a term that is broadly defined, that may identify a particular student or students must be kept confidential to all but the parents of students, unless the parents waive confidentiality.

While the records sought might not identify particular students by name, the regulations promulgated by the U.S. Department of Education define the phrase "personally identifiable" to mean:

> "...that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable."

Based upon the language quoted above, a list of parents of students, even though it might not identify the students themselves, would consist of "personally identifiable" data relating to students. Consequently, under the terms of the federal Act and regulations, I believe that such a list would be considered confidential.

The only instance in which a list of parents' names and addresses might not be considered confidential would in my opinion involve a situation in which a school district has established a policy regarding "directory information" pursuant to the Act. If a policy on directory information has been established, the information contained within the directory, which would not likely include names of parents of students, would be accessible to any person. If, however, no such policy has been adopted, the information would remain confidential.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Elvira Brey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO -1007
FOIL-AO-3270

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

April 5, 1984

Hon. Kevin Moss
Supervisor
Town of Guilderland
Route 20
Guilderland, NY 12084

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 Supervisor Moss:

I have received your thoughtful letter of March 21 and appreciate your kind words.

The question raised in your letter, which was precipitated by an inquiry made by a constituent, concerns the application of the Open Meetings Law to meetings of commissioners of a newly created district.

You alluded to a "special act of the legislature" in 1982 that created the District. According to my research, the legislation in question is Chapter 490 of the Laws of 1982, which states that:

> "[N]otwithstanding any other provision of law, the term "improvement district", as defined in section two hundred nine-a of the town law, shall include an ambulance district in the town of Bethlehem and an ambulance district in the town of Guilderland, both towns being in the county of Albany."

Although the Town Board reviews the budgets of Ambulance Districts within the Town "and makes whatever changes it feels necessary", you indicated that the relationship between the Ambulance Districts and the Town differs from that of a fire district and a town. You also noted that "Our Ambulance Districts are different from a sewer improvement area or a water district since its members are volunteers who are not remunerated in any way for their services by the Town of Guilderland. Therefore, the operations of the Ambulance District are taken care of by members who elect their leaders."

In conjunction with the background information described above, the constituent raised the following questions regarding the Board of Commissioners of the Western Turnpike Rescue Squad, which is the Board of one of the Ambulance Districts:

> "1. Is it legally and morally correct to have the Western Turnpike Board meetings private with the public being refused admittance?
>
> 2. What opinions, influence or questioning process does the public have with regard to the decisions of the Western Turnpike Board?"

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

It is assumed that the Ambulance Districts are not-for-profit corporations. Therefore, while they may be creations of government, they do not clearly appear to be governmental enitites. Nevertheless, in view of the means by which the Districts were created, their formal relationship with the Town, the specific language of the Open Meetings Law, as well as a judicial determination which in my view is relevant, I believe that the meetings of the Boards of Commissioners of the Ambulance Districts are subject to the requirements of the Open Meetings Law.

The scope of the Open Meetings Law is determined in part by the term "public body", which is defined in §97(2) 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."

Under the circumstances, it appears that each of the conditions necessary to a finding that a board of commissions is a "public body" may be met.

First, the Board consists of at least two members, Second, it is required to conduct its business by means of a quorum, pursuant to either the Not-for-Profit Corporation Law or §41 of the General Construction Law. Third, I believe that the Board would "conduct public business" due to its functions and its relationship with the Town. And fourth, as the Board of an improvement district and due to its functions, it appears that the Board would perform a governmental function for a public corporation, in this instance, the Town of Guilderland.

If my assumptions are accurate, each component of the definition of "public body" is present with regard to the Board of Commissioners thereby bringing the Board within the coverage of the Open Meetings Law.

Perhaps equally important is a precedent indicating that a similar type of not-for-profit corporation is an "agency" subject to the Freedom of Information Law. Specifically, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the Court of Appeals, the state's highest court, 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, whe 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" [id. at 579].

From my perspective, the volunteer organization in question, is somewhat analogous to a volunteer fire company, which according to the decision rendered by the Court of Appeals, is subject to the Freedom of Information Law. Based upon the reasoning of the Court, I believe that the

meetings of a board of a volunteer fire company or, in this instance, the Board of Commissioners of an ambulance district, would fall within the r quirements of the Open Meetings Law. Consequently, it is my view that the meetings of the Board must be open to the public in accordance with the Open Meetings Law.

Lastly, the constituent's second question involves the role of the public in relation to meetings of the Board of Commissions. In short, the Open Meetings Law confers upon the public the right to attend and listen to the proceedings of public bodies. However, the Law is silent with respect to public participation. As such, it has consistently been advised that a public body may but is not required to permit the public to speak or otherwise participate at 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: Gerard W. Duda

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1008
FOIL-AO-327/

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

April 6, 1984

Mr. Charles H. Atkin
[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. Atkin:

Your letter addressed to the Office of Charities Registration has been forwarded to the Committee on Open Government, which is also a unit of the Department of State.

Your inquiry involves the scope of what you characterized as "sunshine laws". The phrase "sunshine laws" generally refers to statutes that guarantee the public's right to know about government. In New York, the provisions of law generally referred to as sunshine laws are the Freedom of Infomration and Open Meetings Laws.

The Open Meetings Law (see attached) is applicable to meetings of public bodies. 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."

Based upon the language quoted above, as a general matter, the Open Meetings Law applies to governmental entities, such as town boards, city councils, legislative bodies, and the like.

The Freedom of Information Law (see attached) is applicable to records in possession of governmental entities. Specifically, that statute is applicable to records of an "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 entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Consequently, records in possession of governmental entities in New York are subject to the provisions of the Freedom of Information Law.

The Corporation that is subject of your inquiry, the Bethany Senior Citizens Housing Corporation is, based upon further inquiry, a "type c" not-for-profit corporation. Without additional information regarding the corporation, I would not conjecture as to its specific purposes. Nevertheless, in the majority of circumstances, since a not-for-profit corporation is generally not a governmental entity, its records would fall beyond the scope of rights of access granted by the Freedom of Information Law, and its meetings would not likely be subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3272

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

April 6, 1984

Ms. Barbara Kraebel
Suite 411
60 East 42nd Street
New York, NY 10165

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. Kraebel:

As you are aware, I have received your letter of March 17 and the materials attached to it.

Your inquiry concerns your efforts to obtain information regarding the assessment of real property from the New York City Tax Commission, the New York City Real Property Assessment Bureau and the New York City Finance Department. Although the Tax Commission responded, the other two agencies to date have neither granted nor denied access to the materials that you requested.

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

First, having reviewed the correspondence between yourself and the Tax Commission, although you may be dissatisfied with the amount of information provided, it appears that the response was appropriate in terms of the Freedom of Information Law. That statute is applicable to existing records, and it appears that extant records at the Tax Commission that fall within the purview of your request were indeed made available. It is noted, too, that §89(3) of the Freedom of Information Law states that, as a general rule, an agency is not re-

quired to create or prepare a record in response to a request. Therefore, while the records made available might not be as complete as you had expected, if they are the only materials falling within the scope of your request, I believe that the Tax Commission complied with the Freedom of Information Law.

Second, with regard to the absence of appropriate responses by the two other agencies, I would like to point out that the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, contain prescribed time limits for responses to requests.

Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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: Phyllis Davies
Gerald Koszer, NYC Dept. of Finance
Office of Counsel, NYC Real Property
Assessment Bureau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3273

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

April 10, 1984

Hon. George E. Barnes
Supervisor
Town of Macedon
Macedon, NY 14502

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 Supervisor Barnes:

I have received your recent letter, which reached this office on April 6, in which you complained regarding a lack of response to requests made under the Freedom of Information Law to Region 8 of the Department of Environmental Conservation.

In conjunction with your request that I "investigate", I have contacted Mr. Graham Greeley, the Records Access Officer for the Department on your behalf. Mr. Greeley called me this morning and assured me that responses to your requests have been or soon will be forwarded to you.

For future reference, I would like to point out 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 it 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt or a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that 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, appeal dismissed, 57 NY 2d 774 (1982)].

In order to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Mr. Seiffer at Region 8.

I hope that I 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: Eric Seiffer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3274

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

April 10, 1984

Mr. Joseph N. Silverman
[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. Silverman:

I have received your letter of March 19, which again concerns a request for payroll information.

Specifically, some months ago, you requested a payroll record consisting of the name, public office address, title and salary of Ontario County employees. It is noted that §87(3)(b) of the Freedom of Information Law requires that such a record be prepared. Following a denial of your request, I prepared an advisory opinion on your behalf, copies of which were sent to the County Administrator and County Attorney.

Notwithstanding the reasoning expressed in the opinion, which included reference to statutory provisions and various judicial interpretations, the correspondence attached to your letter indicates that disclosure of the record sought is "contrary to [Ontario] County policy".

You have asked whether the County "policy" is consistent with the Freedom of Information Law, whether such a policy may frustrate the intent of a legislative act, whether such a policy has been reviewed by the Committee on Open Government, and whether the courts represent the only source of review of the denial.

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

First, having reviewed my earlier opinion dated January 25, it is reiterated that the payroll record required to be maintained must in my view be made available to any person.

Second, I believe that the "policy" adopted by an agency if valid only to the extent that it is consistent with statutory requirements. Stated differently, a policy cannot in my view serve to diminish rights of access granted by a statute such as the Freedom of Information Law. There are various decisions indicating that agencies' regulations are void to the extent that they conflict with the Freedom of Information Law [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); and Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405]. Further, in a decision rendered on March 29, 1984, the Court of Appeals, the state's highest court, struck down a "practice" in effect since 1927 under which a state agency guaranteed confidentiality in a manner inconsistent with the Freedom of Information Law [see Washington Post Company v. New York State Insurance Department, __ NY 2d __].

Third, although the Committee on Open Government has not reviewed your letter specifically, it has made proposals in its annual reports that confirm its view that the payroll record required to be maintained under §87(3)(b) should be accessible to any person, regardless of the purpose for which a request is made. In terms of background, a continuing problem has involved requests for lists of names and addresses. Section 89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

The Committee recommended to the Governor and the Legislature that agencies be given greater discretion to withhold lists of names and addresses. However, its recommendation specifies that the increased capacity to withhold lists would not apply to payroll information (see Annual Report, December 14, 1983, pp. 21-23). A copy of the Annual Report will be sent to the County Administrator.

Lastly, at this juncture, unless the contents of this letter and the references made therein serve to persuade the County to disclose, the only additional means of seeking the records appears to involve the initiation of a judicial proceeding.

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: Hon. Elwyn C. Herendeen, County Administrator
Hon. John Park, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3275

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

April 10, 1984

Mr. Louis Onokato
82-A-5144
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. Onokato:

I have received your letter of March 17, which concerns a denial of access to records by a court clerk. The records involve an indictment and a proceeding before a grand jury.

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

First, the Freedom of Information Law is applicable 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 legislation."

In turn, §86(1) of the Freedom of Information Law defines "judiciary" to mean:

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

As such, I do not believe that the Freedom of Information Law is applicable to the courts or court records.

Second, under the circumstances, it is suggested that you discuss the matter with your attorney or representatives 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3276

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

April 10, 1984

Ms. Kathleen Filce
[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. Filce:

I have received your letter of March 19 and the materials attached to it.

Your inquiry was apparently precipitated by a request made on January 21 for the Sachem Central School District's subject matter list. In response to that request, you received a letter from the District Clerk which, in the body of letter, identified six categories of records available for inspection and copying. Due to the inadequacy of the response, you submitted a second request to the District Clerk and thereafter appealed on February 15 to the District's appeals officer. As of the date of your letter to this office, no response to your appeal had been rendered, and your ensuing complaint to the Board of Education dated February 24 had not been answered.

In an effort to respond to your questions and various issues raised in the correspondence, I would like to offer the following comments.

First, although the requirements concerning the preparation of a subject matter list in the original Freedom of Information Law pertained to available records, the current provision refers to all records. Specifically, §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."

Based upon the language quoted above, the subject matter list need not constitute an index that identifies each and every record of an agency; however, it must in my view refer, by category, to all of the records maintained by an agency, whether or not the records are available.

Moreover, §1401.6 of the regulations promulgated by the Committee, which have the force and effect of law, 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."

In view of the foregoing, I believe that a subject matter list must be prepared by the School District and maintained on an ongoing basis, and that it must contain more references to categories of records kept by the District than those listed in the letter sent to you.

Second, one of the District's responses to you inferred that a form should be completed in order to request records. Neither the Freedom of Information Law nor the regulations indicates that a form must be used to submit a request. Section 89(3) of the Freedom of Information Law states that an agency may require that a request be made in writing and that the request must "reasonably describe" the records sought. Consequently, it has consistently been advised that a written request that reasonably describes the records sought should suffice. It has also been advised that a failure to complete a form prescribed by an agency cannot be cited as a valid reason for delaying or denying access to records.

Third, with respect to the regulations to which reference was made earlier, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural aspects of the Law and the subject matter list. In turn, §87(1) of the Freedom of Information Law requires the governing body of a public corporation, in this case, the School Board, to adopt regulations in conformity with the Law and consistent with the Committee's regulations. It is noted that the regulations require the designation of one or more "records access officers" (see §1401.2) and an appeals officer or body (see §1401.7). I would like to point out, too, that having reviewed our appeal file for February, I was unable to locate a copy of your appeal, which, according to §89(4)(a) of the Freedom of Information Law, should have been forwarded to this office.

Fourth, you asked whether the School Board is required to answer questions raised in a letter dated February 24. While the questions might easily be answered, it is noted that the Freedom of Information Law is a statute involving access to records. Stated differently, it is not a vehicle that requires government officials to answer questions; it is, however, a vehicle under which government must respond to requests for records.

Fifth, the names of the Committee members are listed on the letterhead, and the address appearing on the letterhead may be used to communicate with them. The only members who have "titles" are the ex officio government members; the others are members of the public. The ex officio members are Gail Shaffer, Secretary of State, Alfred DelBello, Lieutenant Governor, John Egan, Commissioner of General Services and Michael Finnerty, Director of the Budget.

Lastly, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee, and model regulations designed to enable agencies to comply. Copies of this opinion and those documents will also be sent to the District.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3277

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

April 10, 1984

Mr. Gerald A. Scotti
President
Mohawk Valley Community College
Professional Association
1101 Sherman Drive
Utica, NY 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. Scotti:

I have received your letter of March 21 and the correspondence attached to it. Your inquiry concerns a denial of access to records by the Mohawk Valley Community College.

Specifically, early in March, you submitted a request to the designated records access officer "for copies of the CPA Audit Management letters for the years 1981, 1982 and 1983". Although the audits were made available, the "management letter part of each audit" was withheld. The records access officer wrote that "Those management letters are intended solely for the use of management." Following your appeal, the President of the College upheld the denial, stating that the management letters "may be considered as inter- or intra-agency communications and are thus not available to you under the Freedom of Information Law."

You have requested an advisory opinion regarding the denial and, 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 term "record" is expansively defined in §86(4) of the Freedom of Information Law to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever 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 opinion, if the records in question are maintained or were produced for the College, they constitute "records" subject to rights of access granted by the Freedom of Information Law.

Third, based upon the facts as you have presented them, it does not appear that any ground for withholding listed in §87(2) could appropriately serve as a basis for a denial.

The provision cited by the President of the College, §87(2)(g), states that an agency may withhold records that:

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

From my perspective, records submitted by a certified public accounting firm to the College would not fall within the scope of the exception quoted above. 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."

A certified public accounting firm in my view is not an "agency" as defined in the Freedom of Information Law. Consequently, the records it submitted to the College could not in my opinion be characterized as either "inter-agency" or "intra-agency" materials.

It is noted that one court has held that records prepared by a consulting firm designated to serve as a municipality's "professional representative in the planning and professional inspection of the construction" of a public works project fell within the scope of §87(2)(g) [see Sea Crest Construction Corp. v. Stubing, 442 NYS 2d 130, 82 AD 2d 546 (1981)]. However, it does not appear that the firm that prepared the management letters was involved in carrying out a duty as an extension of government; on the contrary, it appears that the firm conducted routine audits of the financial condition of the College. If my assumption is accurate, I do not believe that §87(2)(g) or any other ground for denial could justifiably be cited to withhold the records sought.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Jerome M. Alverman, Vice President
for Administrative Services
Dr. Michael Schafer, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3278

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

April 10, 1984

Mr. Campbell McCaffer
[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. McCaffer:

I have received your letter of March 19 in which you raised questions regarding access to records.

Your first question involved rights of access to records of the driving record of an individual. As a general matter, I believe that such records are generally available not under the Freedom of Information Law, but rather pursuant to the Vehicle and Traffic Law, §202, a copy of which is attached.

In a related vein, you asked whether you can request that the Department of Motor Vehicles mail to you records pertaining to a particular individual "several times over a period of a few months." While I do not believe that the Department would be required to agree to make available records that might not yet exist, I believe that it must respond to any request involving existing records.

The second area of inquiry involves access to police reports. In this regard, a clear response cannot be offered because, in many instances, records may be available or deniable, as the case may be, depending upon the effects of disclosure. For instance, although the Freedom of Information Law is based upon a presumption of access, one

of the grounds for denial, §87(2)(e) of the Freedom of Information Law, 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..."

Therefore, if, for example, a police report pertains to an ongoing criminal investigation, and disclosure would "interfere" with the investigation, it could likely be withheld. On the other hand, in some instances, if an investigation has ended, the report might be accessible.

To provide you with additional background regarding public access to records, as you requested, enclosed are copies of the Freedom of Information Law, a pocket guide that summarizes the Law and two articles 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1011
FOIL-AO-3279

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

April 10, 1984

Hon. Daniel P. Moynihan
Member of the U.S. Senate
733 Third Avenue
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 Senator Moynihan:

I have received your letter of April 6 and appreciate your interest in the New York Freedom of Information Law and Open Meetings Law (see attached).

You have requested that I review and respond with respect to comments made in the correspondence attached to your letter.

The first area of inquiry concerns rights of access to the full contents of a tape recording of an open meeting of a public body. The tape recording is apparently used as an aid in preparing minutes of meetings.

In this regard, I direct your attention to the Freedom of Information Law and 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 Freedom of Information Law, §86(4), 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."

Since a municipal board is an agency subject to the requirements of the Freedom of Information Law [see §86(3)], once a tape recording exists, I believe that it constitutes a "record" that falls within the scope of rights of access. Moreover, it has been held judicially that a tape recording of an open meeting is a record that is accessible under the Freedom of Information Law [see Zaleski v. Hicksville Union Free School District, Board of Education, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978]. Therefore, based upon the specific language of the Law, as well as its judicial interpretation, it is clear in my view that a tape recording of an open meeting must be made available.

The second area of inquiry involves a contention that minutes of meetings must be accurate and that they consist of a verbatim account of statements made during a meeting. From my perspective, while a public body may prepare a verbatim transcript reflective of every statement made at a meeting, the Open Meetings Law does not require that minutes of that degree of detail must be maintained.

Section 101(1) of the Open Meetings Law prescribes what might be characterized as minimum requirements concerning the contents of minutes of open meetings. The cited provision states that:

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

Based upon the language quoted above, reference must be made in minutes to certain activities that occur during a meeting; however, it does not in my opinion require that a verbatim account of every comment made during a meeting be transcribed and preserved as minutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3280

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

April 11, 1984

Mr. Stanley Blumenthal
[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. Blumenthal:

I have received your letter of March 20, as well as the materials attached to it. Your inquiry concerns responses to requests by the New York City Department of General Services.

In terms of background, following an initial request, Jay S. Gingold, the Records Access Officer for the Department, apparently provided several of the records sought, but withheld others on the basis of §87(2)(g) of the Freedom of Information Law. You wrote that you appealed the denial to Neil Murphy, General Counsel to the Department.

Since you indicated that, as of the date of your letter to this office, you had "received no responses to either of [your] F.O.I. requests", you asked that this office "intercede" on your behalf. More specifically, you requested that "the denied documents (especially the one from d'inzillo) [be] sent" to the Committee "for a determination on availability..." You also requested that I render an opinion regarding whether Commissioner Litke should rescind regulations recently promulgated, and whether the Commissioner "should withdraw from handling this matter..."

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

First, it appears that you misunderstood the role of the Committee on Open Government. The Committee has the capacity to advise with respect to the Freedom of Information Law; it has no authority to compel an agency to grant or deny access to records. As such, this office does not have the power to obtain and review an agency's records from the purpose of determining rights of access. Only a court enjoys that extensive an authority to review an agency's denial.

Similarly, neither the Committee nor its staff has the authority to render an opinion regarding the role of Commissioner Litke relative to the questions that you raised.

Second, although you stated at the beginning of your letter that you had not received responses to your requests, the correspondence attached to your letter indicates that a response was indeed given by Jay S. Gingold, the Records Access Officer. Moreover, since you referred to an appeal, and since §89(4)(a) of the Freedom of Information Law requires agencies to forward to the Committee copies of appeals and the determinations that follow, I reviewed the Committee's appeal file. In this regard, I located a determination on appeal dated March 5 rendered by Neil F. Murphy, General Counsel and Appeals Officer. Mr. Murphy made reference to the enclosure of a copy of a letter from Mr. D'Inzillo to Commissioner Litke. As such, the letter to which you referred was made available. The remainder of the information sought was apparently withheld on the basis of §87(2)(g). Further, you were informed that you could review the denial pursuant to Article 78 of the Civil Practice Law and Rules.

For purposes of background, §87(2)(g) permits an agency to withhold inter-agency and intra-agency materials under certain circumstances. In brief, the cited provision enables an agency to withhold those aspects of such materials to the extent that they are reflective of advice, opinion, recommendation and the like. Without knowledge of the contents of the records withheld, I could not conjecture as to the propriety of the denial.

Lastly, as Mr. Murphy indicated in his determination on appeal, you have four months from the date of the determination to initiate a proceeding under Article 78 of the Civil Practice Law and Rules. It is emphasized that §89

(4)(c) of the Freedom of Information Law specifies 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. Stated differently, the agency would be required to demonstrate to a court that the records withheld in fact fall within one or more of the grounds for denial listed in §87(2) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jay S. Gingold
Neil F. Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3281

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

April 11, 1984

Mr. Gerald Scotti
President
Mohawk Valley Community College
Professional Association
1101 Sherman Drive
Utica, NY 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. Scotti:

I have received your letter of March 23 and the materials attached to it.

Your inquiry concerns your unsuccessful efforts to obtain records pertaining to the Mohawk Valley Community College Foundation. Following an initial denial, you appealed to Dr. Schafer, President of the College, who indicated that the records were in possession of the Foundation, and not the College itself. You wrote, however, that "Mr. Carmen Scalzo, the college's Director of Development and Secretary of the Foundation informed [you] that the college did in fact have the documents and that they were in his (Mr. Scalzo's) possession in room 347 Payne Hall (the college's Administrative Building)."

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 Mohawk Valley Community College, 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 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 extent 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 College and the Foundation in question is similar to that of a volunteer fire company and a municipality, it would appear that the Community College Foundation, 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 Community College. Specifically, the Certificate of Incorporation attached to your letter indicates that the purposes of the Foundation are:

> "(a) To accept, hold, invest, re-invest and administer any gifts, bequests, devises, benefits of trusts and property of any sort, without limitation as to amount or value, and to use, disburse or donate the income or principal thereof for the benefit of Mohawk Valley Community College, its students, faculty, and graduates, including but not limited to the following: to make grants of financial assistance to the College, its faculty, students, and graduates, including scholarships, grants, and loans to students, graduates, and faculty, the endowing of professorships, and assisting financially the continuing development of the faculty and staff and program of the College..."

As such, it appears that the Foundation carries out its duties for the benefit and on behalf of the College.

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 College. 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 the College 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 the College officials 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 wo 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 govern-

> mental and nongovernmental activities, expecially 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 from 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? An 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 College and the Foundation appears to be somewhat analogous to that described by the Court. Consequently, it is reiterated that records maintained by the College concerning the Foundation are in my opinion subject to the Freedom of Information Law, for they are apparently in the physical possession of the College.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3282

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

April 11, 1984

Hon. Robert Wager, Mayor
Members of the Board of Trustees
Village of Waterford
65 Broad Street
Waterford, NY 12188

Dear Mayor Wager and Members of the Board of Trustees:

Having received a letter dated March 22 from Robert L. Hemming, I would like to provide you with information in an effort to enhance your ability to comply with the Freedom of Information Law.

In terms of background, 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.

Further, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general 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, to adopt regulations in conformity with the Law and consistent with the Committee's regulations.

To ease the burden of developing regulations, the Committee has prepared model regulations that enable an agency to comply with the procedural requirements by filling in the appropriate blanks.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee, model regulations, an explanatory pamphlet and five pocket guides that summarize the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Robert Hemming

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3283

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

April 11, 1984

Mr. Terrence E. Mason
81-A-5032
Clinton Correctional Facility
P.O. 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. Mason:

I have received your letter of March 22 which concerns rights of access to records pertaining to you.

According to your letter, various evaluative records pertaining to you have been denied by the Department of Correctional Services. Moreover, since you will apparently soon appear in a parole hearing, it is your view that the Parole Board will have more information than you may have, thereby placing you at a disadvantage.

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

First, it is noted that the Freedom of Information Law, a copy of which is attached, is based upon a presumption of access. Stated differently, all records of an agency are available except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, with respect to the records that were denied, it appears that the denial may have been proper. Section 87(2)(g) of the Freedom of Information 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..."

Whil some aspects of inter-agency or intra-agency materials might be available, others, such as those portions consisting of advice, opinion, or recommendation, for example, may in my view be withheld.

Third, the Freedom of Information Law in §89(1)(b)(iii) requires the Committee on Open Government to promulgate general regulations regarding the procedural aspects of the Law. In turn, §87(1) requires each agency to adopt regulations in conformity with the Law and consistent with the Committee's regulations. The Department of Correctional Services has adopted regulations regarding records in its possession, which are enclosed for your review.

Fourth, enclosed is a copy of §8000.5 of the regulations of the Division of Parole. Subdivision (c) of §8000.5 states in part that:

> "(1) An inmate, a releasee or counsel for either may have access to information contained in the parole case record:
>
> (i) prior to a scheduled appearance before the board;
>
> (ii) prior to a scheduled appearance before an authorized hearing officer of the division; or
>
> (iii) prior to the timely perfecting of an adminstrative appeal of a final decision of the board."

As such, it appears that a certain records are available to you prior to a proceeding.

Lastly, it is suggested that you confer 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3284

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

April 11, 1984

Mr. Robert M. Collins
[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. Collins:

I have received your letter of March 12, which reached this office on March 27. Please accept my apologies for the delay in response.

According to your letter, you are interested in knowing "how, and from whom" you may request regulations and internal agency policy guidelines concerning the Child Protective Services Division at the Department of Social Services. You wrote further that, having contacted the Department, you were informed that there is no records access officer or subject matter list.

You have asked for advice regarding your rights of access to the records in question. In this regard, I would like to offer the following comments and suggestions.

First, the designated records access officer for the Department of Social Services in Albany is Ms. M. Elizabeth Lyon, whose office is located at 40 North Pearl Street, Albany, NY 12243. Ms. Lyon may be reached by phone at (518) 474-9516.

Second, although the Department is not required to do so, Ms. Lyon recently forwarded to this office a copy of the Department's subject matter list. Enclosed are copies of those aspects of the subject matter list that may be useful to you.

Third, with respect to rights of access, it is noted that the Freedom of Information Law (see attached) is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

In this regard, it would appear that the records that you are seeking must be made available. Relevant under the circumstances is one of the grounds for denial, which, due to its structure, would in my opinion require that the records sought be made available.

Specifically, §87(2)(g) of the Freedom of Information Law states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency 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, regulations promulgated by the Department of Social Services represent the policy of the agency and are found in Title 18 of the New York Code of Rules and Regulations. I believe that those regulations could be reviewed at any law library that maintains the Official Compilation of Codes promulgated by New York State agencies. Guidelines and similar directives would in my opinion also likely be available, for they would represent either "instructions to staff that affect the public" accessible under §87(2)(g)(ii) or "final agency policy" accessible under §87(2)(g)(iii).

In view of the foregoing, it is suggested that you direct your request to Ms. Lyon at the Department reasonably describing the records in which you are interested.

Lastly, although I an unaware of the identity of the records access officer for the Westchester County Department of Social Services, I believe that similar records in possession of the County would be equally available. It is suggested that you might contact the County Information Center at 285-2170 or the Office of the County Attorney at 285-2660.

I hope that I 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: M. Elizabeth Lyon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3285

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

April 12, 1984

Mr. Terry Crusoe
83-A-4764 - C-27-40
Box 149
Attica, NY 14011

Dear Mr. Crusoe:

I have received your letter of April 9 in which you requested various police reports from this office.

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 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.

It is suggested that you submit a request to the New York City Police Department's records access officer at One Police Plaza, New York, NY 10038. It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, when submitting a request, you should include as much detail as possible, including indictment, index and identification numbers, as well as names, descriptions of events and similar information that might enable agency officials to locate the records sought.

Further, although the Freedom of Information Law does not apply to the courts and court records, the records that you are seeking might be available from the clerk of the court in which the proceeding was conducted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1012
FOIL-AO-3286

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

April 12, 1984

Ms. Carol Matheke
[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. Matheke:

I have received your letter of March 26, as well as the materials attached to it.

The correspondence involves a series of events in which you had difficulty in obtaining records from the Village of Valatie in a timely manner.

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

First, as you are aware, §101(3) of the Open Meetings Law requires that minutes of an open meeting must be prepared and made available within two weeks of a meeting. It has been reported that public bodies often do not meet within two weeks and, as a consequence, have no opportunity to review or approve the minutes. In those situations, in order to comply with the Open Meetings Law, it has been suggested that the minutes be prepared and made available within the two week period, but that they be marked "unapproved", "non-final" or "draft", for example. By so doing, the public can learn generally of what transpired at a meeting; concurrently, notice is effectively given that the minutes are subject to change.

Second, you referred in the correspondence to the contents of minutes. Section 101(1) of the Open Meetings Law pertaining to minutes of open meetings contains what may be characterized as minimum requirements concerning the contents of minutes. The cited provision states that:

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

As such, it is clear in my view that minutes need not consist of a verbatim account of a meeting or refer to each comment made during a meeting.

Third, with respect to responses to requests for records, 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.

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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

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

In addition, it 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)].

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, the regulations to which reference was made earlier concerning the procedural implementation of the Freedom of Information Law, model regulations, and several pocket guides that summarize both laws. The model regulations were designed to enable agencies to comply with the Freedom of Information Law in terms of procedure by filling in the appropriate blanks. In addition, in an effort to enhance compliance, the same materials will be sent to the Mayor to be shared with Village officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Hon. Angelo Nero, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3287

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

April 12, 1984

Mr. George M. Byers
[redacted]

Dear Mr. Byers:

I have received your letter of March 26, as well as a copy of your "Application for Public Access to Records" submitted to the Suffolk County Police Department.

The form indicates that you requested "...information concerning the private home that was broken into on Sunday, March 4., Huntington-Charleston Drive, that was published in the Second Precinct Report of the Long Islander of March 8, 1984." The request was denied on the ground that disclosure would constitute an "unwarranted invasion of privacy".

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

First, the request indicates that certain information related to the records that you requested was made available to a newspaper, the Long Islander. From my perspective, members of the public enjoy the same rights under the Freedom of Information Law as members of the news media. Further, in an early landmark decision, it was held 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].

Second, although the nature of information made available to the Long Islander is not mentioned, it is noted that information kept in the traditional "police blotter" has been determined to be available. In Sheehan v. City of

Binghamton, 59 AD 2d 808 (1977)], it was found that a 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, and that such a record is accessible under the Freedom of Information Law.

Lastly, having reviewed the form, I believe that it is out of date. For instance, the Freedom of Information Law as originally enacted in 1974 referred to "confidential disclosures" and "part of investigatory files" as categories of deniable records. The current Law, however, which became effective in 1978, contains different language regarding deniable records (see attached, Freedom of Information Law).

To attempt to enhance compliance with the Freedom of Information Law, a copy of this letter will be sent to Lt. Gallagher and the County Attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Lieutenant James Gallagher
Theodore Sklar, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3288

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

April 12, 1984

Ms. Dagmar P. Nearpass
Ms. Dolores A. Werner
[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. Nearpass and Ms. Werner:

As you are aware, I have received your letter of March 16. Please accept my apologies for the delay in response.

Notwithstanding the difficulties that you have faced in obtaining information from the Romulus Central School District as described in your letter, it appears that you were successful in many respects. The remaining issue involves your request for a list of persons "who had worked for the school in the 82-83 school year, and to date this year, and the exact amount they were paid". When you pointed out that the payroll record required to be compiled under the Freedom of Information Law indicates yearly salaries, rather than "the exact amount paid", and that substitutes were not included in the list, Mr. Hoagland indicated that W-2 forms represent the only source of the information sought. In response to Mr. Hoagland's contention that the W-2 forms contain confidential information, you suggested that the deniable information could be "blocked out". However, Mr. Hoagland replied by stating that it would "take too much time" and that such an action would involve "creating a record".

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

First, as you may be aware, 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."

Based upon the definition quoted above, the W-2 forms in possession of the District in my opinion clearly constitute "records" subject to rights of access.

Second, §87(2) of the Law states that all records are available, except that an agency may withhold records "or portions thereof" that fall within one or more of the ensuing grounds for denial. In view of the quoted language, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, I believe that the language imposes a responsibility upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, from my perspective, the names and figures indicating gross income paid by the District to its officers and employees found on a W-2 form must be made available. The remaining information, which refers to the amounts withheld for social security, among other items, could in my view justifiably be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. It has been suggested in similar situations that a stencil or similar device could be prepared in order that records containing accessible and deniable information could easily be copied in order that only the accessible information is reproduced.

Lastly, I agree with Mr. Hoagland in that the Freedom of Information Law, as a general rule, does not require the creation of a record in response to a request. Nevertheless, in this instance, the records sought do exist. As such, I believe that they must be made available in accordance with the Freedom of Information Law. If compliance involves making deletions from existing records based upon a ground for denial, it is my opinion that the District would be required 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

cc: Mr. Hoagland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1013
FOIL-AO-3289

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

April 12, 1984

Ms. Judy R. Wever
[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. Wever:

I have received your letter of March 26 in which you raised a series of questions concerning the responsibilities of officials of the St. Regis Falls School District under the Freedom of Information Law.

The first question is whether it is "legal for the Board of Education to discuss proposed curriculum and staffing in Executive Session". In this regard, it is emphasized that the Open Meetings Law is based upon a presumption of openness. Stated differently, a meeting of a public body, such as a Board of Education, is presumed to be open, unless and until a topic arises that may appropriately be considered during an executive session. Section 100(1) of the Law specifies and limits the types of discussions that may be conducted in executive session.

In my opinion, the only ground for executive session relevant to the question is §100(1)(f), the so-called "personnel" exception. However, due to its specific language, I do not believe that an executive session could be held.

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..."

A discussion of curriculum involves a matter of policy and, as such, could never be considered during an executive session. Similarly, if a discussion of staffing pertains to the allocation of positions, rather than a "particular person", I believe that such a discussion must transpire during an open meeting.

The second question concerns "what can be done" when the Board discusses issues during executive sessions, but "does not release the results of these discussions". As a general matter, if a public body takes no action during an executive session, minutes of the executive session need not be prepared, and no additional disclosure would be required (see Open Meetings Law, §101).

Further, 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 58 NY 2d 626 (1982)]. As such, if a board takes action, based upon the judicial decisions cited above and the facts that you have provided, it would appear that such action should be accomplished by means of a vote taken during an open meeting.

The third question would involve the preparation of a "new plan" for programs and staff, and whether such a plan "need not be released until the preliminary budget meeting". Here I direct your attention to the Freedom of Information Law.

Like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. In brief, the Law provides that all records must be made available, except to the extent that they fall within one or more grounds for denial listed in §87(2)(a) through (h).

It would appear that one of the grounds for denial would relate to the record 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. 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 described, it would appear, however, that the Board must discuss the plan, a matter of policy, during one or more open meetings. If that is so, presumably the nature of the plan would be disclosed at meetings, if not by means of a record. Further, if a plan is adopted, I believe that it would represent the policy of an agency and would, therefore, be available in its entirety upon adoption.

Fourth, you asked whether it is reasonable "to require a taxpayer to fill our a 'Freedom of Information' form, wait until the minutes have been approved a month later, and pay 25¢ a page once his request has been approved, just to get minutes that are not read in public meeting in the first place?"

In this regard, §101(3) of the Open Meetings Law requires that minutes of an open meeting must be prepared and made available within two weeks of the meeting. In situations where a board does not meet within two weeks and cannot approve the minutes, in order to comply with the Open Meetings Law, it has been advised that the minutes be made available within two weeks, but that they be marked "unapproved", or "draft", for example. By so doing, the public can learn generally of what transpired at a meeting; concurrently, notice is effectively given that the minutes are subject to change.

It is also noted that the Freedom of Information Law makes no mention of a particular form that must be used for the purpose of requesting records. In accordance with §89(3) of that statute, it has been advised that any request made in writing that "reasonably describes" the records sought should suffice. It has also been advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for delaying or denying access to records.

The fifth question pertains to a recent strike and unsuccessful efforts of concerned parents to meet with the Board, which referred questions to the superintendent. You asked whether that was "correct procedure". In my opinion, the Open Meetings Law does not deal with that type of situation. As such, I could not appropriately provide advice.

Sixth, you asked how the public can "be aware of all special meetings called by the board". You added that "Often these are not advertised, and members meet at school 'informally'." The focal point of the Open Meetings Law is the term "meeting" [see §97(1)], which has been expansively construed by the courts. In a landmark decision rendered by the Court of Appeals, the state's highest court, it was found that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conduct-

ing public business, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, if there is an intent on the part of the Board to meet to conduct public business, even "informally", I believe that such a gathering would fall within the requirements of the Open Meetings Law.

Further, every meeting must be preceded by notice of the time and place where it will be held.

Section 99(1) of the Open Meetings Law pertains to meetings scheduled at least a week in advance and 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 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.

The seventh, eighth and ninth questions involve the responsibilities of a school board and/or its staff to answer questions or implement policy. Those questions do not arise under the Open Meetings or Freedom of Information Laws. It is suggested, however, that those questions might be answered by a representative of the State Education Department.

Your tenth question concerns any requirement that proposed new policies be read aloud at an opening meeting prior to their adoption. In my view, although a board may do so, there is no legal requirement that proposed policies be read aloud at meetings.

Lastly, you asked whether it is "legal to tape record the proceedings of a regular meeting". Based upon recent judidical determinations [see e.g., People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979)] and an opinion rendered by the Attorney General in 1980, any person may use a small, portable, battery-operated tape recorder at an open meetings 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 Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3290

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

April 12, 1984

Mr. Phillip Byers
77-A-1830
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. Byers:

I have received your letter of March 27 in which you complained that Skidmore College had not forwarded to you a transcript. It is your view that the transcript should be available to you under the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g).

Since a transcript is an "education record" pertaining to you, it must in my view be made available to you.

In order to aid you, I have contacted Skidmore College on your behalf. I was informed that the transcript is being prepared and that it will be mailed to you tomorrow.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. Patricia Britten

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3291

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

April 18, 1984

Mr. Craig Whiteley
83-A-3750 C-4-26
Pouch 1
Woodbourne, NY 12788

Dear Mr. Whiteley:

I have received your letter of April 10 in which you requested from this office information reflective of your criminal history record.

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 that in which you are interested, nor does it have the authority to compel an agency to grant or deny access to records. As such, the requested record cannot be made available by this office.

Nevertheless, I believe that your criminal history record can be made available to you by requesting it through either the Department of Correctional Services of the Division of Criminal Justice Services, which maintains such records. In order to direct a request to the Division of Criminal Justice Services, you should write to:

The Division of Criminal Justice Services
Identification Services
Executive Park Towers
Stuyvesant Plaza
Albany, NY 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 dispostion data, or the report, is that latest available. If the DCJS report does contain nonconviction data, then the only proper purpose for its release shall be those described in 28 C.F.R. 20.21(b)."

In view of the foregoing, it is suggested that you submit a request for your criminal history records to either the Division of Criminal Justice Services or to your facility superintendent in conjunction with the regulations of the Department of Correctional Services regarding access to Department records. I have enclosed a copy of those regulations for your consideration.

I hope that I have been of some assistance. Should any 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-3292

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

April 18, 1984

Mr. Lee H. Turner
[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. Turner:

I have received your recent letter in which you asked whether tape recordings of Town Board meetings kept by the Town of Norfolk "are public records that can be reviewed by town residents under the Public Officer's Law".

In this regard, I direct your attention to the Freedom of Information Law and 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 Freedom of Information Law, §86(4), 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."

Since a municipal board is an agency subject to the requirements of the Freedom of Information Law [see §86(3)], once a tape recording exists, I believe that it constitutes a "record" that falls within the scope of rights of access. Moreover, it has been held judicially that a tape recording of an open meeting is a record that is accessible under the Freedom of Information Law [see Zaleski v. Hicksville Union Free School District, Board of Education, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978]. Therefore, based upon the specific language of the Law, as well as its judicial interpretation, it is clear in my view that a tape recording of an open meeting must be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1014
FOIL-AO-3293

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

April 19, 1984

Mr. Donald P. Moore
[redacted]

Dear Mr. Moore:

Thank you for your kind comments regarding my presentation in Rye, which I found to be enjoyable.

As you requested, enclosed are copies of the Freedom of Information and Open Meetings Laws.

You asked whether either of those statutes applies to corporations organized under §402 of the Not-for-Profit Corporation Law. As you may be aware, the variety of corporations organized under the cited provision is extremely broad.

The Open Meetings Law is applicable to meetings of public bodies. 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 of such public body."

Based upon the language quoted above, as a general matter, the Open Meetings Law applies to governmental entities, such as town boards, city councils, legislative bodies, and the like.

The Freedom of Information Law is applicable to records in possession of governmental entities. Specifically, that statute is applicable to records of an "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 entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Consequently, records in possession of governmental entities in New York are subject to the provisions of the Freedom of Information Law.

From my perspective, the applicability of the Freedom of Information or Open Meetings Laws is in my view dependent upon the specific nature and function of the corporation. For instance, I believe that volunteer fire companies would be subject to both the Freedom of Information and Open Meetings Laws, for it has been held that those entities are "agencies" that fall within the requirements of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. Similarly, volunteer ambulance corps may, depending upon the relationship with a municipality, be subject to those statutes. In other instances, however, the nexus with government may be so insignificant or tenuous that neither statute would be applicable.

In short, without more specific information about a particular not-for-profit corporation, I could not advise that all or none would be subject to either of the two open government laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3294

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

April 23, 1984

Ms. Dagmar Nearpass
[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. Nearpass:

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

Your latest inquiry concerns a request for student records in which both the parent of the student, who had been under eighteen years of age, and the student himself when he reached age eighteen, apparently consented in writing to disclosure. The Romulus School District denied access and, having complained to the State Education Department, Gerald Freeborne indicated that the denial was proper. He wrote that education records generally are confidential, and that "an organization is not entitled to inspect student records". You indicated, however, that you did not represent an "organization", but rather an "advocate" seeking the records after having received written consent from both the parent and the student.

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

First, rights of access to the student records are not, under the circumstances, governed by the Freedom of Information Law, but rather the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment".

Second, in brief, the Buckley Amendment requires that "education records", a term broadly defined in regulations promulgated by the U.S. Department of Education, be kept confidential to all but parents of students under the age of eighteen, and the students themselves when they reach eighteen. Either a parent or a student, as the case may be, may waive the right to confidentiality and confer their rights of access upon a third party.

Assuming that the parent or student has rights of access to the records sought, the District would, in my view, pursuant to federal regulations, be required to disclose to any third party, whether an individual or an organization, when there is written consent (see regulations, §99.30).

Moreover, in conjunction with other aspects of your correspondence, it is noted that federal regulations promulgated under the Buckley Amendment require the "Formulation of institutional policies and procedures" involving rights of access to education records (§99.5), as well as an annual notification of rights (§99.6).

In order to provide additional information concerning the requirements of the Buckley Amendment, copies of the federal regulations are enclosed. A copy will also be sent to the District.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Superintendent Hoagland
Deputy Commissioner Freeborne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1016
FOIL-AO-3295

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

April 23, 1984

Richard D. Morse
Deputy Supervisor
Town of Rotterdam
Town Hall
Vinewood Avenue
Rotterdam, NY 12306

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. Morse:

I have received your letter of March 26, which reached this office on April 12. Your continuing interest in complying with the Freedom of Information and Open Meetings Laws is much appreciated.

Having reviewed the Town's resolution regarding access to records, I would like to offer the following comments and suggestions.

First, Section 2 includes the designations of both a fiscal officer and a hearing officer. In my opinion, neither is necessary. While the original Freedom of Information Law made reference to a fiscal officer responsible for the preparation of payroll information, the current Freedom of Information Law, which become effective on January 1, 1978, no longer includes reference to the designation of a fiscal officer.

The function of a hearing officer is unclear. It is noted, too, a denial of a request made by a records access officer may be appealed directly to the designated appeals officer. Therefore, if the designation of a hearing officer represents an additional step in a review procedure, the reference to such a designation should in my view be removed.

Second, the resolution contains verbatim, various aspects of both the original and the current Freedom of Information Law. From my perspective, the resolution should consist of a procedural framework for compliance; it need not make reference to substantive provisions of the Law.

Third, although the general regulations of the Committee appear to be adopted by reference, it might be preferable to incorporate the thrust of the Committee's regulations as an integral part of the Town's rules.

Fourth, and perhaps most importantly, I have enclosed a copy of model regulations that were designed to enable an agency to adopt procedures as required by law by filling in the appropriate blank spaces.

With regard to the resolution adopted in conjunction with the Open Meetings Law, it is noted that, unlike the Freedom of Information Law, the Open Meetings Law does not require the establishment of rules. Often the resolutions regarding the Open Meetings Law pertain only to a designation of the time and place of meetings.

I would like to point out 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 held 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 [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff;d 45 NY 2d 947 (1978)]. Further, it has also been held that the exemption from the Open Meetings Law regarding political caucuses [see §103(2)] applies only to discussions of political party business; conversely, it was found that a gathering of a majority of the total membership of a public body held to discuss public business, even though those in attendance represent a single political party, constitutes a "meeting" subject to the Open Meetings Law, rather than a political caucus exempt from the Law [see Sciolino v. Ryan, 103 Misc. 2d 1021, 431 NYS 2d 664, aff'd 81 AD 2d 475, 440 NYS 2d 795 (1981)].

As such, in many instances there may be no distinction between a "meeting" and a "work session" or "caucus".

I hope that I 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- 3296

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

April 23, 1984

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:

I have received your letters of March 28 and April 7, in which you raised a series of issues concerning access to records.

Your first area of inquiry concerns a request for records pertaining to an arrest made on January 17, for which you have received no response. In this regard, 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 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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, appeal dismissed, 57 NY 2d 774 (1982)].

You also alluded to a relationship with the Family Court. Please be advised that the Freedom of Information Law is applicable to records of an "agency", a term that is defined in §86(3) of the Freedom of Information Law (see attached) 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, although other provisions of law often grant access to court records, the Freedom of Information Law does not apply to the courts or court records.

Another issue involves a request for records at the Department of Social Services indicating that rent was paid by the Department directly to a former landlord. It is suggested that you forward a request, providing as much specificity as possible, to the Department's records access officer, Ms. M. Elizabeth Lyon, whose office is located at 40 North Pearl Street, Albany, NY 12243.

Your second letter concerns an unsuccessful effort to obtain the name of a person who might have initiated a complaint regarding child abuse. Although you received a response to the effect that no complaint could be found in the central register, it is noted that §422(7) of the Social Services Law states that:

> "[A]t any time, a subject of a report may receive, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation, which he reasonably finds will be detrimental to the safety or interests of such person."

Lastly, both the your letters refer to a "Privacy Act". Please note that no "privacy act" has yet become effective in New York. However, enclosed is a copy of the Personal Privacy Protection Law, which will become effective on September 1, 1984.

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-3297

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

April 23, 1984

Mr. John Sepanski
[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. Sepanski:

I have received your letter of March 30 concerning a denial of access to records by the New York Mills Union Free School District.

In brief, the records sought involve a draft or projected figures regarding expenditures to be made by the District. The information has apparently been withheld because the final budget has not been prepared.

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

First, the Freedom of Information Law pertains to existing records. Section 89(3) states that, as a general rule, an agency is not required to create or prepare a record in response to a request.

Second, the Freedom of Information Law does, however, apply to all existing records, regardless of their characterization. Section 86(4) of the Law defines "record" to include:

> "...any information kept, held, filed, produced, 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, whether documents are considered "draft" or final, they are in my view subject to 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) through (h) of the Law.

Further, although the records sought might be used in the deliberative process, which has not yet been completed, 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, it is reiterated that they are nonetheless subject to rights of access granted by the Freedom of Information Law.

Fourth, 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, to the extent that the records sought consist of "statistical or factual tabulations or data" they would be 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 requirements 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard R. Rosinski, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3298

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

April 23, 1984

Mr. John D. Lake, Sr.
Executive Director
Binghamton Housing Authority
45 Exchange Street
P.O. Box 1906
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. Lake:

I have received your letter of March 29 and the materials attached to it.

You have requested an advisory opinion regarding a denial of a request made under the Freedom of Information Law.

According to your application, a request was submitted for "All pages of a report prepared by then Code Enforcement Director David Schultz researching the organization and structures of public housing authorities". The request was denied on the ground that the report is "Intergovernmental Correspondence consisting of opinions, not statistical or factual tabulations or data".

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) refers to the capacity to withhold "records or portions thereof" that fall within one or more grounds for denial. Therefore, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, due to the quoted language, I believe that an agency must review records sought in their entirety to determine which portions, if any, may justifiably be withheld or perhaps deleted.

Third, the basis for withholding to which the written denial alluded is §87(2)(g) of the Freedom of Information Law. 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, I would agree that the report constitutes "intra-agency" material. However, if the content of the report is as you described in your request, research of "the organization and structures of public housing authorities", it would appear that significant portions of the report would consist of "factual" information. It is noted, too, that rights of access under §87(2)(g)(i) include not only statistics and facts appearing in numerical or tabular form, but also statistical or factual information appearing in the form of a narrative. As stated by the Appellate Division in Ingram v. Axelrod:

> "Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that 'the mere fact that some of the data might be an estimate or recommendation does not convert it into an expression or opinion...' (Matter of Polansky v. Regan, 81 AD 2d 102, 104, 440 NYS 2d 356). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly discloseable" [90 A.D. 2d 568, 456 NYS 2d 146, 148 (1982); emphasis added by court, see also Miracle Mile Assoc. v. Yudelson, 68 AD 2d 176 (1979)].

Therefore, if the report is reflective purely of opinion, I would concur with the denial. Nevertheless, to the extent that it contains factual information, or other information accessible under subparagraphs (i), (ii) or (iii) of §87(2)(g), I believe that it should be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

cc: Hon. Juanita Crabb, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3299

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

April 23, 1984

Mr. Raymond F. Guentner
[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. Guentner:

I have received your letter of March 30, as well as the materials attached to it.

Your inquiry concerns a request for records in possession of the Monroe County School Boards Association that indicate the salaries of the superintendents of the eighteen school districts in Monroe County. The Association denied your request on the ground that it is not a governmental entity, but rather a not-for-profit corporation that falls outside the scope of the Freedom of Information Law.

It is your contention that the information sought should be available and that the Association is or should be subject to the requirements of the Freedom of Information Law.

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

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

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

Although the duties of the Association might involve providing assistance or services to member school boards, I do not believe that it is a state or municipal office or a "governmental entity".

Second, as a not-for-profit corporation, I would conjecture that the Association is financed by dues paid by member boards. As such, although the purpose of the Association may be to enhance the workings of government, the Association is not in my view a governmental entity. Therefore, unless there are additional facts of which I am unaware, it appears that the Association is not subject to the Freedom of Information Law.

Lastly, as Ms. Packard of the Association wrote, the information sought is clearly available from agencies that must comply with the Freedom of Information Law. Section 87(3)(b) of the Freedom of Information Law requires that each agency, including a school district, shall maintain:

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

Therefore, the information in question could in my view clearly be obtained by means of a review of school districts' payroll lists.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. Jann G. Packard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3300

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 2231
(518) 474-2518, 2791

April 23, 1984

Mr. Sal Mauro, 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. Mauro:

I have received your letter of April 1 in which you raised a question under the Freedom of Information Law.

According to your letter, you sent a certified letter on November 26, to the Ulster County Health Department's Director of Environmental Sanitation in which you requested information under the Freedom of Information Law. As of the date of your letter to this office, no response had been received.

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

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 the 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 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, under the circumstances, I believe that you may appeal on the ground that your request was constructively denied.

Third, in order to determine who in Ulster County government renders determinations on appeal under the Freedom of Information Law and to encourage an appropriate response, it is suggested that you contact the County Legislature who represents you.

Lastly, to inform the Director of Environmental Sanitation of the duties imposed by the Freedom of Information Law, a copy of this letter 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

cc: Dean Palen, Director of Environmental Sanitation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3301

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

April 24, 1984

Mr. Alan Siegel
[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. Siegel:

I have received your letter of April 2 and the correspondence attached to it.

Your inquiry concerns a denial of a record that you requested from the Department of Civil Service. Specifically, by letter dated February 28, you requested " a copy of the list of materials available from [the] Department and also a copy of the face page (front green sheet) of exam booklet 463-C for Social Services Disability Analyst Trainee I, administered on February 25, 1984".

In response, you were informed that the "catalogue" of Civil Service Department records would be available to you at a cost of twenty-five cents per photocopy. The records access officer also wrote that he was advised by the Division of Examinations and Staffing Services that the Department "does not release Civil Service examination booklets, whole or in part". The denial was affirmed on appeal based upon §87(2)(g) of the Freedom of Information Law concerning inter-agency and intra-agency materials, as well as §87(2)(h), which pertains to examination questions and answers. It was stated that "The front page of the examination booklet is part and parcel and an integral part of the examination booklet containing the examination questions and answers."

I would like to offer the following comments in an effort to assist you.

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.

Second, 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. The quoted anguage in my view clearly indicates that the Legislature envisioned situations in which a record might be both accessible and deniable in part. Further, I believe that the language requires an agency to review a record sought in its entirety to determine which portions, if any, may justifiably be withheld.

Third, §87(2)(g) permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency 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.

Without familiarity with the contents of the cover sheet, I could not conjecture as to its contents. However, it is noted that "factual" data, even in narrative form, has been found to be available [see e.g., Ingram v. Axelrod, App. Div., 90 AD 2d 568 (1982), and Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied, (1979)]. Moreover, the Appellate Division, Third Department, chose to "read the exemption narrowly, as protecting only those materials involving sub-

jective matters which are 'integral to the agency's deliberative process' in formulating policy" [Johnson Newspaper Corp. v. Stainkamp, 94 AD 2d 825, 827, modified __ NY 2d __ (1984)]. As you have described the record, it does not appear to be "integral to the agency's deliberative process". Moreover, presumably it was available to you and others when the examination was administered.

Fourth, the other ground for denial cited by the Department, §87(2)(h), provides that an agency may withhold records that:

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

While the "green sheet" might be part of an examination booklet, it does not apparently contain either examination questions or answers. If that is so, §87(2)(h) could not in my view be cited as a basis for withholding.

Lastly, in your correspondence, you questioned the fee for a copy of the Department's catalogue, which I believe constitutes the "subject matter list" required to be maintained pursuant to §87(3)(c) of the Freedom of Information Law. Please be advised that accessible records may be inspected without charge; however, §87(1)(b)(iii) indicates that an agency may charge up to twenty-five cents per photocopy.

In an effort to intercede on your behalf, copies of this opinion will be sent to Ms. Kathy Bennett, the newly designated Counsel to the Department, and to Mr. Harold Snyder, who affirmed the denial 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: Kathy Bennett, Counsel
Harold R. Snyder, Jr., Supervising Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3302

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

April 24, 1984

Mr. Martin Lansky
[redacted]

Dear Mr. Lansky:

I have received your letter of March 30 in which you raised a question under the "Truth in Testing Law" (Education Law, Article 7-A).

Specifically, you asked whether examination materials accessible at the State Education Department can be reviewed in New York City rather than Albany.

In this regard, I have contacted the Department's records access officer on your behalf in order to obtain additional information. I was informed that records obtained pursuant to the Truth in Testing Law by the Education Department are kept only in its Albany offices. Consequently, while the records in question may be examined in Albany, as a general matter, they are not available for inspection at the Department's New York City offices. Further, in my view, there is no requirement that the records sought must be sent to New York City for your review.

It is suggested that you may request copies of records by writing to Eugene Snay, Records Access Officer, New York State Education Department, Education Building, Albany, NY 12234. If you submit a request, it should reasonably describe the records in which you are interested. It is noted, too, that the Freedom of Information Law generally permits an agency to assess a fee of up to 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3303

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

April 24, 1984

Mr. Leroy E. Green
81-C-694
135 State Street
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 Mr. Green:

I have received your letter of April 2, in which you requested assistance.

Your letter and the correspondence attached to it indicate that you requested information from the Office of the Clerk of the Oneida County Court. As of the date of your letter, no response had been received.

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

First, the correspondence indicates that various records or information were requested under the Freedom of Information Law. Please be advised that the Freedom of Information Law applies to records of an "agency", which 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) of the Freedom of Information Law defines "judiciary" to mean:

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

Therefore, in my view, the Freedom of Information Law does not apply to the courts or court records.

Second, while the Freedom of Information Law is not applicable to the records sought, various provisions of the Judiciary Law and court acts often provide substantial rights of access to court records. One such statute is §255 of the Judiciary Law, a copy of which is enclosed.

Third, it is suggested that you contact your attorney, or perhaps a representative of a legal aid group or Prisoners' Legal Services, for example. I would conjecture that such an individual could provide you with the help needed to obtain the 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

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3304

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

April 24, 1984

Mr. Dominick Minerva
Village Attorney
Village of Valley Stream
Village Hall on the Village Green
Valley Stream, New York 11580

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. Minerva:

As you are aware, I have received your letter of April 2 and the materials attached to it.

According to the materials, you denied a request for records of violations and summonses maintained by the Building Inspector of the Village of Valley Stream. The denial was apparently based upon §160.50 of the Criminal Procedure Law. Further, although related records were determined to be available in Young v. Town of Huntington [88 Misc. 2d 632 (1976)], you wrote that, unlike the applicant in Young, the applicant here has "no genuine interest in the records maintained by the Village Building Inspector of violations by others of the Village Code".

I disagree with your determination for several reasons.

First, I believe that the sealing requirements of §160.50 of the Criminal Procedure Law apply only to those situations in which a person has been charged, and the charges are later dismissed in his or her favor. Stated differently, the sealing provisions would not in my opinion apply to cases in which the charge is upheld.

Second, enclosed are copies of the Appellate Division and Court of Appeals' determinations rendered in Johnson Newspapers v. Stainkamp [94 AD 2d 825, modified __ NY 2d __ (1984)]. In brief, the Appellate Division found that similar records were available. The modification by the Court of Appeals involved rights of access that did not extend to records sealed pursuant to §160.50 of the Criminal Procedure Law. However, the Court specified that it had not yet been determined whether the sealing provisions were applicable to the records in question.

Third, while the applicant for records in Young, supra, might have had a personal interest in the records, I do not believe that interest had a bearing upon the outcome. 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, regardless of status or interest".

Lastly, I direct your attention to §307 of the Multiple Residence Law, which may or may not be applicable. The cited provision refers to records of a building department and 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 or certificates."

To the extent that §307 of the Multiple Residence Law applies to the records of the building inspector, the records sought would apparently be accessible under that provision.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: William Puka

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3305

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

April 25, 1984

Mr. Henry Bilal
83-A-3596
Attona Correctional Facility
P.O. Box 125
Attona, NY 12910

Dear Mr. Bilal:

I have received your recent letter in which you appealed a denial of a request for records to the Committee.

Specifically, you apparently requested various medical records at your facility on March 31. As of the date of your letter to this office, no response to your request had been sent to you.

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 review records or compel an agency to grant or deny access to records.

Nevertheless, based upon the facts presented in your letter, I believe that your request has been constructively denied, and that you may appeal. In this regard, §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 he 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, the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services indicate that an appeal should be directed to Counsel to the Department at its Albany office. Therefore, it is suggested that you might appeal to 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

FOIL-AO-3306

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

April 25, 1984

Mr. Andrew L. Hughes
Townley & Updike
Chrysler Building
405 Lexington Avenue
New York, NY 10174

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. Hughes:

I have received your letter of April 5 in which you requested an advisory opinion regarding a denial of access to records and the relationship between the Freedom of Information Law and regulations concerning records of the Division of Parole.

In your capacity as counsel to Newsday, your inquiry pertains to a request by your client, which is attached, for "the names of three parole commissioners who recently ruled against the parole of Winston Mosely at Green Haven State Prison", "how each commissioner voted and the reasons for denial of parole".

William K. Atlschuller, Senior Attorney at the Division of Parole, denied access, stating that:

> "...while this agency does maintain such a record, access to that information is governed by Section 259-k (2) Executive Law and our regulations thereunder, 9 NYCRR 8000.5(c). Pursuant to those regulations, the information that you seek is confidential to this agency and therefore may not be released."

It is your view that the records sought should be made available. In this regard, as you requested, I would like to offer the following comments.

First, I agree with your contention that the records sought do not apparently constitute part of the "case record" as defined in 9 NYCRR §8008.2(a). The phrase "case record", according to the regulations, includes:

> "...any memorandum, document or other writing pertaining to a present or former inmate, parolee, conditional releasee or other releasee, and maintained pursuant to sections 259-a(1)-(3) and 259-c(3) of the Executive Law."

Since you quoted the provisions of the Executive Law cited in the regulations, I will not restate them herein. However, while the records sought relate to case records, they appear to be separate from case records used by the Board in the process of making a determination.

Further, from my perspective, an agency cannot, as a general matter, exempt records from disclosure by means of regulations. As stated in Zuckerman v. Board of Parole, a determination rendered under the original Freedom of Information Law:

> "It is established as a general proposition that a regulation cannot be inconsistent with a statutory scheme (see e.g., Matter of Broadacres Skilled Nursing Facility v. Ingraham, 51 AD2d 243, 245-246) and the statute involved here specifically states that exemptions can only be controlled by other statutes, not by regulations which go beyond the scope of specific statutory language (Public Officers Law, §88, subd 7, par a). This conclusion is further reinforced by the general rule that public disclosure laws are to be liberally construed (Cuneo v. Schlesinger, 484 F2d 1086, cert den sub nom Rosen v. Vaughn, 415 US 977; Matter of Burke v. Yudelson, 81 Misc 2d 870) and that statutory exemption from disclosure must be narrowly construed to allow maximum access" [53 AD 2d 405, 407-408 (1976), see also Morris v. Martin, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)].

It is noted, too, that the Court of Appeals has determined on several occasions that records are presumptively accessible under the Freedom of Information Law, and that they must be made available except to the extent that one or more of the grounds for denial appearing in §87(2) may appropriately be invoked [see e.g., Doolan v. BOCES, 48 NY 2d 341 (1979); Fink v. Lefkowitz, 63 AD 2d 610 (1978), modifed in 47 NY 2d 567 (1979); and Washington Post Company v. New York State Insurance Department, App. Div., 462 NYS 2d 208, reversed __ NY 2d __, March 29, 1984].

Second, with respect to the identity of the commissioners who were involved in the determination in question and their votes, I direct your attention to §87(3)(a) of the Freedom of Information Law, which states that each agency shall maintain:

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

The cited provision represents one of the few exceptions to the general rule that an agency need not create a record in response to a request made under the Freedom of Information Law. Pursuant to §87(3)(a), I believe that the Board of Parole is an agency [see Freedom of Information Law, §86(3)] that is required to prepare and maintain a record indicating the vote of each member who cast a vote in the proceeding.

Although it might be contended that there are considerations of privacy or perhaps the safety of the members of the Board of Parole who presided in the proceeding, I believe that the subject of the proceeding was present and that the identitites of the three members of the Board were made known at the time of the proceeding. Consequently, it is my view that the record of votes requested by your client must be prepared and made available.

The remaining area of inquiry involves "the reasons for denial of parole". In this regard, I believe that written reasons are prepared when parole is denied. Therefore, any such writing would constitute a "record" [see Freedom of Information Law, §86(4)] subject to rights of access granted by the Law.

Relevant under the circumstances is §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold records that:

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

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.

The vote of the Board and its decision in my view constituted a "final determination" accessible pursuant to §87(2)(g)(iii), except to the extent that a different ground for denial might be applicable.

It is noted in this regard 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, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, an agency in receipt of a request must in my view review the record sought in its entirety to determine which portions, if any, might justifiably be withheld.

Although the record sought might constitute a final determination apparently accessible under §87(2)(g)(iii), due to its nature, it is possible that certain aspects of the record might be withheld. Sections 87(2)(b) and 89(2)(b) of the Freedom of Information Law indicate 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 record, I could not conjecture with respect to the presence or absence of privacy considerations. However, to the extent that disclosure would constitute an unwarranted invasion of personal privacy, I believe that those portions of the record might justifiably be deleted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Altschuller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1021
FOIL-AO-3307

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

April 26, 1984

Mr. Michael J. Murphy
[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. Murphy:

I have received your letter of April 5, in which you requested my comments regarding the contents of a variety of materials forwarded with your letter.

Since few specific questions have been raised, I would like to offer the following general comments regarding issues which in my view have arisen concerning the materials.

First, it is emphasized that the Freedom of Information Law is an access to records law. Stated differently, the Freedom of Information Law is not a vehicle under which a member of the public may require that questions be answered. It is, however, a statute that enables any person to request records of an agency, such as a school district.

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

In conjunction with one of your questions, you referred to a contention by the District Clerk that the vote of each member of a board of education is not required, but rather only the "final tally" would be required. Please note that one of the few exceptions to the rule that a record need not be created involves a record of votes. 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..."

Consequently, in my opinion, in any instance in which the School Board votes as a body, a record must be prepared which indicates which members voted and the manner in which each member cast his or her vote. If, for example, the Board consists of nine members and a vote is unanimous, I believe that an indication that the vote was nine to zero would be adequate. However, if the vote was seven to zero or if a dissenting vote was cast, I believe that the voting record must indicate who voted and how each member voted.

A related issue arose regarding a request for records that had been disposed of after a year. The Freedom of Information Law does not deal with the retention of records. However, pursuant to §65-b of the Public Officers Law, the Commissioner of Education has developed detailed schedules indicating minimum retention periods for numerous records. It would appear that the records in question could be disposed of in conjunction with a retention schedule established by the State Education Department.

Third, in terms of rights of access generally, the Freedom of Information Law is based upon a presumption of access. All records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Further, §87(2) of the Law states that accessible records must be made available for inspection and copying, and §89(3) provides that an agency must prepare copies of records upon payment of or offer to pay the established fee for photocopying. That fee cannot exceed twenty-five cents per photocopy for records up to nine by fourteen inches, unless a different fee is prescribed by statute [see Freedom of Information Law, §87(1)(b)(iii)].

One of the issues raised in your letter concerns an "investigation" regarding an alleged denial of wages to employees of a particular school. Apparently, the report of the investigation was brief and was made available to you. Subsequently, you requested the records inspected by various School District officies that were used in preparation of the report. I would like to point out that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described".

Under the terms of your request, I would conjecture that it may be difficult, if not impossible, to locate the records that may have been reviewed by the officials that you identified. If that is so, the request, from my perspective, would not have reasonably described the records sought.

Next, one of your requests involves records of salaries and expenses of various District officials. To the extent that such records exist, I believe that they would be available. Section 87(3)(b) of the Freedom of Information Law requires that each agency maintain a record indicating the name, public office address, title and salary of every officer or employee of the agency. In addition, records of expenditures would in my view be accessible on the ground that they constitute factual data available under §87(2)(g)(i).

Finally, one of your latest requests deals with minutes of open meetings and executive sessions of the Board of Education. Here I direct your attention to the Open Meetings Law. Section 101(1) contains what might be characterized as minimum requirements concerning the contents of minutes. The cited provision states that:

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

Further, §101(3) requires that minutes of open meetings be prepared and made available within two weeks of such meetings.

I would also like to point out that, 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 58 NY 2d 626 (1982)]. As such, if a board takes action, based upon the judicial decisions cited above and the facts that you have provided, it would appear that such action should be 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: Leonard Adler, Superintendent
Jeanne Caravella, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1022
FOIL-AO-3308

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

April 27, 1984

Mr. James R. Beebe
[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. Beebe:

I have received your letter of April 3, as well as the materials attached to it.

Having requested all correspondence between the Superintendent and the Board of Education of the Newark Valley Central School District, you were initially informed that "Requested records are exempted under the Freedom of Information Law". Following the denial, you appealed to the Superintendent, who affirmed, citing §87(2)(g) of the Freedom of Information Law.

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

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

I would also like to point out that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. Consequently, it is clear in my view that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, I believe that the quoted language requires an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

The provision cited by District officials as the basis for a denial pertains to "inter-agency or intra-agency materials". Inter-agency materials would consist of records transmitted from one agency to another. Intra-agency materials involve communications among or between officials of one agency. As such, the correspondence between the Superintendent and the Board would constitute "intra-agency" material. Due to the structure of §87(2)(g), inter-agency and intra-agency materials must often be made available in whole or in part.

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. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

From my perspective, the correspondence that you requested must be reviewed to determine which portions must be made available as described above.

You referred to and included a copy of a record presented to the Board regarding polling places and related information regarding elections. If, for example, the record was prepared by a District official, it could in my view be characterized as "intra-agency" material; nevertheless, it consists solely of "statistical or factual" information. Therefore, I believe that, on request, it would be accessible to any person under the Freedom of Information Law.

Reference was also made to the Board members' receipt of copies of minutes of previous Board meetings, and an apparent denial of those records on the ground that they are "intra-agency material". Once again, minutes prepared by the District Clerk or a different District official would in my opinion constitute "intra-agency" material. However, assuming that minutes consist of a rendition of events transpiring at a meeting, they would be reflective of "factual...data" accessible under §87(2)(g)(i). They might also contain instructions to staff that affect the public or final agency policies or determinations accessible respectively under §87(2)(g)(ii) or (iii).

Lastly, I would like to direct your attention to the Open Meetings Law as it pertains to minutes. With regard 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."

Further, §101(3) of the Open Meetings Law requires that minutes of open meetings must be prepared and made available within two weeks of such meetings. In situations in which a public body does not meet within two weeks and, therefore, has no opportunity to approve minutes, the following suggestion has been made. To comply with the two week time period, when a public body does not approve minutes, the minutes should nonetheless be prepared and made available after having been marked "unapproved", "draft", or "non-final", for example. By so doing, the requirements of the Open Meetings Law are given effect and, concurrently, members of the public who receive the minutes are provided notice that the minutes are subject to change.

Enclosed are copies of the Freedom of Information and Open Meetings Laws. In addition, copies of this opinion and the two laws will be sent to Mr. Micha, the Records Access Officer, and Dr. Starkweather, the Superintendent and 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: Anthony Micha
Dr. William D. Starkweather

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3309

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

April 27, 1984

Mr. G. Kaspar
[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. Kaspar:

I have received your letter of April 3 as well as the materials attached to it. Your inquiry concerns your efforts in gaining access to records of the Sachem Central School District.

It is noted at the outset that, according to a letter addressed to you on March 7 by Mr. C. Robert Clark, Assistant Superintendent of Schools for Business, it appears that most of the records requested have been made available. Nevertheless, I would like to offer the following comments regarding your specific areas of inquiry.

First, with respect to an apparent failure to indicate the vote taken by each member of the Board of Education, I agree with your contention that §87(3)(a) of the Freedom of Information Law requires that such a record be prepared. The cited provision states that each agency shall maintain:

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

Based upon the language quoted above, in any instance in which the Board of Education takes action, a record of votes must be prepared that indicates which members voted and how each member cast his or her vote.

Second, §89(3) of the Freedom of Information Law requires that, on request, when making copies of records available, an agency shall "certify to the correctness of such copy if so requested..." It is noted that the certification envisioned by §89(3) does not guarantee the accuracy of the contents of a record, but rather only that a copy of a record is a true copy.

Third, you asked whether the District has sent copies of appeals to this office. Having reviewed our files of appeals for March, I was unable to locate any appeals forwarded by the District. As you are aware, §89(4)(a) of the Freedom of Information Law requires that "each agency shall immediately forward to the Committee on Public Access to Records a copy of such appeal and the determination thereon".

Fourth, you stated that you could not understand why Mr. Clark responded to your request rather than Ms. Caravella, the designated Records Access Officer. As Mr. Clark indicated in his letter, he had familiarity with the records sought. Moreover, the regulations promulgated by the Committee, which in §1401.2 describe the duties of a records access officer, provide that the records access officer is responsible for coordinating the agency's response to a request for records. From my perspective, so long as a response is given in accordance with the Law in conjunction with the direction given by the records access officer, it is unimportant who in fact responds to a request.

Lastly, you asked whether the "Public Records Officer and Appeals Officer" for the District are "registered" in this office. There is no requirement that the names of a records access or appeals officer be registered with or otherwise communicated to the Committee. I would like to point out that the Freedom of Information Law is applicable to virtually every unit of government in the state. Consequently, it would be difficult, if not impossible, to maintain an up to date listing of more than ten thousand records access or appeals officers.

I hope that I 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: C. Robert Clark

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3310

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

April 27, 1984

Mr. Stephen Singer
Woodstock Times
Box 808
Woodstock, NY 12498

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. Singer:

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

Specifically, you wrote that:

> "The Onteora Central School District recently initiated a proceeding against a teacher, under the auspices of education law, sec. 3020-A. However, the process was aborted by the accused teacher's resignation.
>
> "However, there is a possibility that the teacher was 'bought out', that the school district paid him an amount of money to encourage him to resign. Neither the teacher nor his lawyer nor the school district officials will disclose how much he was paid or even if he was, indeed, paid."

You indicated further that "no one will say anything because it is a 'personnel issue' or because it is a 'matter of litigation'."

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

First, if indeed the teacher was "bought out" and a document exists regarding the terms or amount of any such agreement, I believe that the document would constitute a "record" subject to rights of access. 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."

Therefore, a document indicating a "buy out" or similar agreement would in my view clearly fall within the scope of the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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 two of the grounds for denial might be relevant to the record in question, if it exists, it does not appear that either ground could be cited to withhold the record.

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 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); 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 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 citizens 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."

It is also noted that several of the cases cited earlier, particularly Steinmetz, supra, indicate that the inclusion of a record in a personal file or the characterization of documents as "personnel records" does not automatically exclude them from rights of access. Rather, the nature and content of records determine the extent to which they are accessible or deniable.

Based upon the Freedom of Information Law and its judicial interpretation, therefore, it is my view that records reflective of the terms of the "buy out" 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 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. 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).

Lastly, you indicated that a basis for withholding involves a contention that the topic concerns "a matter of litigation". Unless I am misinterpreting the facts, there is no litigation, for the matter has been resolved. Further, unless the record was prepared solely for litigation [see Westchester-Rockland v. Mosczydlowski, 58 AD 2d 234], it does not appear that a denial of the request could be justified.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board, Onteora School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3311

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

April 30, 1984

Mr. Frederic M. Gang
[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. Gang:

I have received your letter of April 10 concerning your unsuccessful requests for records of the Syosset School District.

According to your letter, in February, you requested "appraisal reports authorized by the Board of Education for three properties sold by the district..." In response, you were informed that the District's attorney would have to be consulted. Having submitted a written request for the same materials on March 26, you were informed on April 9 that the attorney's response had not yet been given to the Board.

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 the request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the re-

ceipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 faollow 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 respect to rights of access, 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, based upon the facts as you have described them, one of the grounds for denial may be relevant. However, I do not believe that it could be invoked at this juncture. Section 87(2)(c) states that an agency may withhold records which:

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

It has been held that appraisals of real property may be withheld pursuant to §87(2)(c) prior to the consummation of a transaction. However, in this instance, the properties have apparently been sold and the transactions have been completed. If that is so, the "impairment" that may have resulted prior to an agreement has likely disappeared. Therefore, it would appear that the appraisals in question are accessible [Murray v. Troy Urban Renewal Agency, Sup. Ct., Rensselaer Cty., April 24, 1980, rev'd 84 Ad 2d 612, 56 NY 2d 888 (1982)].

Enclosed for your consideration are copies of the Freedom of Information Law and the Committee's regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3312

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

April 30, 1984

[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.

[redacted]:

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

According to your letter, ten years ago, your daughter, who is now twenty years old, was accused of cheating and was slapped by a teacher. Following the incident, you met with the school principal, and eventually, the teacher admitted that she had hit your child. Recently, a somewhat similar event occurred involving different people, which precipitated your inquiry. Specifically, your questions involve your rights to a report that may have been prepared concerning your meeting of ten years ago with the principal and to a record of action that may have been taken in relation to the teacher.

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

First, although the Freedom of Information Law is generally applicable to records of a school district, for example, it is possible that rights of access to a report of the meeting between yourself and the principal may be determined by a provision of federal law. Specifically,

the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment" governs access to records identifiable to students. In brief, the Buckley Amendment requires that "education records" identifiable to a particular student or students be kept confidential with respect to all but the parents of students under eighteen years of age, or the students themselves, who acquire the rights of their parents when they reach eighteen.

It is noted that the term "education records" is broadly defined in regulations promulgated under the federal Act by the United States Department of Education. According to the regulations, §99(3), education records:

> "(a) means 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.
>
> (b) The term does not include:
>
> (1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which:
>
> (i) Are in the sole possession of the maker thereof, and
>
> (ii) Are not accessible or revealed to any other individual except a substitute. For the purpose of this definition, a 'substitute' means an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position."

Assuming that a record concerning your meeting with the principal is identifiable to your daughter and is an "education record", I believe that, at this juncture, it would be accessible to your daughter. If that is so, you could obtain it with your daughter's written consent.

If such a report is not an "education record" but continues to exist, it would constitute a "record" subject to the New York Freedom of Information Law. That statute 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."

As such, the report in question, if it exists, would in my view constitute an "education record" subject to rights granted by the Buckley Amendment or a "record" subject to rights granted by the Freedom of Information Law.

If rights are determined by the Freedom of Information Law, which is based upon a presumption of access, it appears that one of the grounds for withholding might apply.

Section 87(2)(g) states that an agency may withhold records that:

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

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

Under the circumstances, a report prepared regarding your meeting could in my view be characterized as "intra-agency' material. However, if it consists only of a rendition of a discussion, I believe that it would consist of factual data accessible to you. Further, although disclosure of the report might be withheld if requested by third parties on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b), the same considerations would not apply to a request made by the subject of the record.

Second, with respect to action that may have been taken against a teacher, rights of access would in my view be dependent upon the nature of such a record and its contents. If some sort of final determination regarding the teacher had been rendered, it would appear that such a determination would be available [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 Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980] under §87(2)(g)(iii). The determinations cited above indicate that, although records might be found within a personnel file, that alone would not necessarily remove them from rights of access. The decisions also indicate that records pertaining to public employees that are relevant to the performance of their official duties are often accessible under the Freedom of Information Law on the ground that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Nevertheless, without additional information regarding the specific contents of the record in question, I could not conjecture as to rights of access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3313

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

April 30, 1984

Mr. William Josephson
Fried, Frank, Harris,
Shriver & Jacobson
One New York Plaza
New York, NY 10004

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. Josephson:

I have received your letters of April 12 and April 18 in which you requested an advisory opinion under the Freedom of Information Law regarding your unsuccessful efforts in seeking records from the New York City Transit Authority.

Attached to your letter is a copy of a request involving some nineteen categories of records. The records generally pertain to Grumman Flxible Buses used by the Authority. In brief, the records sought include, among other items, maintenance reports, surveys, testing information, warranty claims, consulting reports, evaluations, records of defects and repairs, a fire in one of the buses, safety, an engineering study, minutes of meetings and press releases.

Also attached to your letter is a copy of an unsigned denial of your request by Richard K. Bernard, Vice President and General Counsel of the Authority. Mr. Bernard described four bases for withholding. The first involves a contention that, as Counsel to Grumman, you represent a potential litigant. Citing Farbman and Sons, Inc. v. NYC Health and Hospitals Corp. [94 AD 2d 576 (1983)],

Mr. Bernard denied on the ground that you were requesting "litigation-oriented" records. The second basis for withholding involved a contention that your request was "overbroad and burdensome" and that it "generally fails to set forth information regarding dates, filing designations, locations, and sufficient other information that may assist in obtaining records sought". The third ground for denial is based upon a contention that "Parts of your request encompass records which are exempt from FOIL as 'intra-authority materials'..." The last ground cited by Mr. Bernard concerns a finding that some of the materials sought are subject to the attorney-client privilege, or are reflective of materials prepared in anticipation of litigation or attorneys' work product.

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

First, I agree with the contention that you raised in your appeal to Mr. Robert R. Kiley, Chairman of the Authority Board, in which you indicated that, since litigation has not yet been commenced, the holding in Farbman, supra, would not be applicable. From my perspective, to the extent that Farbman contains a principle of law, that principle would be that the Freedom of Information Law cannot be used as a substitute for discovery after the commencement of litigation. I would like to point out, too, that there appears to be disagreement between Appellate Divisions that have dealt with the issue of the use of the Freedom of Information Law as opposed to the use of discovery devices under Article 31 of the Civil Practice Law and Rules.

While Farbman, supra, Arzuaga v. NYC Transit Authority [73 AD 2d 518, 422 NYS 2d 689] and Brady & Co. v. City of New York [84 AD 2d 113, 445 NYS 2d 724, appeal dism., 56 NY 2d 711, 451 NYS 2d 735, 436 NE 2d 1337] indicate that the Freedom of Information Law cannot be used in lieu of discovery after the commencement of litigation, 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 as a litigant, and is neither enhanced nor restricuted 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 894 (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 potential 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); and Washington Post Company v. New York State Insurance Department, App. Div., 462 NYS 2d 208, reversed __ NY 2d __, March 29, 1984].

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 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 governmental 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.

Second, the request was denied on the ground that it did not "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law.

From my perspective, many of the categories of records requested provide enough information to enable the Authority to respond. In those instances in which the request might not have reasonably described the records sought, I would like to point out that one of the duties of the designated records access officer is to assist an applicant in identifying requested records, if necessary [see 21 NYCRR, §1401.2(b)(2)]. As such, I believe that the Authority's records access officer bore some responsibility to reach you in order to assist you in identifying the records sought.

Third, Mr. Bernard wrote that "parts" of your request could be withheld under §87(2)(g) of the Freedom of Information Law. The cited provision states that an agency, such as the Authority, 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 tabulations or data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, I believe that those documents that could be characterized as inter-agency or intra-agency materials should have been reviewed to determine which portions must be made available in conjunction with subparagraphs (i), (ii) or (iii) of §87(2)(g). Based upon the descriptions of the records sought, it appears that significant portions of some of the materials constitute "statistical or factual data" that must be made available. It is emphasized, too, that §87(2) in its introductory language refers to the capacity to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. Consequently, I believe that the Legislature envisioned situations in which a single record or report might contain both accessible and deniable information. Moreover, even though deniable information might be intertwined with the remainder of a record, that would not, according to case law, permit the agency to withhold the entire record [see Ingram v. Axelrod, App. Div., 90 AD 2d 568 (1982) and Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979)].

Lastly, the denial is also based upon a contention that some of the requested materials may be subject to the attorney-client privilege, that they consist of attorney work product, or that they are reflective of "materials prepared in anticipation of litigation". In my view, to the extent that the records sought are subject to the attorney-client privilege or are reflective of attorney work product, they may be kept confidential pursuant to the Civil Practice Law and Rules, respectively, §§4503 and 3101(c) and, therefore, pursuant to §87(2)(a) of the Freedom of Information Law.

With respect to the other claim, that the records were prepared for eventual litigation, it has been held that material prepared solely for litigation is deniable, but that materials prepared for multiple purposes, one of of which involves eventual litigation, would not fall within

the exemptions from disclosure appearing in §3101(d) of the Civil Practice Law and Rules or §87(2)(a) of the Freedom of Information Law [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234]. Therefore, if records were prepared in the ordinary course of business, or perhaps for multiple purposes, one of which might involve use in ensuing litigation, I do not believe that they could be withheld on the ground that they constitute material prepared for 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: Richard K. Bernard, Vice President
and General Counsel
Robert R. Kiley, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3314

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

May 1, 1984

Ms. Harriet Elise Cox Twine
35 Lower Byrdcliffe Road
P.O. Box 477
Woodstock, NY 12498

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. Twine:

I have received your letter of April 12 in which you raised questions regarding the fees for copies of medical records.

According to your letter, the estate of a deceased physician is charging one dollar per page to transfer copies of medical records pertaining to you to another physician. Your question is whether that fee is excessive and what "general rule" might apply to such a situation.

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

First, as you may be aware, the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. The Freedom of Information Law is applicable to records of an "agency", which is defined in §86(3) of the Law to mean:

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

Since the records in question are not in possession of an "agency", the provisions of the Freedom of Information Law are not applicable. It is noted for your information, that records accessible under the Freedom of Information Law are available for a fee of twenty-five cents per photocopy, unless a different fee is prescribed by some other statute.

Second, to the best of my knowledge, there is no law or general formula that may be cited regarding the fees that may be assessed when medical records are transferred or reproduced. Physicians are licensed by the Board of Regents, and the Board has established various rules of conduct to be followed by physicians. The rules indicate that a "reasonable" fee may be assessed when medical records are reproduced and transferred. I have contacted an attorney at the Education Department on your behalf to determine what is considered "reasonable". He informed me that a dollar per photocopy would, in his view, likely be considered to be reasonable.

I would like to add that legislation passed by the Assembly (A. 7070) and sponsored by Mr. Hinchey, but not yet passed by the Senate, would generally provide rights of access to medical records to the subjects of the records. One aspect of that legislation would state that "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider". From my perspective, the quoted language would, if enacted, likely decrease the charge that is now being assessed. However, I could not conjecture as to the action that might be taken by the Senate regarding the legislation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3315

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

May 1, 1984

Mr. Richard Johnson
82-A-0272
Green Haven Correctional Facility
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. Johnson:

I have received your letter of April 16, in which you requested advice regarding access to medical records in possession of a private hospital.

Please be advised that the Freedom of Information Law is not applicable to records of a private hospital. The Freedom of Information Law is applicable to records of an "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 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 applies generally to governmental rather than private entities.

Nevertheless, there is a statute that may indirectly enable you to obtain medical records pertaining to you. Enclosed is §17 of the Public Health Law, which enables a competent patient to designate the physician of his choice to request and obtain medical records concerning the patient from another physician or hospital. Therefore, while you may not have a direct right of access to the medical records in question, the physician of your choice could likely request and obtain the records on your behalf.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3316

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

May 1, 1984

Ms. Alfreda W. Slominski
[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. Slominski:

I have received your letter of April 18, as well as the materials attached to it.

Your inquiry pertains to a variety of issues concerning the implementation of the Freedom of Information Law by the Town of Holland. I would like to offer the following comments regarding those issues.

First, having reviewed the Town Board's resolution that establishes procedures under the Freedom of Information Law, it appears that the procedures contain a mixture of provisions, some of which relate to the original Freedom of Information Law enacted in 1974, and others that relate to the current Freedom of Information Law, which became effective in 1978.

It is noted at the outset that §89(1)(b)(iii) requires the Committee on Open Government to promulgate general regulations regarding the procedural implementation of the Freedom of Information Law. In turn, §87(1) requires the governing body of a public corporation, in this instance, the Town Board, to adopt regulations in conformity with the Law and consistent with the Committee's gen-

eral regulations. Enclosed for your consideration are copies of the Committee's regulations as well as model regulations designed to assist agencies in developing their own regulations. Copies of those materials will also be sent to the Town Board.

Second, you referred specifically to the Town's resolution insofar as it pertains to an appeal. I agree with your contention that there is an apparent contradiction, for Section Ic states that "The Appeal Officer shall be the Supervisor of the Town of Holland..." However, Section V states that "Appeals shall be directed in writing to the Town Board properly setting forth the material requested and the denial thereof". As such, the resolution apparently has designated both the Town Supervisor and the Town Board to render determinations on appeal under the Freedom of Information Law. From my perspective, the Town Board should modify its resolution to specify one person or body to whom appeals may be directed.

Third, a deficiency in the regulations concerns the absence of time limitations regarding responses to requests and appeals. Reference to the time for response to a request is found §89(3) of the Freedom of Information Law and §§1401.5(b) and (d) and 1401.7(c) of the Committee's regulations. Reference to the time limit for response to an appeal is found in §89(4)(a) of the Freedom of Information Law and §1401.7(g) of the regulations.

Fourth, I have reviewed your request for records as well as the forms on which requests are made. Without dealing with the substance of the requests at this juncture, it is noted that the forms are apparently based upon the original Freedom of Information Law. For instance, two of the categories for denial are designated as "confidential disclosure" and "part of investigatory files". Those phrases may have been cited under the Freedom of Information Law as enacted in 1974; nevertheless, they do not appear in the current Freedom of Information Law.

I would also like to point out that it has been consistently advised that, although an agency may devise a form, a failure to complete a form prescribed by an agency cannot be cited as a basis for a delay or denial of a request. In brief, §89(3) of the Freedom of Information Law merely states that an applicant should submit a written request that reasonably describes the records sought. Consequently, I believe that any such written request should suffice.

Fifth, since you requested the town zoning ordinance map and records of complaints regarding zoning violations that must be kept by the zoning officer, and since no such records were located, you raised questions regarding certification. In this regard, §89(3) of the Freedom of Information Law states in part that, upon request, the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". Moreover, §1401.2(b)(6) of the regulations concerning the duties of a records access officer states that the records access officer shall:

> "[U]pon failure to locate records, certify that:
>
> (i) The agency is not the custodian for such records;
>
> (ii) The records of which the agency is a custodian cannot be found after diligent search."

Lastly, as indicated earlier, you wrote that the zoning ordinance of the Town of Holland requires the zoning officer to maintain "a permanent record of all complaints considered and all actions taken by him". Nevertheless, in response to a request for that information, it was indicated that copies of an oral report given at a Board meeting are on record in the "Justice Department". From my perspective, the question here involves compliance by the zoning officer with the provisions of a local law. Based upon your reference to that local law, it appears that the records sought must be kept and made available.

Similarly, although the Town Clerk wrote that the zoning map that you requested is not available, your request refers specifically to a map filed with the Town Clerk pursuant to an ordinance adopted in April of 1973. In my view, it is difficult to envision that a record of such continuing importance fails to exist or cannot be found.

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: Town Board
Lois LaMarche, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3317

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

May 1, 1984

Dr. Charles Holowach
District Superintendent
BOCES
Lackawanna Avenue
Mt. Morris, NY 14510

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 Dr. Holowach:

I have received your letter of April 13 and the correspondence attached to it. You have requested advice regarding your unsuccessful efforts in obtaining records regarding the cost of services provided by Neighborhood Legal Services, Inc., a legal advocacy office.

In response to a request for the records by the client, James R. Sheldon, Jr. , a staff attorney for Neighborhood Legal Services, wrote that "we have no obligation under the Freedom of Information Act to provide this information. Furthermore, we have no records which we could provide to you which could be used to estimate the cost of these services."

I would like to offer the following comments regarding Mr. Sheldon's response.

First, as you may be aware, the Freedom of Information Law is applicable to records of an "agency", a term which is defined in §86(3) of the Law to mean:

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

While Neighborhood Legal Services might be a recipient of government funds, it appears to be a not-for-profit corporation that is not a governmental entity. If that is so, it is not an "agency" subject to the Freedom of Information Law and would not be required to comply with the requirements of the Freedom of Information Law.

Second, §89(3) of the Freedom of Information Law provides that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, even if Neighborhood Legal Services was subject to the Freedom of Information Law, I do not believe that it would be obligated to prepare records indicating the cost or value of services rendered.

I hope that I 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-3317

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

May 1, 1984

Dr. Charles Holowach
District Superintendent
BOCES
Lackawanna Avenue
Mt. Morris, NY 14510

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.

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> "...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 Neighborhood Legal Services might be a recipient of government funds, it appears to be a not-for-profit corporation that is not a governmental entity. If that is so, it is not an "agency" subject to the Freedom of Information Law and would not be required to comply with the requirements of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3318

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

May 2, 1984

Mr. Richard Groesbeck
D.I.N. 80-A-0134
Clinton Correctional Facility
Merle Cooper Program
P.O. Box 367
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. Groesbeck:

I have received your letter of April 20 in which you requested assistance concerning access to medical records.

Specifically, you wrote that you have unsuccessfully attempted to obtain copies of laboratory tests from the Albany Medical Center Hospital. You expressed the belief that the information should be made available to you and that it might represent "an important factor in [your] criminal case and appeal thereof".

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

First, in your letter of request to the Hospital, you contended that it is a "public corporation" and, therefore, is an "agency" required to comply with the Freedom of Information Law. Notwithstanding the designation of the facility in question as the Albany Medical Center Hospital, I believe that it is a private rather than a governmental entity. If that is so, the Hospital is not an "agency" as defined by §86(3) of the Freedom of Information Law and is not required to grant the public access to its records pursuant to the Freedom of Information Law.

Second, there is a statute that might enable you to gain indirect access to the records in which you are interested. In brief, §17 of the Public Health Law states that, upon request of a competent patient, a physician designated by the patient may request and obtain medical records pertaining to the patient from another physician or hospital.

Consequently, if the records cannot be obtained by officials of your facility, it is suggested that you designate a physician to seek and obtain the records on you 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-3319

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

May 3, 1984

Mr. Robert Hoagland
Superintendent/Business Administrator
Romulus Central School
Romulus, New York 14541-0080

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. Hoagland:

I have received your letter of April 7 in which you raised questions concerning a request for records.

Specifically, the request involves records "of the exact amount each employee actually received for the past calendar year". You wrote that the District does not have such a record "other than our one official copy of the payroll we receive from BOCES", which apparently consists of thirty-nine pages.

Your question is whether you are required to "copy and create a duplicate of this by marking out on all thirty-nine pages the Social Security numbers and other confidential information (how much is paid to savings, tax shelter annuities, garnishees, etc)." You added that "This would be somewhat time consuming" and in your view "is not required under the law".

Having reviewed my letter of April 12 sent to the applicants for the records, a copy of which was forwarded to you, I can merely reiterate the advice provided in that opinion.

First, although you indicated that you "do not have a record other than [your] official copy", the document that you maintain is in my view clearly a "record" as defined in §86(4) of the Freedom of Information Law and subject to rights of access granted by the Law. It is noted, too, that a recent decision rendered by the Court of Appeals, the state's highest court, construed the definition of "record" as broadly as its language appears in the Law [see Washington Post Co. v. NYS Insurance Dept., App. Div. 462 NYS 2d 52, reversed __ NY 2d ___, March 29, 1984]. Washington Post dealt with a situation in which records were voluntarily submitted by insurance companies, under a promise of confidentiality, to the Insurance Department. The Appellate Division found that, since the records were submitted to the Department for the purpose of convenience, rather than any requirement imposed by law, they were not "records" subject to the Freedom of Information Law. The Court of Appeals unanimously reversed, citing the "plain language" of the definition of "record". Therefore, if the District maintains records indicating the gross pay of its employees, those records in my view fall within the scope of the Freedom of Information Law.

Second, although accessible and deniable information may be "intertwined" within a single record, that factor would not in my opinion render the entire record deniable [see Ingram v. Axelrod, App. Div., 90 AD 2d 568 (1982)]. As stated in my letter to the applicants, §87 (2) requires an agency to disclose all records, except "records or portions thereof" that fall within one or more of the ensuing grounds for denial. Consequently, if some portions of a record are accessible while other portions may be withheld, I believe that the accessible portions must be made available upon payment of the appropriate fees for photocopying.

Third, a W-2 form obviously contains information which, if disclosed, would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. I believe that those aspects of the form could justifiably be deleted, while the remainder would be available. In many instances, agencies have prepared stencils or similar devices that can be placed over a document in order that only the accessible portions are photocopied. Enclosed is an example of such a stencil that may be used to photocopy accessible portions of a W-2 form. I believe that three such stencils could be used on a record of eight and a half by eleven inches.

In sum, assuming that the applicants are willing to pay for photocopying, I believe that the District would be required to make available those aspects of its records which indicate the gross pay of its employees.

I hope that I 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: Ms. Dagmar P. Nearpass
Ms. Dolores A. Werner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3320

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

May 3, 1984

Mr. Lewis E. Ward
[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. Ward:

I have received your letter of April 22 in which you requested assistance in pursuing a "freedom of information request on the New York State National Guard".

With respect to the Freedom of Information Law as it applies to agencies, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law. It is noted that rights of access to records of the State Legislature are limited to those listed §88(2) of the Freedom of Information Law. Enclosed are copies of the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law.

When making a request, I would like to point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, it is suggested that you provide as much detail as possible, such as descriptions of events, locations of facilities, or the subjects of policies, regulations or criteria in which you are interested.

The source of much of the information pertaining to the National Guard is the Division of Military and Naval Affairs, which is located at the State Campus, Security Building, Albany, NY 12226. Having contacted the Division on your behalf, I was informed that a request should be sent to the Records Manager at the address given in the preceding sentence.

In addition, the Senate and Assembly Committees on Governmental Operations, which are chaired respectively by Senator Caesar Trunzo and Assemblyman Melvin Zimmer, deal with legislation pertaining to the National Guard. Further, there is an Assembly Subcommittee on the Military and Civil Defense, which is chaired by Assemblyman Mark Siegel. The person to contact in his office is Ms. Tracy Calvan. The address for each of the legislator's offices is the Legislative Office Building, Albany, New York. The zip code for the Senate is 12247; for the Assembly, the zip code is 12248.

I hope that I 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-3321

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

May 3, 1984

Mr. Aldo T. De Benedictis
President
Ardea Construction Inc.
395 Gramatan Avenue
Mount Vernon, NY 10552

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. De Benedictis:

I have received your letter of April 23, as well as the materials attached to it.

According to your letter and the materials, a request made under the Freedom of Information Law was submitted to the Town Clerk of the Town of Eastchester on April 5. As of the date of your correspondence with this office, no response to your request had been given.

The application form indicates that you requested:

> "Public bidding records for the addition to the Waverly Fire Station, Main Street, Eastchester, N.Y. and construction records on same projects - and any other existing record as permitted by law & constitution."

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 business days to grant or deny access. Further, if no response is given within five business 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 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 respect to the substance of your request, 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.

Assuming that the bidding process has ended and that a contract has been awarded, I do not believe that any ground for denial could justifiably be cited to withhold bids. Section 87(2)(c) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

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

Based upon the language quoted above, while bids and similar information might be withheld prior to their opening or the deadline for submission of bids, after bids have been opened and a contract has been awarded, the "impairment" generally disappears and the records become available [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1980)]

With respect to the remaining records concerning construction, I believe that building plans or permits, for example, as well as records of payment and related information would generally be accessible.

In order to ensure that this advice is communicated to officials of the Town, copies will be sent to the Town Clerk and Town 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

cc: Town Clerk
Howard Spitz, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3322

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

May 4, 1984

Mr. Jimmie Burton
83-A-6492
Great Meadow Correctional Facility
P.O. Box 51
Comstock, New York 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. Burton:

I have received your letter of April 23 in which you requested advice and information.

According to your letter, you requested information regarding the membership of named attorneys in the Nassau County Bar Association. The Director of the Bar Association, Mr. Marjorie Dion, responded by stating that, in her view, the Freedom of Information Law does not apply to records of the Bar Association.

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

It is noted at the outset that the Freedom of Information Law applies to records of an "agency". The term "agency" is defined in §86(3) of the Freedom of Information Law to mean:

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

Based upon the language quoted above, as a general matter, rights of access granted by the Freedom of Information Law would pertain to records in possession of units of state and local government. Since the Nassau County Bar Association is not a governmental entity, I do not believe that it is an "agency" or that its records fall within the scope of the Freedom of Information Law.

In sum, in my view, the Bar Association is not required to grant access to its records pursuant 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3323

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

May 4, 1985

Mr. Anthony M. Mauro
[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. Mauro:

I have received your letter of April 24 in which you requested a clarification regarding rights granted by the Freedom of Information Law.

Specifically, according to your letter, you are an employee of the Triborough Bridge and Tunnel Authority. Having requested a list of the names, addresses and locations of employees of the Authority that you sought to use as a candidate in an upcoming union election, you were furnished with an incomplete list which did not contain home addresses. You wrote that in response to your request, an Authority official wrote that there is no requirement under the Freedom of Information Law that home addresses be given to you.

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

First, one of the few instances in the Freedom of Information Law in which an agency must create a record concerns a payroll record. 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..."

Based upon the language quoted above, although a list of employees containing the information described above must be prepared, that list need not include the home addresses of employees.

Second, as a general matter, an agency is not required to create a record in response to a request [see Freedom of Information Law, §89(3)]. Therefore, although the Authority must create a list that makes reference to employees' public office addresses, titles and salaries, the Authority is not required to create a list that includes employees' home addresses.

And third, a relatively new provision, §89(7) of the Freedom of Information Law, states that:

> "[N]othing in this article 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; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of an officer, employee or retiree of such employer, if such name or home address is otherwise available under this article."

The provision quoted above indicates that the home addresses of present and former public employees need not be disclosed under the Freedom of Information Law. Further, although the last clause of the provision refers to rights of access to home addresses by an employee organization, the cited provision grants such rights "if such name or home address is otherwise available under this article".

Since I do not believe that there is a right to home addresses granted by the Freedom of Information Law, the Authority would not in my view be required to provide home addresses of its employees 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: Counsel, Triborough Bridge and
Tunnel Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3324

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

May 7, 1984

Mr. Lee Pokoik
[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, unless otherwise indicated.

Dear Mr. Pokoik:

As you are aware, I have received a copy of an appeal that you sent to this office following a request for records directed to the Board of Trustees of the Village of Ocean Beach.

According to your appeal, on approximately April 10, you submitted a written request on a form prescribed by the Village for "copies of all water bills and sewer surcharge bills issued by the Village office for the tax year 1983-84". Since more than five business days elapsed without receiving a response from the Village, you appealed to the Board of Trustees.

You informed me today that no response to the appeal has been rendered as yet.

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 business days to grant or deny access. Further, if no response is given within ten business days of the acknowledgment of the 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 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, in terms of rights of access, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except 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, the records in which you are interested must be made available. One of the grounds for denial, due to its structure would, in my view require that the records sought be made available. Section 87(2)(g) states that an agency, such as the Village of Ocean Beach, 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 withhold, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public or final agency policy or determinations must be made available.

Under the circumstances, the bills in question apparently consist solely of "statistical or factual tabulations or data" that must be made available under §87(2)(g)(i).

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."

I believe that bills and similar records have long been available under §51 of the General Municipal Law, which states in part that:

> "All 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 benefits 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, subject to reasonable regulations to be adopted by the applical local legislative body, to the inspection of any taxpayer or registered voter, who may copy, photograph or make photocopies thereof on the premises where such records are regularly kept."

In sum, it appears that the records sought must be made available, and that the Board of Trustees has failed to comply with the requirement imposed by §89(4)(a) of the Freedom of Information Law that the records sought be made available or that the reasons for further denial be fully explained in writing to you within seven business days of its receipt of your appeal.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3325

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

May 8, 1984

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 April 26, which involves your efforts in gaining access to records of the Little Falls Hospital.

You intimated that, since the Hospital "operates under federal subsidies", that perhaps its records, particularly its books, should be open. In this regard, I would like to offer the following comments.

First, the fact that an institution, such as a hospital, might receive funding from government sources would not in my opinion automatically brings its records within the scope of the Freedom of Information Law.

Second, the Freedom of Information Law is applicable to records of an "agency", which is defined in §86(3) of the Law to mean:

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

As such, the Freedom of Information Law, as a general matter, applies to entities of state and local government.

Therefore, if the Little Falls Hospital is operated by a municipality, I believe that it would be an "agency" required to comply with the Freedom of Information Law. On the other hand, if the hospital in question is private, I do not believe that the Freedom of Information Law would be applicable, even though it receives government funding.

Lastly, if the Little Falls Hospital is private and not subject to the Freedom of Information Law, there may nonetheless be means by which you can learn of its finances. If, for example, the Hospital is required to submit reports and similar documentation to a state agency, such as the State Health Department, the records that it submits to a state agency would be subject to the Freedom of Information Law. Consequently, while a hospital might not be subject to the Freedom of Information Law, it may be possible to obtain records regarding the hospital from an agency that is 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1025
FOIL-AO- 3326

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

May 8, 1984

Mr. Robert L. Hemming
[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. Hemming:

Your letter of April 17 addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. As you are aware, the Committee is responsible for advising with respect to the Freedom of Information Law and Open Meetings Law.

In terms of background, you requested that the Attorney General conduct an investigation to determine whether the Village Board of Trustees of the Village of Waterford is complying with the Open Meetings Law. Please be advised that this office does not have the resources or the authority to engage in such an investigation. Nevertheless, in an effort to assist you, a copy of this opinion will be sent to the Board of Trustees.

Your initial area of inquiry pertains to the brevity of meetings held by the Board of Trustees. You have inferred that other meetings closed to the public might be held, and you alluded to a situation in which a meeting was adjourned, but the Board apparently continued to confer.

In this regard, it is emphasized that the definition of "meeting" [see attached, Open Meetings Law, §97(1)] has been expansively interpreted by the courts. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, found that the term "meeting" in-

cludes 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 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, it is clear in my view that work sessions, agenda meetings, and similar "informal" gatherings fall within the scope of the Open Meetings Law, even if no action is taken at such gatherings.

You also referred to difficulty in obtaining minutes of meetings and budget reports. With respect to minutes, §101(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks. In situations in which action is taken during an executive session, minutes reflective of the nature of the action taken, the date and the vote must be prepared and made available within one week. Questions have often arisen regarding situations in which a public body might not meet for two weeks and, therefore, cannot approve minutes within that period. In those cases, it has been advised that the clerk or whoever is responsible for preparing the minutes should do so within two weeks, but that minutes may be marked "unapproved", "draft", or "non-final", for example. By so doing, the public can learn generally what transpired at a meeting and, concurrently, notice is effectively given that the minutes are subject to change.

Lastly, I believe that budget reports and similar, related records are accessible under the Freedom of Information Law. The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

Further, §87(2)(g)(i) requires that inter-agency or intra-agency materials consisting of "statistical or factual tabulations or data" are accessible. Assuming that budget reports are reflective of statistical or factual information, I believe that they would be available to any person. I would like to point out, too, that §89(3) of the Freedom of Information Law requires that an agency respond to a written request that reasonably describes the records sought within five business days of the receipt of a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Village Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3327

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

May 9, 1984

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 April 27 in which you requested advice regarding rights of access granted by the Freedom of Information Law.

You apparently requested records from the United Way agency of Dunkirk pertaining to the Rural Ministry of Dunkirk. You indicated that the records that you seek, which involve budgets used to determine the amount to be given to the Rural Ministry by the United Way, were denied.

Your question is whether you may obtain such records under the Freedom of Information Law.

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

First and perhaps most important, the Freedom of Information Law is applicable to records of an "agency". Section 86(3) of the Law defines "agency" to mean:

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

Based upon the language quoted above, rights of access granted by the Freedom of Information Law pertain generally to records of units of state and local government. From my perspective, although the United Way and perhaps the Rural Ministry maintain a relationship with government, they are not governmental entities and, therefore, fall outside the requirements of the Freedom of Information Law. Stated differently, I do not believe that rights granted by the Freedom of Information Law apply to records of the United Way.

Second, I would like to point out that in the Department of State there is a Bureau of Charities Registration, which maintains records concerning charitable corporations. It is suggested that you might want to contact the Bureau of Charities Registration for the purpose of seeking records concerning the United Way of Dunkirk.

Should such a request be made, it may be addressed to:

Bureau of Charities Registration
NYS Department of State
162 Washington Avenue
Albany, NY 12232

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3328

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

May 9, 1984

Mr. Michael A. Weber
Research Associate
Room 1812
270 Broadway
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. Weber:

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 and the materials attached to it, you requested records from the New York City Office of Economic Development pertaining "to negotiations held by the City with Searson/American Express for the purchase of a parcel of City owned land and have the subject of a memorandum of agreement dated January 12, 1984."

Twenty-six documents that are briefly described in a letter addressed to you be Steven Rosenberg of the Office of Economic Development were denied. You wrote that:

> "The two reasons given in the letter for denying access to the documents are; 1, disclosure would impair present or imminent contract awards and 2, the material is of an inter or intra agency nature."

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) refers to the capacity to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. Therefore, in my view, the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, I believe that the language quoted above requires that an agency review records sought in their entirety to determine which portions, if any, might justifiably be withheld.

With respect to the grounds for denial cited by representatives of the Office of Economic Development, the initial basis is §87(2)(c), which permits an agency wot withhold records or portions thereof that:

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

From my perspective, §87(2)(c) is based upon potentially harmful effects of disclosure. As such, a question of fact arises as to the extent to which disclosure of the records denied would indeed "impair present or imminent contract awards..."

Eight of the documents withheld are drafts of memoranda of agreement which apparently led to a final memorandum of agreement signed on January 12. The final memorandum of agreement was made available to you and is included in the materials that you forwarded. In my opinion, it is difficult to envision how the draft memorandum of agreement could at this juncture impair the negotiation process. Further, if disclosure of those drafts would not adversely affect the negotiation process, I do not believe that §87(2)(c) would appropriately be invoked to withhold those records.

It is possible that the other records withheld might, depending upon their contents, pertain to the continuing negotiations between the City and Shearson/American Express. To the extent that disclosure would impair the negotiating process, they may in my view be withheld. However, as indicated earlier, I believe that each of the records must be reviewed in order to determine the effects of disclosure and the application of §87(2)(c).

The other ground for denial cited by the City 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 or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Once again, records withhold on the basis of §87(2)(g) must in my view be reviewed to determine which portions must be made available under subparagraphs (i), (ii) or (iii) of §87(2)(g), and concurrently, to determine which aspects of inter-agency or intra-agency materials might be withheld on the ground that they consist of advice, opinion, recommendation and the like.

Lastly, you alluded to hearings that are being conducted regarding the issue before a community board and the New York City Planning Commission. If the hearings are public hearings, presumably certain facts and details regarding the proposal are made known to the public in order that points of view may effectively be expressed. If my assumption that information regarding the proposal must be made public in conjunction with hearings, it may be difficult to demonstrate that disclosure at this juncture would impair present or imminent contract awards.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Steven Rosenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3329

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

May 10, 1984

Mr. Alan Friedman
[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. Friedman:

As you are aware, I have received your letter of April 26, as well as a variety of materials attached to it.

Your inquiry concerns your efforts to obtain various records from agencies in the City of Hudson. The records sought pertain to projects or grants concerning community development, urban renewal, urban development action grants, and industrial development.

In reaction to one package of requests addressed to the Urban Renewal Agency, the response was as follows:

> "This request is overbroad and does not itemize particular documents sought to be copied and inspected by the applicant. This office is prepared to make available copies of appropriate documents to the applicant. The applicant can not be permitted to inspect the agency's files in the office of the agency. The agency does not have sufficient space nor the appropriate manpower to provide this service. Applications for specific documents will be reviewed and the documents copied at a cost of $.25 per page to the applicant. The copies will be made available within three business days after the approval of the applicant's request.

In another response made on a form, various grounds for withholding were cited.

Based upon a review of the materials, I would like to offer the following comments.

First, although the records sought concern related categories of information involving projects or grants made by or through the City of Hudson, it appears that several agencies may have possession of the records sought. For instance, the General Municipal Law, §640, pertains to the creation of the City of Hudson Community Development and Planning Agency, which is a public corporation subject to the Freedom of Information Law. Section 902-b of the General Municipal Law refers to the City of Hudson Industrial Development Agency. In short, although the records sought may be related, they may be in possession of a variety of agencies under the aegis of the City of Hudson. It is suggested, therefore, that you attempt to distinguish among the records in which you are interested, determine which agencies maintain particular categories of records, and forward your requests to the appropriate agencies.

Second, while your requests may be broad, the Freedom of Information Law does not require that an applicant identify records sought with specificity when making a request. It is noted that the original Freedom of Information Law enacted in 1974 required that an applicant request "identifiable" records. The existing Freedom of Information Law, §89(3), requires that an applicant "reasonably describe" the records sought in writing. Consequently, an applicant for a record is not in my view required to specify with particularity the record or records sought.

Further, the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, describe the duties of a records access officer. According to the regulations, the records access officer is required to assist in identifying requested records, if necessary. Therefore, I believe that part of the burden in identifying or locating the records sought rests with the agency. [See attached, regulations, §1401.2(b)].

Third, one of the statements made in response to the request is that the applicant "can not be permitted to inspect the agency file in the office of the agency". In this

regard, assuming that records are available under the Freedom of Information Law, I would like to point out that §87(2) grants the right to inspect and copy those records.

Another statement in the denial refers to insufficient manpower to provide this service. A similar contention was made in United Federation of Teachers v. New York City Health and Hospitals Corporation, [428 NYS 2d 823 (1980)]. However, it was held that a shortage of manpower to comply with a request does not constitute a defense, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law."

Here I would like to point out that the form prescribed by the Hudson Community Development and Planning Agency, which is identical to that used by the Hudson Urban Renewal Agency, appears to be out of date.

For example, two of the grounds for denial are characterized as "confidential disclosure" and "part of investigatory files". Both of the phrases quoted in the preceding sentence appeared in the original Freedom of Information Law. Recently, the Court of Appeals referred to the original language of the Freedom of Information Law, which permitted agencies to withhold records that were "confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise including trade secrets". The Court cited the deletion of that provision and found that an agency could not promise confidentiality [See Washington Post Company v. NYS Insurance Department, __NY2d__, March 29, 1984].

Similarly, the original Freedom of Information Law exempted from disclosure "part of investigatory files compiled for law enforcement purposes". That provision no longer exists.

The current exception that may be considered analogous to §88(7)(b) is §87(2)(d), which states that an agency may withhold records or portions thereof which 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."

Unlike the original provision concerning trade secrets, §87(2)(d) is based upon potentially harmful effects of disclosure. In the context of the records you are seeking, it is possible that financial data might be denied if disclosure would "cause substantial injury" to a commercial enterprise. However, only to that extent could the records in my view be held under §87(2)(d).

The "investigatory files" exception has as its equivalent §87(2)(e) under the current 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 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;"

Once again the language quoted above is based upon potentially harmful effects of disclosure. Moreover, it is doubtful in my opinion that §87(2)(e) could appropriately be asserted, for it appears that the records sought were likely prepared in the ordinary course of business, rather than for law enforcement purposes.

Lastly, as I informed you by phone, I have contacted Mr. Schorno on your behalf. Mr. Schorno discussed the breadth of several aspects of your request. Here, I would like to reiterate that §89(3) of the Freedom of Information

Law requires that an applicant "reasonably describe" the records sought. In some situations the requests may be so broad that the agency could not determine which records were requested. Therefore, it is suggested that you might want to narrow the scope of your request and discuss the types of records in which you are interested with representatives of the agencies that maintain 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:ew

cc: Mayor Michael Yusko, Jr.
Edmond F. Schorno, Executive Director
Carl G. Whitbeck, Jr., City Legal Advisor
Arthur Koweer, Chairman
William Loewenstein, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3330

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

May 10, 1984

Mr. Robert Billings
[redacted]

Dear Mr. Billings:

I have received your letter of May 3 in which you requested that I ascertain whether the Office of Mental Health intends to respond to a request made under the Freedom of Information Law.

Having reviewed your request, a copy of which is attached to your letter, I contacted Robert Spoor, Records Access Officer at the Office of Mental Health on your behalf. I believe that the Office of Mental Health will provide copies of the records in which you are interested upon payment of the appropriate fees.

In your request, you asked that the fees for copies be waived. While the federal Freedom of Information Act contains provisions under which an applicant for records may seek a waiver of fees, it is noted that no similar provision exists under the New York Freedom of Information Law. Consequently, I believe that an agency, such as the Office of Mental Health, may require payment of the appropriate fees prior to making the records 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:ew

cc: Robert Spoor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3331

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

May 14, 1984

Mr. James T. Darragh
[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. Darragh:

I have received your letter of May 7, as well as the materials attached to it.

Your inquiry concerns a request for records directed to Sanitary District Number Two of the Town of Hempstead. As I interpret your letter, you initially telephoned the District in order to express your need for records pertaining to your father, a former employee. At the time, you were told that you could view the records on the following day. As I understand the situation, staff of the District was informed not to disclose the material because you had "been there previously" to inspect records. In short, although you had apparently been granted permission to inspect the file, your request for copies was refused. Further, although you requested that the reasons for such a denial be stated in writing, a written denial was refused.

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

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.

Second, it appears that your request involves minutes of various meetings, portions of contractual provisions, and other materials contained in a file pertaining to your father. As the materials have been described, I do not believe that any ground for denial appearing in the Freedom of Information Law could justifiably be cited.

Third, §87(2) of the Freedom of Information Law indicates that accessible records are available for inspection and copying. Further, §89(3) of the Law states that, upon payment of or offer to pay the appropriate fees, photocopies of accessible records must be made available. It is noted, too, that the right to copy has been considered concomitant with the right to inspect for more than sixty years [see e.g., In Re Becker, 200 AD 178 (1922)].

Fourth, §1401.7(b) of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, states that:

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

Based upon the language quoted above, when a request is denied, the reasons for the denial must be expressed in writing and the applicant must be informed of his or her right to appeal.

Under the circumstances, since the records have not been made available, it is suggested that you appeal 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

cc: Sanitary District No. 2
Phillip T. Feiring, Esq.
James N. Benjamin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3332

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

May 14, 1984

Mr. Rick Chesebro
81-C-662
Camp Pharsalia
South Plymount, NY 13844

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. Chesebro:

I have received your letter of May 7, in which you requested advice regarding your rights of access, as an inmate, to various records.

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

First, enclosed is a copy of the Freedom of Information Law, which is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Without knowledge of the contents of the records you are seeking, it is difficult to provide specific direction. However, two of the records in which you referred could in my opinion likely be withheld.

For instance, if a probation report is the equivalent of a pre-sentence report, it would be exempt for disclosure under §390.50 of the Criminal Procedure Law, and, therefore, deniable under §87(2)(a) of the Freedom of Information Law. I believe that the only method by which you could obtain such a record would involve the submission of a request to the judge who presided over the proceeding in which you were involved.

Similarly, it would appear that a psychological evaluation might be withheld under §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

While some aspects of inter-agency or intra-agency materials are accessible, portions of such materials, such as those consisting of advice or opinion, for instance, may justifiably by withheld.

Assuming that a psychological evaluation prepared by the staff of the Department of Correction Services is reflective of opinion, such a request could in my opinion be denied.

Lastly, it is noted that §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the Law. In turn, §87(1) requires each agency to adopt its own regulations in conformity with the Law and consistent with the Committee's regulations. Enclosed for your consideration is a copy of the regulations adopted by the Department of Correctional Services under the Freedom of Information Law. It is suggested that you review those regulations carefully, for they provide the procedural framework necessary for making and perhaps appealing a request for records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3333

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

May 14, 1984

Mr. Theodore Guterman II
Connor, Curran and Schram
441 East Allen Street
P.O. Box 77
Hudson, NY 12534

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. Guterman:

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

According to your letter, your client, the Chatham Courier, was denied access to a copy of the contract of the superintendent of the Rensselaer City School District. Attached to your letter is a copy of the denial, in which William A. Lyons , School Business Executive, wrote that:

> "The Rensselaer City School District has determined the release of the Superintendent's contract would result in an unwarranted invasion of personal privacy and might impair collective bargaining negotiotions. For these reasons your request is denied."

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

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

Although Mr. Lyons alluded to two of the grounds of denial, I do not believe that either could justifiably be cited to withhold the contract.

Mr. Lyons indicated that disclosure of the contract "would result in unwarranted invasion of personal privacy". Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof to the extent that disclosure would constitute an unwarranted invasion of personal privacy. Nevertheless, in my view, 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 in essence that records relevant to the performance of a public employee's official duties are generally abailable, 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 to which Mr. Lyons referred is apparently §87(2)(c), which enables an agency to withhold records that:

> "if disclosed would impair present or iminent contract awards or collective bargaining negotiations;"

There is a decision rendered by the states highest court, Court of Appeals, which in my opinion indicates that the terms of contracts that are in effect would not if disclosed"impair" collective bargaining negotiations. Specifically, Doolan v. BOCES [48 NY 2d 341 (1979)] dealt with a situation in which an applicant requested data involving salaries and fringe benefits of teachers and administrators employed by several school districts. The court found that the agency could not meet its burden of proving that the records sought would impair present or imminent collective bargaining negotiations.

Further, As a general matter, I believe that any contract into which a unit of government enters must be made available to the public once it has been approved.

Lastly, §89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available rightof access at law or in equity of any party to records."

Here I direct your attention to §2116 of the Education Law, which states:

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

In view of the language quoted above as well as the judicial interpretation of the Freedom of Information Law, I believe that the contract of the Superintendent of the District must be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. William A. Lyons, School Business Executive
Mr. Stephen Urgenson, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3334

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

May 14, 1984

Mr. Charles Warren
83-A-6866
Camp Pharsalia
South Plymouth, NY 13844

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. Warren:

I have received your letter of May 7, in which you requested advice regarding your rights of access, as an inmate, to various records.

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

First, enclosed is a copy of the Freedom of Information Law, which is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Without knowledge of the contents of the records you are seeking, it is difficult to provide specific direction. However, two of the records in which you referred could in my opinion likely be withheld.

For instance, if a probation report is the equivalent of a pre-sentence report, it would be exempt for disclosure under §390.50 of the Criminal Procedure Law, and, therefore, deniable under §87(2)(a) of the Freedom of Information Law. I believe that the only method by which you could obtain such a record would involve the submission of a request to the judge who presided over the proceeding in which you were involved.

Similarly, it would appear that a psychological evaluation might be withheld under §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

While some aspects of inter-agency or intra-agency materials are accessible, portions of such materials, such as those consisting of advice or opinion, for instance, may justifiably by withheld.

Assuming that a psychological evaluation prepared by the staff of the Department of Correction Services is reflective of opinion, such a request could in my opinion be denied.

Lastly, it is noted that §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the Law. In turn, §87(1) requires each agency to adopt its own regulations in conformity with the Law and consistent with the Committee's regulations. Enclosed for your consideration is a copy of the regulations adopted by the Department of Correctional Services under the Freedom of Information Law. It is suggested that you review those regulations carefully, for they provide the procedural framework necessary for making and perhaps appealing a request for records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3335

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

May 14, 1984

Mr. Isidore Gerber
[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. Gerber:

I have received your letter of May 7, and the materials attached to it.

Your inquiry focuses upon the procedure followed by the Police Department of the Village of Liberty under the Freedom of Information Law. Having reviewed the procedure, I would like to offer the following comments.

First, the introductory language of the procedure indicates that the ensuing rules were promulgated under §88 of the Freedom of Information Law. Please be advised that the reference to §88 pertains to the Freedom of Information Law as originally enacted in 1974. That Law was repealed and replaced by the current Freedom of Information Law, which became effective in 1978. Further, §88 now refers only to records of the State Legislature. The applicable provision under the current Law is §87.

Second, the original Freedom of Information Law granted access to specified categories of records, to the exclusion of all others. The current Freedom of Information Law, however, 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, one of the references in the Department's regulations indicates that police records will "under no circumstances" be available when such records "constitute part of the investigatory files of the Liberty Police Department which are compiled for law enforcement purposes..." The original Freedom of Information Law exempted from disclosure investigatory files compiled for law enforcement purposes. As such, under that Law, any record that was considered part of investigatory files could forever be withheld. The provision of the current Law that may be considered the equivalent of the original provision is based upon potentially harmful effects of disclosure. Specifically, §87(2)(e) states that an agency may withhold records that:

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

Based upon the language quoted above, records compiled for law enforcement purposes may be withheld under the circumstances specified in the Freedom of Information Law. Moreover, I believe that records sought must be reviewed in their entirety to determine which portions, if any, may justifiably be withheld in accordance with the grounds for denial appearing in §87(2) of the Law.

Lastly, you asked "how specific the public requests must be in order to obtain and review records". Section 88(6) of the original Freedom of Information Law required that an applicant submit a request for "identifiable" records. Section 89(3) of the current Law requires merely that an applicant submit a written request that "reasonably describes" the records sought. Therefore, an applicant is no longer required to specify the record in which he or she may be interested; on the contrary, the applicant must "reasonably describe" the records that he or she is seeking.

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 model regulations devised to enhance the capacity of agencies to develop their own regulations. Copies of the same materials and this opinion will be sent to the Village of Liberty Police Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Village of Liberty Police Department

OML-AO-1027
701L-AO-3336

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

May 15, 1984

Mr. Dominic Tom
Schenectady Gazette
332 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 Mr. Tom:

I have received your letter of May 8, in which you requested advice regarding two areas of inquiry.

The first pertains to "an impending attempt by the Duanesburg Town Board to possibly institute a ban on the use of recording and audio-visual equipment at town meetings". You have requested my comments regarding the legality of such a move.

It is noted at the outset that the Open Meetings Law is silent with respect to the use of tape recorders as well as audio-visual equipment. While there are several judicial determinations concerning the use of tape recorders at open meetings of public bodies, I am unaware of any determination concerning the use of television cameras or similar devices at meetings.

With regard to the use of tape recorders, in terms of background, until mid-1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee 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 1979. That decision arose when two individuals sought to bring their tape recorders at 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 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."

Most recently, the Supreme Court, Nassau County, also found that a public body could not prohibit the use of a "hand held battery operated tape recorder" at an open meeting [Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984].

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 the use of tape recorders at its meetings, the Attorney General reversed earlier opinions on the subject and advised that:

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

In view of the foregoing, I do not believe that the Town Board could prohibit a member of the public from using a portable, battery-operated tape recorder at its open meetings.

With respect to the use of other types of equipment, I believe that the principle involved concerns the effect of cameras or similar equipment upon the deliberative process. If the use of cameras, special lighting, and related equipment would clearly be disruptive to the deliberative process, it would appear that a rule prohibiting the use of such devices would be reasonable.

Your second area of inquiry concerns an audit prepared by the United States Department of Housing and Urban Development (HUD) relative to the City of Glens Falls. You asked "how much information city officials may release concerning HUD case files". You wrote further that the Director of the City program maintains that he cannot release information about the files "since the program...is between his office and the federal government".

Here I direct your attention to the Freedom of Information Law. That statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law.

The fact that records might involve relationships with a federal agency would not in my view alone affect rights of access to records.

Without knowledge of the nature of the records in which you are interested, specific advice cannot be offered. However, as you may be aware, an agency is required to respond to a request for records "reasonably described" [see attached, Freedom of Information Law, §89(3)]. Further, upon locating the records, the agency is in my view required to review them for the purpose of determining which portions, if any, fall within one or more of the grounds for denial listed in §87(2). I would like to point out, too, that §87(2) refers to the capacity to withhold "records or portions thereof" that fall within one or more of the grounds for denial. Consequently, there may be situations in which a single record might be both accessible and deniable. For instance, depending upon the nature of a recipient of a grant or loan, there may be considerations of personal privacy. While the income level of a recipient might be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §87(2)(b)], the deletion of identifying details might render the remainder of such a record accessible.

Lastly, HUD is a federal agency and the City of Glens Falls is an "agency" subject to the New York Freedom of Information Law. In this regard, although §87(2)(g) of the Freedom of Information Law permits the withholding of inter-agency or intra-agency materials, I do not believe that §87(2)(g) could be cited to withhold communications between the City and HUD. 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."

The language quoted above indicates that the Freedom of Information Law, in terms of rights of access as well as the the authority to withhold, pertains to records of state and local government. Since the definition of "agency" does not include a federal agency, it does not appear that §87(2)(g) could be cited as a means of withholding records communicated between the City and a federal agency.

Moreover, a recent decision rendered by the state's highest court, the Court of Appeals, stressed the breadth of the Freedom of Information Law. In Washington Post v. NYS Insurance Department [App. Div., 462 NYS 2d 208 (1983), reversed __ NY 2d __ (1984)], it was contended by a state agency that records submitted voluntarily and under a promise of confidentiality to the Insurance Department fell outside the scope of the Freedom of Information Law. The Court of Appeals reversed, citing the broad definition of "record" appearing in §86(4) of the Freedom of Information Law, holding that records are presumptively available except to the extent that a ground for denial may justifiably be cited.

In short, in my view, a denial based solely upon the relationship between the City of Glens Falls and the federal government is without foundation, for rights of access must in my view be determined on the basis 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

RJF:jm

cc: Town Board
City of Glens Falls Urban Renewal Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3337

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

May 16, 1984

Mr. Charles VanValkenburg
[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. VanValkenburg:

I received your letter of May 9, in which you described a situation involving the disclosure of your name and other personal information by a bank without your consent.

Specifically, you apparently received a solicitation for life insurance from an insurance company, which obtained your name, address and Chase Visa account number. Upon questioning how that information was obtained, you were informed "it came from an independent Mail House with the consent of the Chase Manhattan Bank". Officials of the Bank apparently told you that the account number would be kept in confidence. It is your view that you have the right under the Freedom of Information Law to know which "mail house" obtained the information. You also asked what right the bank might have in disclosing your account number for mail order soliticitations.

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

First, the Freedom of Information Law is applicable to records of an "agency", which is defined under §86(3) of the Law to mean:

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

Based upon the language quoted above, the Freedom of Information Law in not applicable to records of a private corporation, such as a bank or direct mail order firm, but only to records of state and local government. It is noted, too, that there is a federal Freedom of Information Act. However, that Act is similar to the New York Freedom of Information Law in terms of its coverage, in that it applies only to records of federal agencies. Consequently, I do not believe that you have a right of access under the Freedom of Information Law to records in possession of a bank or direct mail firms.

Second, to obtain additional information regarding the use of your credit card or account number, it is suggested that you review the terms to which you agreed when you applied for the credit card. It is possible that such a statement might provide the information that you are seeking.

Third, to the best of my knowledge, there is no state law in existence that deals specifically with the use of your name or account number. I believe, though, that similar issues have been raised in the past and that they are the subject of legislation that has been recently introduced.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3338

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

May 16, 1984

Mr. Morris Beatty
83-A-2773
P.O. 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. Beatty:

I have received your letter of May 8, which pertains to your efforts in obtaining information from the Department of Correctional Services.

Although you did not indicate the specific nature of the information that you are seeking, you indicated that you "have gotten negative type responses". Consequently, you have requested advice as well as information from this office.

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

First, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. Consequently, this office does not maintain records generally, such as the records in which you are interested, nor does it have the authority to compel an agency to grant or deny access to records.

Second, I would like to point out that §89(3) of the Freedom of Information Law requires that an applicant submit a request in writing that "reasonably describes" the records sought. As such, when making a request, it is suggested that you include as much detail as possible, such as names, dates, index and identification numbers, descriptions of events and similar information that might enable agency officials to locate the records sought.

Third, if a request is denied, the denial must be given in writing, stating the reasons. Further, §89(4)(a) of the Freedom of Information Law states that a person denied access to records may within thirty days appeal the denial to the head of the agency or whomever is designated to render determinations on appeal by the head of the agency. The appeals officer of the Department of Correctional Services is Counsel to the Department.

Fourth, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law. In turn, §87(1) requires each agency to develop its own regulations in conformity with the Law and consistent with the regulations promulgated by the Committee. The Department of Correctional Services has adopted such regulations, which are enclosed for your review. It is suggested that you read the enclosed regulations closely, for they may provide you with a substantial understanding of the process by which you may seek records.

Lastly, it is reiterated that you seek help from 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-3339

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

May 16, 1984

Mr. Howard Jacobson
80-A-3899
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. Jacobson:

I have received your letter of May 19, in which you requested advice regarding rights of access to records.

According to the materials attached to your letter, you unsuccessfully appealed a denial of access to records to the New York City Police Department concerning your arrest. Although some of the information sought was made available, other aspects of the records were denied on the basis of §§87(2)(g) and (e) of the Freedom of Information Law, as well as judicial determinations. One of the decisions cited was People v. Billups [Sup. Ct., Queens Cty., Criminal Term, NYLJ, July 13, 1981], in which it was held that "the Freedom of Information Law cannot be used merely to make untimely discovery applications". The Assistant Deputy Commissioner of the New York City Police Department, Ms. Rosemary Carroll, also wrote that "the principle that F.O.I.L. cannot be used as a new research or discovery tool by private litigants was upheld by a unanimous Appellate Division-First Department in Farbman & Sons v. New York City Health and Hospital Corp., et al (94 A.D. 2d 576)."

You have asked what step should next be taken, and whether an Article 78 proceeding or a proceeding under the federal Civil Rights Act should be commenced. You added that the records in which you are interested "are five years old", that "there is no ongoing investigation" and that "witnesses testified in open court". As such, in your view "secrecy is not a factor".

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

First, the initial ground for denial under the Freedom of Information Law cited by Deputy Commissioner Carroll 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 that 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 materials that may be withheld under §87(2)(g) in my view involve advice, opinion, recommendations and the like. Consequently, I believe that inter-agency or intra-agency materials requested should be reviewed to determine which portions, if any, may justifiably be withheld.

The other ground for denial cited under the Freedom of Information Law by Ms. Carroll 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 disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

From my perspective, the language quoted above is based upon potentially harmful effects of disclosure. For instance, if an investigation is in process and disclosure would interfere with the investigation, records may be withheld on that basis. However, if an investigation has ended, it does not appear that §87(2)(e)(i) could be cited as a basis for withholding. The other reference cited by Ms. Carroll involves §87(2)(e)(iv), which pertains to disclosure of records compiled for law enforcement purposes that would, in her words, "reveal criminal investigative techniques..." It is noted that the specific language of §87(2)(e)(iv) refers to the capacity to withhold "criminal investigative techniques or procedures, except routine techniques and procedures". The extent to which disclosure would reveal non-routine criminal investigative techniques and procedures is unknown to me.

Lastly, it is emphasized that the Court of Appeals, the state's highest court, on May 10, reversed Farbman, supra [__ NY 2d __ (1984)]. In brief, the Court found that there is no restriction upon the use of the Freedom of Information Law by a litigant or potential litigant.

Due to the reversal of Farbman, it is suggested that you renew 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: Rosemary Carroll

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1028
FOIL-AO-3340

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

May 16, 1984

Mr. Robert M. Porterfield
Mr. Brian Donovan
Newsday
Long Island, NY 11747

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.:

I have received your letter of May 11 concerning the application of the Freedom of Information and Open Meetings Laws to entities involved in industrial development on Long Island.

Your questions pertain to the application of those statutes to "County and Local Industrial Development Agencies and the Long Island Development Corporation (LIDC).

In terms of background, the LIDC is a corporation subject to the provisions of §1411 of the Not-for-Profit Corporation Law. The LIDC has apparently been designated as a "branch bank" for the New York State Job Development Authority and was formed, in part, "for the purpose of being designated as a Certified Local Development Corporation under the United States Small Business Administration's Section 503 Program." In addition, you wrote that "According to a federal audit report, much of the LIDC's assets are receivables from both Nassau and Suffolk County, indicating that large sums of taxpayer's money are used for operating purposes."

Having contacted Ms. Roslyn Goldmacher, the Processing and Servicing Administrator for LIDC, Ms. Goldmacher indicated that she was informed by a representative of the Small Business Administration that the information that you requested "was confidential and the Small Business Administration had determined that it could not be released to the public."

In conjunction with the foregoing, you have raised the following questions:

> "1.) Whether or not the LIDC (as well as Local and County Industrial/Economic Development Corporations) are governmental agencies subject to the New York State Freedom of Information Laws.
>
> 2.) If so, whether or not we have a right of access to uncensored copies of the minutes of the LIDC's Board of Directors meetings and copies of any annual reports submitted to any authority, county, state, or federal.
>
> 3.) Whether or not the LIDC is required to post public notice of regular and special Board of Directors meetings and whether or not the LIDC is required to admit members of the public to such meetings."

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

First, with respect to industrial development agencies, I believe that the records of such agencies are clearly subject to the Freedom of Information Law, and that the meetings of the boards of such agencies fall within the requirements of the Open Meetings Laws. Section 856 of the General Municipal Law, which is entitled "Organization of Industrial Development Agencies", states in subdivision (2) that such an agency "shall be a corporate governmental agency, constituting a public benefit corporation". Since a public benefit corporation is a "public corporation" as defined under §66(1) of the General Construction Law, an industrial development agency is in my view clearly a governmental entity subject to the provisions of the Freedom of Information Law. Further, to reiterate, I believe that its board would constitute a public body required to comply with the Open Meetings Laws.

With respect to the LIDC, for the reasons discussed below, its meetings must in my view be held in accordance with the Open Meetings Law. However, the application of the Freedom of Information Law to the records of the LIDC is somewhat unclear.

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

In view of the language quoted above, the question is whether the corporation is a "governmental" entity performing a "governmental" function.

As a corporation subject to §1411 of the Not-for-Profit Corporation Law, the LIDC may be characterized as a "local development corporation". The cited provision 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 its status as a not-for-profit corporation, it is not clear that the LIDC is a governmental entity, but it is clear that it performs a governmental function.

In an effort to learn more about local development corporations generally, it has been 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 LIDC, as you have described its relationships with government, likely falls into the latter category.

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 Newspaper 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 "an 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.

Due to the relationships with and the strong nexus between the LIDC and various entities of government, it is possible that similar reasoning might be applied with respect to the LIDC as was described in the decision cited above rendered by the Court of Appeals. If such a rationale is applicable, the LIDC would be subject to the requirements of the Freedom of Information Law.

Notwithstanding the lack of clarity regarding the status of the LIDC under the Freedom of Information Law, I believe that meetings of the Board of the LIDC are subject to the Open Meetings Law.

The scope of the Open Meetings Law is determined in part by the phrase "public body", which is defined in §97(2) to mean:

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

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

In conjunction with your questions, if it is assumed that the Board of the LIDC is subject to the Open Meetings Laws, I believe that it would be required to provide notice pursuant to §99 of that statute under the Open Meetings Law. In brief, §99 requires that notice of the time and place of all meetings must be given to the news media and to the public by means of posting in one or more designated, conspicuous public locations. It is noted, too, that §101 of the Open Meetings Laws requires that minutes of meetings be prepared and made available in accordance with the Freedom of Information Law.

The extent to which "uncensored copies" of minutes of meetings of the LIDC Board or annual reports submitted by the Board to "any authority, county, state, or federal" agency must be determined in my opinion on the basis of the Freedom of Information Law. There may be aspects of such records which, depending upon their contents, might be withheld. However, 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 of the grounds for denial appearing in §87 (2)(a) through (h) of the Law.

Therefore, if the LIDC is subject to the Freedom of Information Law, records sought from the Corporation would have to be reviewed in their entirety to determine which portions fall within one or more of the grounds for denial. For instance, an annual report might contain trade secrets in the nature of financial data that might be deniable under §87(2)(d) of the Freedom of Information Law. Nevertheless, the fact that accessible and deniable information found within one record or report might be intertwined, that alone, based upon case law, would not render the records deniable in toto [see Ingram v. Axelrod, 90 AD 2d 568 (1982)]. On the contrary, the agency would be obliged to review the records sought to determine the extent, if any, to which one or more grounds for denial might justifiably be asserted.

The same principles would apply with respect to records of the LIDC submitted to an agency, such as a county. Those records would in my view be presumptively available and could be withheld only on the basis of the grounds for denial listed in §87(2) of the Freedom of Information Law.

Lastly, you wrote that the Small Business Administration informed the LIDC that the information sought "was confidential". Once again assuming that the LIDC is subject to the Freedom of Information Law, neither a claim nor a promise of confidentiality would in my view serve as a basis for withholding [see Washington Post Co. v. NYS Insurance Department, App. Div., 462 NYS 2d 208, reversed__NY 2d__, March 29, 1984]

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

Sincerely,

Robert J. Freeman

RJF:ew

cc: Mr. Peter Cohalan, Suffolk County Executive
Mr. Joseph Caputo, Suffolk County Controller
Mr. Francis Purcell, Nassau County Executive
Mr. Owen Smith, Deputy Nassau County Executive
Ms. Roslyn Goldmacher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-334

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

May 18, 1984

Mr. Frank Caserta
82-B-599
Woodbourne Correctional Facility
Pouch 1
Woodbourne, NY 12788

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. Caserta:

I have received your recent letter in which you requested records pertaining to you from this office.

Specifically, you indicated that you are incarcerated at the Woodbourne Correctional Facility and that you believe "that there is something on [your] record that does not belong there". As such, you requested the records from the Committee.

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

First, the Committee on Open Government 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 require that an agency grant or deny access to records.

Second, assuming that the records in question are maintained at the facility, the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services provide that a request should be directed to the facility superintendent.

Third, I would like to point out that the Freedom of Information Law requires that an applicant submit a request that "reasonably describes" the records sought [see §89(3)]. Therefore, when making a request, it is suggested that you provide as much detail as possible, including identification numbers, dates, descriptions of events, and similar information that might enable agency officials to locate the records you are seeking.

Lastly, the Freedom of Information Law does not grant the right to amend or correct records. However, §5.50 of the regulations of the Department of Correctional Services provide that an inmate may, in certain circumstances, challenge the accuracy of the record. Enclosed for your consideration is a copy of the Department regulations concerning access to and the amendment 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3342

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

May 18, 1984

Ms. June Naxam
North Country Gazette
Route 9,
P.O. Box 408
Chestertown, NY 12817

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. Naxam:

I have received your recent correspondence in which you requested materials from this office and raised a question under the Freedom of Information Law.

Enclosed are various materials, including the Freedom of Information and Open Meetings Laws, a pocket guide that summarizes both statutes, regulations concerning the procedural implementation of the Freedom of Information Law and the Committee's latest annual report. In addition, your name has been placed on our mailing list to receive new and updated materials.

Your question involves an unanswered request for records sent to a school district. In this regard, I would like to offer the following comments.

It is noted at the outset that the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the law, contain prescribed time limits for responses to requests.

Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records

and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7 (b)].

In my view, a failure to respond within the designated time limits results in a 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, 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

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3343

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

May 18, 1984

Mr. Orlando Pacheco
81-A-3535
Drawer B
Stormville, NY 12582

Dear Mr. Pacheco:

I have received your letters of May 12 and May 15 concerning earlier correspondence. Please note that both letters were received on the same day, May 17.

In your letter of May 12, you referred to an appeal sent to this office dated April 9. Further, in your letter of May 15 you asked that I forward to you the envelopes in which your correspondence was contained.

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

First, with respect to the correspondence of April 9, having searched our files, that correspondence was addressed to Attorney General Abrams. In that letter, you appealed an apparent denial of access to records by the New York County District Attorney. It is noted, too, that a response to your appeal of April 30 was sent to this office by Allen F. Sullivan, Appeals Officer for the District Attorney. Mr. Sullivan indicated that correspondence had likely crossed in the mail and that, under the circumstances, your letter would not be treated as an appeal unless you instructed him to the contrary.

Notwithstanding the foregoing, I would like to point out that the Attorney General was not the appropriate person to whom an appeal should have been directed. Section 89(4)(a) of the Freedom of Information Law states in part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within seven business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Based upon the language quoted above, if a request to an agency is denied, the appeal should be sent to the head of the agency or whomever is designated by the head of the agency to render determinations on appeal. Since the Attorney General would not have possession of the records sought, he would not have the capacity to render a determination on appeal.

Second, with regard to your envelopes, as a matter of routine, if the address of a correspondent is included on a letter, the envelopes are discarded. As such, this office no longer has the envelopes in which your correspondence was contained.

Lastly, if you have not received a satisfactory response from the District Attorney, it appears that the next appropriate step would involve contacting the appeals officer for the Office of the District Attorney, Mr. Sullivan.

I hope that I 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: Allen F. Sullivan
Richard Rifkin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3394

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

May 21, 1984

Dr. N. Morton Fybish
[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 Dr. Fybish:

Your letter of May 8 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.

You wrote that various requests for information directed to state agencies have been ignored. As such, you have asked whether there is any statutory requirement that a state agency respond to correspondence received form a member of the public.

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

First, as a general matter, I do not believe that there is any statute that requires that an agency respond to correspondence or answer questions raised by a member of the public.

Second, the Freedom of Information Law is generally the vehicle by which any member of the public may seek records. It is emphasized, however, that the Freedom of Information Law is not a statute that requires agency officials to answer questions or that permits a member of the public to cross examine agency officials. It is also noted that the Freedom of Information Law is applicable to existing records, and §89(3) of the Law states in part that an agency is not, as a rule, required to create or prepare a record in response to a request.

Third, when you seek information from an agency, it is suggested that you avoid raising questions. It is also recommended that you request records pertaining to a particular topic.

Fourth, §89(3) of the Freedom of Information Law provides that an applicant must "reasonably describe" the records requested. Consequently, when making requests, it is suggested that as much information as possible should be given, such as names, dates, identification numbers, description of events and similar information that might enable agency officials to locate the records sought.

Lastly, pursuant to regulations promulgated by the Committee, which govern the procedural aspects of the Law, each agency is required to have designated one or more "records access officers". Therefore, if you are unsure of the person to whom a request should be directed, a request to the records access officer at an agency will likely ensure that the request is answered appropriately.

Enclosed are copies of the Freedom of Information Law, the Committee's regulations, and a pocket guide that contains a summary of the Law.

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

Sincerely,

Robert J. Freeman

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3345

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

May 21, 1984

Mr. Dale A. Wilker, Esq.
Ms. Amy Rothstein, Esq.
Staff Attorneys
The Legal Aid Society
Criminal Appeals Bureau
Prisoners' Rights Project
15 Park Row - 7th 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, except as otherwise indicated.

Dear Ms. Rothstein and Mr. Wilker:

I have received your letter of April 27 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, on February 22 you requested a variety of records concerning the Great Meadow Correctional Facility. The request involves some forty-four pages. Although the Superintendent of the facility, Everett W. Jones, has estimated that the request encompasses approximately 7,000 pages, he contended that the request does not "reasonably describe" the records sought.

You have expressed the view that "overbreadth" does not constitute a ground for denial of access, and that the Department's designated records access officer or officers must assist you in identifying the records sought in accordance with §1401.2 of the regulations promulgated by the Committee.

In order to learn more about your request and the rationale for the Department's response, I have contacted the Office of Counsel at the Department on your behalf.

In brief, it is the belief of Counsel that many aspects of the request, particularly those in which you requested "all" records dealing with particular areas of inquiry, do not "reasonably describe" the records in question. I was informed that records dealing with particular subjects may be kept in many locations within the Department, including a Correctional Facility as well as sections within the Department's central office in Albany. It is the contention of Counsel that, without reviewing virtually all records of the Department, it could not respond with certainty that all records within a particular subject area have been located or that all such records might have been made available or denied in whole or in part.

It is noted, too, that a recent decision rendered by the Court of Appeals might have a bearing upon the responsibilities of the Department in responding to your request.

On May 10, the Court of Appeals reversed the holding of the Appellate Division, First Department, in Farbman v. NYC Health and Hospital Corporation [94 AD 2d 576 reversed, __NY2d__], stating that the use of the Freedom of Information Law can not be restricted merely because an applicant for records is a litigant or a potential litigant.

The Court also dealt with the breadth of the request, stating that:

> "the court below concluded that appellants' request was not sufficiently specific to meet the requirements of CPLR 3120, and this same test of specifity should apply to FOIL requests. While appellants' request may well have been insufficient under CPLR 3120, which demands that documents be "specifically designated," that standard is inapplicable under FOIL, which requires only that the records be "reasonably described" (Public Officers Law §89 subd 3) so that the respondent agency may locate the records in question. (Johnson Newspaper Corp v. Stainkamp, 94 AD 2d 825, affd __NY2d__, decided February__, 1984).

From my perspective, it is possible that the requests for "all records" dealing with particular subjects might involve a search of the records of numerous offices of the Department, and that the systems by which records or files

are kept might not enable Department officials to know where all the records sought may be located. If that is so, several of the requests might not have "reasonably described" the records sought. Contrarily, some aspects of the request might be sufficiently detailed to permit the Department to respond appropriately.

It is suggested that you might want to review your request for the purpose of preparing a revised request that better identifies the records that you are seeking. In such a revision, you might consider identification of locations of records by unit or office within the Department, limitations of time periods regarding the initial dates of preparation of records, and similar additional information that might enable the Department 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

Robert J. Freeman

RJF:ew

cc: Mr. Everett W. Jones, Superintendent
Ms. Judith LaPook, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3346

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

May 22, 1984

Ms. Alfreda W. Slominski
[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. Slominski:

I have received your letter of May 9, as well as the materials attached to it. Once again, your comments concern responses to requests made under the Freedom of Information Law by officials of the Town of Holland.

Attached to your letter are copies of two responses to appeals. One of the appeals pertains to a denial of a request for complaints made to the Zoning Enforcement Officer. In terms of background, §9 of the Town's Zoning Ordinance makes specific reference to a monthly report that must be filed by the Zoning Officer with the Town Board. The cited provision states in part that:

> "Said report shall cite all actions taken by the Zoning Officer including all referrals made by him; all permits and certificates issued and denied; and all complaints of violations received and all violations found by him, and the action taken by him consequent thereon."

As such, the monthly report is required to "cite" the activities of the Zoning Officer as well as complaints and violations. The response on appeal indicates that action taken and results of the actions involving the Zoning Officer "are in the docket books" of the Town Justice Court.

Further, the complaints were denied on the basis of §87 (2)(e) of the Freedom of Information Law.

From my perspective, the response is inappropriate for several reasons.

First, the response appears to be based upon an assumption that every complaint results in action taken and that every action is referenced in the docket books at the Justice Court. I would conjecture, however, that not every complaint results in a charge or a finding of a violation. It is likely in my view that in many instances complaints may be unfounded and may not result in further action; in others, complaints might result in corrective action taken without the necessity of initiating a proceeding in Justice Court. Consequently, in my opinion, the response to the request is incomplete.

Second, the portion of the zoning ordinance quoted above requires that various types of specific information be made available to the Town Board by means of a monthly report. Once again, although monthly reports are made available in conjunction with minutes of meetings of the Town Board, it appears that they, too, are incomplete, for they do not contain all of the information required to be submitted by the Zoning Officer pursuant to the ordinance. As such, the issue in part involves compliance not only with the Freedom of Information Law, but also with a local law established by the Town.

Third, in one of the initial decisions rendered under the Freedom of Information Law, it was contended that records prepared by a town building department regarding enforcement of the building code were exempted from disclosure on the ground that they constituted "part of investigatory files compiled for law enforcement purposes" [Young v. Town of Huntington, 388 NYS 2d 978 (1976)]. That language was reflective of one of the exemptions from disclosure appearing in the original Freedom of Information Law as enacted in 1974. Nevertheless, it was found that the records in question fell outside the scope of that exemption, for the records of a building inspector could not be characterized as investigatory files compiled for law enforcement purposes.

The analogous exception in the current Freedom of Information Law, §87(2)(e), states that an agency may withhold records that:

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

From my perspective, if the records could not be considered exempted from disclosure under the original Freedom of Information Law, the current Freedom of Information Law, which was intended to broaden and clarify rights of access, could not be cited to withhold the same records now. Moreover, the specific exception cited in response to your appeal, §87(2)(e)(iii), pertains to the capacity to withhold records compiled for law enforcement purposes which if disclosed would "identify a confidential source or disclose confidential information relating to a criminal investigation" (emphasis added). I do not believe that the Zoning Enforcement Officer prepares records in conjunction with criminal investigations. Further, the Court in Young, supra, specified that violations of zoning ordinances enforceable by a building inspector "are offenses and not crimes". As such, I do not believe that the provision cited in the response to your appeal is appropriate.

Fourth, 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.

The remaining area of inquiry concerns your request for a zoning map, which was filed in the Town Clerk's office pursuant to an ordinance adopted in April of 1973. Although a copy of a map was made available, it exists on such a small scale that much of it cannot be read.

Although the small map was included, the Clerk wrote that there is "no zoning map available". In this regard, as you indicated, a town cannot dispose of records at will, but only in conjunction with §65-b of the Public Officers Law. That provision states in brief that a unit of local government, such as a town, cannot destroy or dispose of records without the consent of the Commissioner of Education. In turn, the Commissioner has adopted detailed schedules containing minimum retention periods relative to particular records. Records must be kept, at a minimum, for the periods specified in the retention schedules. It would appear that the zoning map that you request could not have properly been destroyed. In addition, §89(3) of the Freedom of Information Law states that, on request, an agency "shall certify that it does not have possession" of a record requested "or that such record cannot be found after diligent search." It is suggested that you request such a certification from 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

cc: Town Board
Town Clerk
Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3347

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

May 22, 1984

Mr. Constantin-Horia Nicolau, Esq.
[redacted]

Dear Mr. Nicolau:

I have received your letter of May 8, in which you again described a series of difficulties that you have faced regarding agencies of state and local government.

Under the circumstances I do not believe that I can provide direction in addition to that given to you in a letter of April 23. You did indicate, however, that you could not appeal a denial of a request directed to "the County of Westchester Department of Public Safety Services - Police Division Warrant Squad, Hawthorne, NY. . ." because you are unaware of the identity of the person to whom an appeal should be directed.

In this regard, I have made inquiries on your behalf. I was informed that you may appeal to the County Attorney, whose address is County Office Building#1, White Plains, NY 10601.

For future reference, it is reiterated that an initial denial must be made in writing [see Freedom of Information Law, §89(3)] and inform the person denied of the right to appeal, as well as the name, title and address of the person to whom an appeal may be sent. Further, §89(4)(a) of the Freedom of Information Law provides that a person may appeal within thirty days of a denial. The appeals officer, within seven business days of the receipt of an appeal, must "fully explain in writing the reasons for further denial, or provide access to the record 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3348

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

May 22, 1984

Mr. Clifford Berchman
82A4163
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. Berchman:

I have received your letter of May 9 in which you requested a copy of a "Governor's Warrant" or information describing the manner in which you might obtain a copy of such a warrant.

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

First, under the circumstances, I contacted the Governor's office on your behalf to determine whether it maintains possession of the warrant which you are interested. I was informed that the Governor's office does not possess the warrant.

Second, it was suggested that there may be two other offices that maintain the record. Specifically, the warrant would likely be in possession of either the District Attorney or the court in which the proceeding was conducted, or both.

Third, it is noted that the office of a District Attorney is an "agency" required to comply with the Freedom of Information Law. Further, §89(3) of the Law requires that a request "reasonably describe" the record sought. Therefore, when directing a request to the District Attorney, it is suggested that you provide as much

detail as possible, including identification, index or indictment numbers, dates, descriptions of events, and similar information that might enable agency officials to locate the record sought.

Lastly, although the courts and court records are not subject to the Freedom of Information Law, many records in possession of a court clerk are nonetheless available under various provisions of law, such as §255 of the Judiciary Law. Consequently, a request might also be sent to the clerk of the court, again providing as much detail as possible to enable the clerk to locate the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3349

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

May 22, 1984

Ms. Karen Alu
[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, except as otherwise indicated.

Dear Ms. Alu:

I have received your letter of May 9, which pertains to a request made under the Freedom of Information Law for records of the Elwood Union Free School District. Although you informed me by telephone that the records were made available, the process under which the records were given to you raise issues concerning the implementation of the Freedom of Information Law by the District.

In terms of background, you requested three items from the District, including the adminstrators' contract, the payroll record, and the contract between the District and the Superintendent of Schools, Dr. Laria. The first two items were made available in a timely manner. You were informed, however, that the Superintendent's contract "could only be obtained through Dr. Laria or Mr. Michael Green who is the President of the School Board". You apparently requested the contract from the Superintendent without success on several occasions. Further, when you reminded him that five business days had elapsed since the receipt of your request, you wrote that you were "bluntly told 'So, sue me'" by the Superintendent. You later contacted this office to indicate that the contract was made available by the Superintendent after a meeting of the Board of Education.

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

First, §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) of the Law requires the governing body of a public corporation, in this instance, the Board of Education, to adopt regulations consistent with the Law and regulations of the Committee.

One of the aspects of the regulations, §1401.2, deals with the designation of one or more records access officers. A records access officer would be responsible for coordinating an agency's response to requests and, generally, for making initial determinations to grant or deny access. In the event of a written denial of a request, or a denial due to a failure to respond within the requisite time, §1401.7 of the regulations requires that the governing body must designate a person or body to whom an appeal may be directed.

In short, the Freedom of Information Law requires that appropriate procedures be adopted in order that the Law may be implemented in a routine or regularized manner.

Second, with respect to rights of access, 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.

On other occasions, two grounds for denial have been suggested as possible bases for withholding a superintendent's contract. However, for the reasons offered below, I believe that such a contract is available, for neither of the grounds could in my view appropriately be cited.

Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Nevertheless, in my view, while a contract might identify a particular individual, the courts have held on several occasions that 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 in essence 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 un-

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 opinion 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 that has been raised is §87(2)(c), which enables an agency to withhold records that:

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

There is a decision rendered by the state's highest court, the Court of Appeals, which in my opinion indicates that the terms of contracts that are in effect would not if disclosed "impair" collective bargaining negotiations. Specifically, Doolan v. BOCES [48 NY 2d 341 (1979)] dealt with a situation in which an applicant requested data involving salaries and fringe benefits of teachers and administrators employed by several school districts. The court found that the agency could not meet its burden of proving that the records sought would impair present or imminent collective bargaining negotiations.

Further, as a general matter, I believe that any contract into which a unit of government enters must be made available to the public once it has been approved.

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 or in equity of any party to records."

Here I direct your attention to §2116 of the Education Law, which states:

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

In view of the language quoted above as well as the judicial interpretation of the Freedom of Information Law, I believe that the contract of the Superintendent of the District must be made available.

Enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee to which reference was made earlier, and model regulations designed to enable agencies to devise their own procedures. Copies of the same materials and this opinion will be sent to Dr. Laria and Mr. Green in an effort to enhance compliance with the Freedom of Information Law in the future.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Dr. Michael Green, President, Board of Education
Dr. Joseph Laria, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3350

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

May 22, 1984

Ms. Sandy Neil Silver
[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. Silver:

I have received your letter of May 10 in which you requested assistance in relation to your capacity to review the contents of an examination.

Specifically, you wrote that, as a vocational rehabilitation counselor, you took a certification examination in 1983. The test is prepared by the Commission on Rehabilitation Counselor Certification, which is an independent organization located in Chicago. Having failed the exam by a point, you questioned what recourse might be available to you. Other than a "hand scoring" of the exam, no additional avenues were suggested or made available to you.

It is your contention that you should be permitted to review the questions that may have been answered incorrectly. Nevertheless, the director of the Commission indicated that disclosure of an examination or its questions would result in an increase in the cost of administering the exam due to the necessity of developing new questions whenever the exam is given.

Further, having contacted your assemblyman, you were told that state and county civil service examinations are available under the Freedom of Information Law. It is your belief that similar rights of access should exist with respect to the examination in question.

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

First, the Freedom of Information Law is applicable to records of an "agency", which is defined in §86(3) of the Law to mean:

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

Based upon the language quoted above, the Freedom of Information Law is applicable to units of state and local government in New York. In my view, it does not apply to records of a private organization, such as the Commission.

Second, although the Freedom of Information Law is based upon a presumption of access and grants broad rights of access to records of government, one of the exceptions pertains to examination questions and answers. Section 87 (2)(h) 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, if an examination question is to be used in the future, neither the question nor the answer is required to be made available under the Freedom of Information Law. It is noted, too, that the rationale for the exception is similar to that expressed by the director of the Commission. In brief, if examination questions and answers are accessible, new examinations with new questions would have to be prepared on an ongoing basis at substantial cost to the state and units of local government that administer examinations.

There is also a "Truth-in-Testing" Law which grants rights of access to certain standardized tests. However, the tests that must be made available pursuant to that law

are those "designated for use or used in the process of selection for post-secondary or professional school admissions" (see Education Law, §340). As such, rights granted by the Truth in Testing Law would not apply to the test that is subject of your inquiry.

In sum, it appears that there is no state law that deals specifically with access to the contents of the examination. Therefore, although your contentions are appreciated, I do not believe that you have a right to review your exam or the questions that may have been answered incorrectly.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3351

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

May 23, 1984

Mr. Robert Rankel
Collins Correctional Facility
83A8031
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. Rankel:

I have received your letter of May 12 in which you requested assistance in obtaining a copy of a "probation report".

According to your letter, you requested a copy of the report from the Department of Correctional Services. However, the report was denied. It is apparently your belief that the report contains erroneous information. Consequently, you would like to have an opportunity to correct it.

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

First, if the record in which you are interested consists of a presentence report, I believe that the response by the Department of Correctional Services was appropriate. Section 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 or amended 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 depart-

ment, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court".

Subdivision (2) of §390.50 states in part that:

"[N]ot less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination the prosecutor shall also be permitted to examine the report or memoranda. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other protion thereof, disclosure of which would not be in the interest of justice".

Second, in terms of the relationship between the quoted provisions 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.

It is suggested that you might want to discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1029
FOIL-AO-3352

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

May 23, 1984

Mr. James C. Mescall
[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. Mescall:

I have received your letter of May 11, as well as the materials attached to it.

You wrote that you recently directed a request to the Office of Court Administration for records related to your job performance as court officer. In response to your request, John Eiseman, Deputy Counsel, indicated that the records pertaining to you constituted intra-agency materials that are deniable. He stated further that there are no documents pertaining to incidents that "were received from outside sources". You have asked "what reasons are good enough" for the Office of Court Administration to withhold information that you need in conjunction with the proceeding before the Division of Human Rights. It is your contention that "they had to use outside sources" during an investigation prior to a determination regarding your employment. As such, you have asked whether you may "ask to have copies of the investigation that the Applicant Verification Unit" performs. The third question is whether an "evaluation panel" falls within the scope of the Open Meetings Law and whether you may request minutes or records of its meetings.

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

First, it is emphasized that 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 prepare or create a record in response to a request. Consequently, I do not believe that the Freedom of Information Law may be used as a vehicle for seeking information that does not exist in the form of a record or records. Further, although you could request records pertaining to an investigation, if no such records are in possession of the Office of Court Administration, the Freedom of Information Law would not in my view apply.

Second, with respect to the denial itself, Mr. Eiseman alluded to the exception found in §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. 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. However, the cited provision permits an agency to withhold inter-agency or intra-agency materials reflective of advice, recommendation, suggestion, opinion, and the like. Assuming that the records withheld involve the type of commentary described in the preceding sentence, it would appear that the denial was appropriate.

Lastly, I am unfamiliar with the nature or membership of the "evaluation panel". I would like to point out that the Open Meetings Law is applicable to meetings of public bodies and that §97(2) of that statute defines "public body" to mean:

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

Without additional information regarding the nature of the evaluation panel, I could not conjecture as to the application of the Open Meetings Law.

Nevertheless, even if the panel is considered a "public body", its deliberations regarding the qualifications of prospective employees could in my view clearly be conducted during a closed or "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..."

Further, if action is taken during an executive session, minutes reflective of the nature of the action must be prepared in the form of minutes. However, §101(2) of the Open Meetings Law states that:

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

I would also like to point out that, in a somewhat similar situation it was found that documents prepared by an advisory hearing panel did not constitute final agency determinations or policy but rather were "pre-decisional materials prepared to assist an agency decision-maker, and therefore were exempt from disclosure" [see McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion)].

In sum, it would appear that the response forwarded to you by Mr. Eiseman was consistent with the Freedom of Information Law. It is suggested that you discuss the matter with the Division of Human Rights.

I hope that I 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 Eiseman

FOML-AO-1030
FOIL-AO-3353

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

May 23, 1984

Ms. Judy Braiman-Lipson
Empire State Comsumer
Associates, Inc.
345 Clover Hills Drive
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 Ms. Braiman-Lipson

I have received your letter of May 11 in which you asked that I comment with respect to a series of issues raised in your letter.

According to your letter, on May 8 you contacted Mr. William Leo of the Rochester City School District to arrange an appointment for May 11 at noon "to view the District's asbestos file". During the conversation, you informed Mr. Leo of your desire to review the District's file on the subject including "yearly survey reports, bulk sample reports, all correspondence regarding asbestos, all copies of notices which need to be posted in school buildings containing friable asbestos".

On the day of your appointment, District officials reviewed your request, stating that its characterization as an "asbestos file" was "too general" and that the phrase "could mean anything". You also wrote that the records access officer "refused" to provide a list of categories of the District's files, that she refused to prepare a written denial, and that she went to lunch despite the appointment to meet at noon. You also added that, at a meeting, school officials refused to answer questions regarding the asbestos file and informed you that "the District sets their own policies on how the Freedom of Information Law should be handled".

In conjunction with the facts as you described them as well as the materials attached to your letter, I would like to offer the following comments.

First, it is noted that §89(3) of the Freedom of Information Law requires that an applicant submit a request that "reasonably describes" the records sought. In a recent decision rendered by the Court of Appeals, the state's highest court, it was found that the standard that records be "reasonably described" means that the request should be made in such a way that the "agency may locate the records in question" [see Farbman v. NYC Health and Hospitals Corporation, __NY2d__ (1984)]. Under the circumstances, in view of the nature of your request of April 27 and the ensuing conversation concerning the request, as well as a news release issued by the Board of Education on May 7 which refers to an "asbestos file", it would appear that you met the burden of reasonably describing the records sought.

Moreover, in describing the duties of a designated records access officer, the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, state that the records access officer is responsible for assuring that agency personnel "assist the requestor in identifying the records, if necessary" [see regulations, §1401.2(b)(2)]. Consequently, I believe that the agency bears some of the burden of attempting to help in identifying the records sought.

A second issue involves a refusal to provide a list of categories of the District's files. I assume that you are referring to the "subject matter list". Section 87(3)(c) of the Freedom of Information Law requires that each agency shall maintain:

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

In addition, §1401.6(b) of the regulations promulgated by the Committee states that:

> "[T]he subject matter list shall be sufficiently detailed to permit identification of the category of the record sought."

Third, with respect to the refusal to prepare a written denial, §89(3) of the Freedom of Information Law requires that a denial of a request must be made in writing. Section 1401.7(b) of the regulations requires that the reasons for denial be stated in writing and that the person denied must be informed of the identity of the person to whom an appeal may be directed.

Fourth, with respect to the action of the access officer, who went to lunch despite your appointment, all that I can suggest is that, if indeed an appointment was made, presumably there would be a responsibility on the part of both parties to adhere to an agreement to meet.

Fifth, in terms of the time limits for response to a request, the Freedom of Information Law and the regulations promulgated by the Committee refer to prescribed periods during which an agency must respond.

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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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)].

Sixth, you indicated that school officials refused to answer your questions at a meeting. If you are referring to a meeting of the School Board or a committee of the Board, I would like to point out that the Open Meetings Law

is silent with respect to public participation. In brief, the Open Meetings Law provides any member of the public with the right to attend and listen to the deliberations of a public body. However, there is nothing in the Open Meetings Law that confers a right upon a member of the public to speak or ask questions at a meeting.

Lastly, you wrote that District officials provided a copy of the form required to request records under the Freedom of Information Law and informed you that the District sets its own policies regarding "the manner in which the Freedom of Information Law should be handled".

I would like to point out in this regard that §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) of the Law requires each agency, in this instance, the Board of Education, to adopt regulations in conformity with the Law and consistent with the Committee's regulations. Consequently, I believe that the "handling" of the Freedom of Information Law must be performed in a manner consistent with the statute as well as the regulations of the Committee.

Further, having reviewed the District's form used for requesting records that is attached to your letter, I believe that the form is out of date. The section of the form dealing with the capacity to deny refers to provisions of the Freedom of Information Law that appeared as the Law was initially enacted in 1974. However, the original statute was repealed in 1978 by the current Freedom of Information Law.

In addition, there is nothing in the Freedom of Information Law that refers to any particular form that must be used when making a request. Therefore, it has been consistently advised that a failure to complete a form prescribed by an agency cannot be considered a valid basis for delaying or denying access. On the contrary, any request made in writing that "reasonably describes" the records sought should in my view be sufficient.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Eleanor Peck, Records Access Officer
William G. Leo, Assistant Superintendent
for Business Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AL-3
FOIL-AO-3354

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

May 24, 1984

Mr. Robert I. Williamson
County Attorney
Tompkins County
County Court House
Ithaca, NY 14850

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. Williamson:

I have received your letter of May 10 in which you requested an advisory opinion under the Freedom of Information Law. Your continuing interest in complying with the Law is much appreciated.

In your letter, you referred to §89(2)(a) and (b) of the Freedom of Information Law pertaining to unwarranted invasions of personal privacy. Specific reference was made to §89(2)(b)(i) which states that an unwarranted invasion of personal privacy includes:

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

In this regard, you have raised three questions.

The first is whether the language quoted above prohibits Tompkins County from releasing information that may be characterized as an unwarranted invasion of personal privacy. From my perspective, the Freedom of Information Law is permissive. Section 87(2) of the Law requires that all records of an agency must be made available, "except that such agency may deny access to records or portions thereof that..." fall within one or more of the ensuing grounds for denial (emphasis added). Consequently, it is my view that an agency may withhold records falling within the scope of the grounds for denial, including §87(2)(b), which permits the withholding of records which:

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

Nevertheless, the Law does not in my opinion require that records falling with a ground for denial must be withheld. In my view, the only instances in which an agency would be prohibited from disclosing records would involve those situations in which a statute specifically provides such direction. In those cases, the records would be exempted from disclosure by statute and would fall within the provisions of §87(2)(a).

The second question is whether §89(2)(b)(i) permits the County to withhold records falling within the scope of the cited provision. In short, assuming that disclosure would indeed result in an unwarranted invasion of personal privacy, to that extent, the provision permits the withholding of records.

Your last question involves Article 6-A of the Public Officers Law, the Personal Privacy Protection Law, which becomes effective on September 1, 1984. Specifically, you have asked whether, upon the effective date of the new law, the County will be prohibited from releasing records the disclosure of which would constitute an unwarranted invasion of personal privacy.

In this regard, it is emphasized that the Personal Privacy Protection Law will be applicable only to records in possession of state agencies. For the purpose of that statute, §92(1) defines "agency" to mean:

> "...any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of the district attorneys."

As such, the Personal Privacy Protection Law will not be applicable to units of local government.

I would like to point out that on September 1, an amendment to the Freedom of Information Law will also go into effect. A new §89(2)-a will provide that:

> "[N]othing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter.

The last clause of the language quoted above involves §96 of the Public Officers Law. As in the case of the remainder of the Personal Privacy Protection Law, §96 will apply only to an agency subject to that statute. Consequently, while state agencies subject to the Personal Privacy Protection Law will be prohibited from releasing records when disclosure would constitute an unwarranted invasion of personal privacy, that provision will not apply to units of local government. Stated differently, a state agency required to comply with the Personal Privacy Protection Law will be obliged to withhold records when disclosure would constitute an unwarranted invasion of personal privacy. However, units of local government will continue to operate under the permissive provisions of the Freedom of Information Law which enable but not require an agency to withhold records when disclosure would constitute an unwarranted invasion of personal privacy.

It is noted that I have discussed the matter with the drafters of the legislation, who indicated that the intent was to avoid any application of the Personal Privacy Protection Law to municipal government. Therefore, once again, the new "prohibition" found within §89(2)-a of the Freedom of Information Law will not in my view apply to units of local government, such as Tompkins 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3355

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

May 24, 1984

Ms. Barbara Bernstein
New York Civil Liberties
Union
Nassau Chapter
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 Ms. Bernstein:

I have received your letter of May 17 as well as the correspondence attached to it.

According to your letter, the Nassau County Chapter of the New York Civil Liberties Union has been engaged in a survey of fire department by-laws to determine whether they may be "facially descriminatory". As such, you have requested by-laws under the Freedom of Information Law from fire districts and fire companies.

One department, the North Merrick Fire Department, has indicated that its regular business hours are "from 10 to 12 any Sunday morning or 8 to midnight on the second Tuesday of any month". Further, you were informed that you would be required to go to the District office to seek the records. Based upon that response, you wrote that "it is bad enough having to travel all over Nassau County to have to photocopy a page or two of a booklet that could easily be mailed in a business envelope, but to be restricted to Sunday mornings or one night a month makes it impossible to gain the information we need". In addition, the attorney for the District, Mr. Raymond F. Concannon, indicated that the "charge for copying is now fifty cents per page".

You have requested an advisory opinion concerning the situation. In this regard, I would like to offer the following comments.

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations regarding the procedural implementation of the Law. In turn, each agency, including the Board of Commissioners of a Fire District, is required under §87(1) of the Freedom of Information Law to adopt regulations in conformity with the Law and consistent with the Committee's regulations.

Second, §1401.4 of the regulations promulgated by the Committee deals specifically with the hours during which records may be requested and reviewed for inspection and copying. The cited provision states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily or 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, two hours on a Sunday morning and four hours on one Tuesday evening a month could hardly be characterized as "regular business hours".

Third, 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 therefore, 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 postage or who includes a stamped, self addressed envelope should be able to receive copies of records by mail.

In my view, rights of access granted by the Freedom of Information Law could not justifiably be diminished by requiring an individual to travel a substantial distance to inspect or request copies of records. Since the provisions of the Freedom of Information Law cited above clearly require an agency to produce copies of accessible records upon payment of or offer to pay the appropriate fees,a refusal to mail copies to an applicant upon receipt of those fees would in my view constitute a constructive denial of access.

Fourth, with respect to fees, the regulations required to be promulgated under §87(1) of the Freedom of Information Law indicate that they must refer to:

> "[t]he 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 Freedom of Information Law, §87(1)(b)(iii)].

Under the circumstances, I do not believe that there is a statute other than the Freedom of Information Law that prescribes a fee in excess of twenty-five cents per photocopy. Consequently, in my opinion, the Fire District could not charge more than twenty-five cents per photocopy.

Lastly, the correspondence indicates that you have made a series of requests and that, as yet, the records have not been made available. In this regard, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee prescribe time limits for response to requests.

Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days in necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within

five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 NY2d 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:ew

cc: Mr. Raymond F. Concannon, Attorney at Law
Mr. William Dunker, Secretary,
Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3356

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

May 29, 1984

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 May 17 and the materials attached to it.

You have requested that I act with respect to an unanswered request made under the Freedom of Information Law sent to the New York City Department of Environmental Protection. Specifically, you sent a request dated April 23. Since there was no response, you appealed to the Commissioner on May 7. As of the date of your letter to this office, the appeal remained unanswered.

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

First, as you are aware, the authority of the Committee on Open Government is advisory. Stated differently, this office does not have the capacity to compel an agency to grant or deny access to records. However, in an effort to assist you, a copy of this opinion will be sent to Commissioner McDough.

Second, having reviewed your request, there may be aspects of the information sought that do not exist in the form of a record or records. Further, §89(3) of the Freedom of Information Law states that, as a general rule, an agency is not obliged to create or prepare a record in response to a request.

Third, 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 form 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: Commissioner McDough

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3357

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

May 31, 1984

Mr. Harvey M. Elentuck
Teacher of Mathematics
[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 a copy of your letter of May 19 addressed to John R. Nolan, Secretary to the New York City Board of Education.

In your handwritten comments, you asked whether there is anything further that I might do in relation to various requests that you have made over the course of years.

Under the circumstances, since numerous advisory opinions and other materials have been sent to you on an ongoing basis, I do not believe that I can offer additional assistance relative to your efforts in obtaining records.

Nevertheless, I would like to offer the following brief comments.

I have enclosed a copy of a recent decision of the Court of Appeals, Kheel v. Ravitch. The case involved a request for a memorandum prepared by the staff of an agency containing an evaluation and opinion of the performance of the person who requested the memorandum. The Court found that the memorandum represented neither final agency policy nor a final determination. As such, it was found to be deniable under §87(2)(g) of the Freedom of Information Law concerning inter-agency and intra-agency materials. The decision might have a bearing upon some of your requests and your reliance upon Blecher v. NYC Board of Education, (Sup. Ct., Kings Cty., NYLJ, October 25, 1979). In addition, as I have suggested in the past,

Blecher may be inconsistent with McAulay v. Board of Education, [61 AD 2d 1048, aff'd, 48 NY 2d 659 (1979)].

Further, you have contended that a denial of a request must be based upon a ground for denial, as opposed to a statement that "these records are not maintained in such a manner that the information you seek can be provided". While I agree that a denial of access to records can be based only upon the grounds for denial listed in §87(2) of the Freedom of Information Law, Ms. Bernstein's response might not have constituted a denial. On the contrary, it may have indicated that the information sought could not be located due to the manner in which it is prepared or kept. As you are aware §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. If the agency connot locate the records sought, the applicant would not in my view have reasonably described the records. Perhaps that is the sense of Ms. Bernstein's response. If that is so, I do not believe that it could be characterized as a denial.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: John R. Nolan, Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3358

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

June 1, 1984

Mr. Robert W. Berry
[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. Berry:

I have received your letter of May 24 in which you requested assistance under the Freedom of Information Law.

According to your letter, you requested information regarding energy consumption at the Westchester County Medical Center. You indicated that you sought the information at the request of the Commissioner of Public Works for Westchester County. In response to your request, Mr. Moses Baskin, Assistant Director of the Medical Center, sent approximately two hundred pages of material which you returned, for it was in your opinion irrelevant. As such, you have requested advice.

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, and defines the term "record" broadly in §86(4) 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, to the extent that the information you are seeking exists in the form of a record or records, it would be subject to rights of access granted by the Freedom of Information Law.

Second, it is also noted that, as a general rule, an agency is not required to create or prepare a record in response to a request. Having reviewed the materials attached to your letter, it is possible that some of the information sought might not exist in the form of a record or records. To that extent, officials of the Medical Center would not be required to create new records on your behalf.

Third, §89(3) of the Law states that an applicant must request records "reasonably described". It has been held judicially that an applicant has met the burden of reasonably describing the records sought if the agency has the capacity to locate the records in question [see Farbman v. NYC Health and Hospitals Corp., 94 AD 2d 576, reversed __NY2d__ (1984)]. Moreover, the regulations promulgated by the Committee, which govern the procedural aspects of the Law, indicate that an agency's records access officer is responsible for assisting an applicant in identifying the records sought, if necessary [see attached regulations, §1401.2 (b)(2)]. Therefore, I believe that the burden of identifying the records sought rests, in part, with the agency.

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

Fifth, under the circumstances, to the extent that the records sought exist, it appears that they would be available. Bills, contracts, and similar records reflective of the expenditure of public monies are in my view clearly available. Further, the only ground for denial of possible significance would also, due to its structure, likely require that existing records be made available.

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. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

In addition to copies of the Freedom of Information Law and the Committee's regulations, enclosed is a booklet concerning 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:ew

Enc.

cc: Frank C. Bohlander, Commissioner
G. J. Clarke, Public Access Records Officer
Moses Baskin, Assistant Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3359

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

June 1, 1984

Mr. David J. Lynch
[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. Lynch:

I have received your letter of May 23, as well as the correspondence attached to it, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, on April 6, you submitted a request under the Freedom of Information Law to the Chief of Police of the City of Schenectady for the "criminal record" record of a named individual. Assistant Chief, Joseph Formosa, denied your request on April 12, stating that "arrest records of our Department are not subject to the Freedom of Information Law". He added that "arrest records are subject to authorized subpoenas". On April 27, you appealed to Mayor Johnson. As of the date of your letter to this office, no determination on appeal had been rendered.

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

First, although Assistant Chief Formosa wrote that arrest records are not subject to the Freedom of Information Law, it is my view that all records of an agency fall within the requirements of that statute. Section 86(4) of the Law defines "record" broadly to include:

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

As such, I believe that arrest records in possession of the Police Department are clearly "records" subject to rights of access [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); Washington Post Co. v. NYS Insurance Department, App. Div., 462 NYS 2d 208 (1983)].

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law. Therefore, the question involves the extent, if any, to which the records sought fall within one or more of the grounds for denial.

Third, in my opinion, there may be a distinction in terms of rights of access between records of an arrest as opposed to records of a conviction. If a person is charged with a criminal offense, and the charge is later dismissed in his or her favor, the records may be sealed pursuant to §160.50 of the Criminal Procedure Law. In such cases, the records are excepted from disclosure under §87(2)(a) of the Freedom of Information Law, which pertains to records that are "specifically exempted from disclosure by state or federal statute".

With respect to a record of a conviction in the nature of criminal history information, I do not believe that any ground for denial could justifiably be asserted. Although the record identifies a particular person, it could not in my opinion be withheld on the ground that disclosure would constitute an "unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], for a conviction would have occurred in open court. A second potential basis for withholding might involve a claim that a conviction record constitutes "intra-agency" material deniable under §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..."

From my perspective, a conviction record would be reflective of "factual" information accessible under §87(2)(g)(i). Moreover, in a case involving a request for lists of persons arrested for speeding and other traffic violations, it was held that §87(2)(g) could not be cited to withhold the records sought [see Johnson Newspaper Corp. v. Stainkamp, 94 AD 2d 825, modified __ NY 2d __ (1984)].

The remaining ground for denial of possible significance is §87(2)(e), which provides 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, it is questionable whether a conviction record in the form of criminal history information could be characterized as a record "compiled for law enforcement purposes".

Further, even if it is so considered, the harmful effects of disclosure described in §87(2)(e) would not in my view arise, for a conviction indicates that the investigation and the ensuing judicial proceeding, at least in terms of a trial court proceeding, have ended.

In sum, I believe that criminal history information indicative of convictions is accessible, but that records of arrests dismissed in favor of an accused are deniable pursuant to §160.50 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Formosa, Assistant Chief
Hon. Karen Johnson, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3360

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

June 1, 1984

Mr. Douglas E. Arters
The Post Journal
P.O. Box 226
Brocton, NY 14716-0226

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. Arters:

I have received your letter of May 25 in which you requested an advisory opinion under the Freedom of Information Law regarding rights of access to records of the Brocton Central School District.

According to your letter, the District officials:

> "...will now release (and possibly only elaborate on) only information that has been specifically dealt with at an official school board meeting. Several days ago, [you] sought additional information about the payment to be made to an architect on a state-funded project at the school - all taxpayers' money of course. They did say the architect would receive 12% of the contract costs, adding that the figure was not to exceed a certain amount. They indicated that the specific figure was not to be published in the newspaper because it had not been brought up at the school board meeting."

Your question is whether "this kind of thinking" is "in conformity with the intent and purpose of the Freedom of Information Act?"

In my opinion, the stance of District officials is inconsistent with both the spirit and the letter of the Freedom of Information Law for the following reasons.

First, the Freedom of Information Law is applicable to all records of an agency, including a school district. Of significance is §86(4) of the Law, which defines "record" to include:

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

In view of the breadth of the provision quoted above, the Court of Appeals, the state's highest court, has found that its scope is as expansive as its specific language, stating 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" [Westchester News v. Kimball, 50 NY 2d 575, 581 (1980)]. Therefore, in my view, documents "kept, held, filed, produced or reproduced by, with or for" the District are "records" subject to rights of access granted by the Freedom of Information Law, whether or not they are "dealt with" at a school board meeting.

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 the particular records to which you alluded, records reflective of the expenditure of public monies, such as books of account, contracts, checks and similar materials, are in my opinion clearly available to any person.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory booklet on the subject that may be useful to you. Copies of those materials and this opinion will be sent to the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3361

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

June 4, 1984

[redacted]
81-G-0157
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. Shydlinski:

I have received your recent letter in which you requested assistance.

You are apparently interested in obtaining information from a psychiatric center pertaining to your sons.

Although you have not provided enough detail to enable me to supply you with a clear response. I would like to offer the following comments.

First, the Freedom of Information Law is applicable to records of an "agency" which is defined in §86(3) of the Law to mean:

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

As such, if the psychiatric center is a part of a unit of state or local government, records would be subject to whatever rights of access might exist under the Freedom of Information Law. On the other hand, if the center is a private facility, the Freedom of Information Law would not in my opinion apply.

Second, assuming that the center and its records are subject to the Freedom of Information Law, it is noted that the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Third, one of the grounds for denial, §87(2)(b), permits an agency to withhold records that:

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

In turn, §89(2)(b) states that an unwarranted invasion of personal privacy includes:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

Based upon your letter, your legal relationship with your sons is unclear. Therefore, it is possible medical or similar records might be denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Another 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." Without knowing the nature of the center, I could not advise you as to other provisions of law that might apply to records pertaining to your sons. However, several statutes that may be relevant require the confidentiality of particular records. For example, §33.13 requires the confidentiality of patient records kept by state mental hygiene facilities; medical records may also be confidential under §2803-c and §2805-g of the Public Health Law; similarly records pertaining to children described in §372 of the Social Services Law are generally confidential.

In short, there may be several provisions of law that might pertain to rights of access to the records you are seeking. Without additional information, I regret that I cannot provide more specific direction.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3362

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

June 4, 1984

Mr. Herbert Thomas
79-A-1632
Greenhaven Correctional Facility
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. Thomas:

I have received your letter of May 25 in which you requested information regarding the Freedom of Information Law.

According to your letter, you are interested in obtaining records regarding your criminal history and fingerprints from either the Division of Criminal Justice Services or the New York City Police Department.

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 teh 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, there are other provisions of law that deal with criminal history information as well as fingerprinting such as Article 160 of the Criminal Procedure Law, §873 of the Executive Law, which involves the duties of the Division of Criminal Justice Services, and regulations promulgated by the Division. However, I am unaware of any provision of a statute that would specifically prohibit you from obtaining the records in which you are interested.

It is noted that the Freedom of Information Law enables an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b) and §89(2)].

While I believe that a request for fingerprints pertaining to you made by a third party could be denied on the ground that disclosure would result in an unwarranted invasion of personal privacy, I do not believe that such a ground for denial would exist if you seek records pertaining to yourself. Moreover, §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...
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

As such, it would appear that if you provide reasonable proof of identity, the records in question should be made available to you by either the Division of Criminal Justice Services or the New York City Police Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3363

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

June 4, 1984

Mr. Vincent McCann
78-AO-378
Drawer B
Greenhaven Correctional Facility
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. McCann:

I have received your letter of May 29, as well as the materials attached to it.

According to your letter, you requested a record, a letter prepared by your wife, from a senior parole officer, who failed to respond. The letter is apparently related to a divorce proceeding. Consequently, you have requested advice.

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

First, it is unclear on the basis of your correspondence as to which agency maintains the record in which you are interested. It appears that the record may be in possession of your facility, which is an entity of the Department of Correctional Services. However, it is possible that the letter might be in possession of the Department of Parole. In either case, pursuant to the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, each agency is required to have a designated "records access officer" responsible for answering requests. Therefore, it is suggested that a request be directed to the "records access officer" of the agency that you believe maintains the letter in question. It is noted that the regulations adopted under the Freedom of Information Law by the Department of Correctional Services indicate that the facility superintendent is the records access officer regarding records kept at a facility.

Second, for future reference, it is noted that the Freedom of Information Law and the Committee's regulations contain prescribed time limits for responses to requests.

Section 89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, although the Freedom of Information Law is based upon a presumption of access, records or portions thereof may be withheld in conjunction with the grounds for denial listed in §87(2) of the Law. One of the grounds for denial pertains to "unwarranted invasions of personal privacy". Under the circumstances, it is possible that there may be privacy considerations involving the person who sent the letter that you are seeking, your wife. Neverthe-

less, the capacity to assert a ground for denial involving the protection of privacy [see §87(2)(b) and §89(2)(b) of the Freedom of Information Law] would be based upon the nature and contents of 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3364

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

June 5, 1984

Mr. Robert Cardew
82-C-739
Clinton Correctional Facility
Box B
Dannemora, NY 12929

Dear Mr. Cardew:

I have received your letter of May 29 and the correspondence attached to it.

According to the materials, on March 20, you requested from the State Commission of Correction a copy of a report entitled "Attica '83--A Report on the Inmate Strike and Operations of the Attica Correctional Facility". On May 8, Ward DeWitt, executive director of the Commission indicated that the report is being reviewed and that you would be advised of its "availability within the next ten days". As of the date of your letter to this office, no further response has been received.

I have contacted the Commission of Correction on your behalf in order to obtain information regarding the status of your request. In this regard, I was informed that the report is being reviewed for the purpose of determining which portions may justifiably be withheld under the Freedom of Information Law.

I would like to point out that, although the Freedom of Information Law is based upon a presumption of access, records may be withheld to the extent that one or more grounds for denial listed in §87(2) might apply. I was told that some aspects of the report might if disclosed compromise security or endanger the life or safety of individuals. Nevertheless, based upon my conversation, a copy of the accessible portions of the report will be made available to you upon completion of the 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3365

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

June 5, 1984

Mr. J.H. White
1018 9th Avenue
Suite 205
Seattle, WA 98104

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. White:

Your letter addressed to Robert Abrams, Attorney General of New York, has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the New York Freedom of Information Law.

You wrote that you are interested in compiling "lists of new business licenses issued" in New York. In this regard, I would like to offer the following comments.

First, it is noted that there are approximately eleven hundred licenses that may be sought in order to do business.

Second, enclosed are copies of the Freedom of Information Law and an explanatory brochure that may be useful to you. In brief, like the federal Freedom of Information Act, the State 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, you asked for a copy of "official request forms". Please note that there is no official form required to be completed when making a request. Section 89(3) of the Law merely requires that a written request "reasonably describe" the records sought.

Lastly, enclosed is a copy of the Committee's latest annual report which, among other items of information includes summaries of judicial determinations rendered 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3366

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

June 7, 1984

Mr. Thomas Johnson
82-A-3224
Box 338
Napanoch, NY 12458

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. Johnson:

I have received both of your letters of May 31 in which you requested assistance regarding the Freedom of Information Law.

According to one of the letters and the correspondence attached to it, you submitted a request on April 26 to two named police officers assigned to different precincts of the New York City Police Department. After citing the docket and indictment numbers, you requested "any and all materials, data, facts, findings, discoveries, and revelations known to you and law enforcement authorities prior to the commencement of trial May 26, 1981 to June 1, 1981". It appears that, as of the date of the letter to this office, there had been no response to your request.

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

It is noted that the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law [see Freedom of Information Law, §89(1)(b)(iii)]. In turn, §87(1) of the Law requires that each agency adopt regulations in conformity with the Law and consistent with those of the Committee. An aspect of the regulations involves the designation of the "records access officer" who is responsible for coordinating an agency's response to requests for records made under the Freedom of Information Law.

I would conjecture that neither of the police officers to which your request was addressed is designated as records access officer. Moreover, since they work in different precincts, it is unlikely that either would have all of the records that you requested.

In view of the foregoing, it is suggested that you resubmit a request to the Records Access Officer, New York City Police Department, One Police Plaza, New York, New York 10038.

Second, it is noted that §89(3) of the Law requires that an applicant "reasonably describe" the records sought. Although it is possible that your request might have reasonably described the records, perhaps additional detail would enable agency officials to locate and evaluate the records sought with greater efficiency.

Your second letter deals with a request for records directed to your attorneys. Once again, it appears that the attorneys failed to respond to your request. Please note that the Freedom of Information Law is applicable 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."

Assuming that your attorneys are not officials or representatives of an agency subject to the Freedom of Information Law, the Freedom of Information Law would not be applicable to records in their possession.

Lastly, in both of your letters, you sought to appeal. In this regard, the Committee on Open Government is authorized to provide advice under the Freedom of Information Law. The Committee does not have the authority to render determinations on appeal. In the event of a denial of access to records by an agency, §89(4)(a) 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, determinations on appeal are not rendered by this office but rather by the head or governing body of an agency, or a person designated to render such determinations on their 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3367

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

June 8, 1984

Ms. Patricia Brunsman
Nanuet Public Library
149 Church Street
Nanuet, NY 10954

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. Brunsman:

I have received your letter of June 4, which pertains to the Freedom of Information Law as if affects school district libraries.

In this regard, as you requested, enclosed is a copy of the Freedom of Information Law. It is noted that the Law does not make specific reference to school district libraries or any other specific classification of governmental entity. The scope of the Law is determined in part by the term "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."

Based upon the language quoted above, as a general matter, the Freedom of Information Law in my view is applicable to entities of state and municipal government.

Since a school district library is a creation of a school district, which is a public corporation and a municipal governmental entity, I believe that such a library is itself a governmental entity that performs a governmental

function [see Education Law, §255]. Therefore, I believe that a school district library is required to comply with the Freedom of Information Law.

You raised a question dealing with rights of access to an "employee's name, public address, title, and salary". Although the Freedom of Inforamtion Law, §89(3), states as a general rule that an agency need not create a record in response to a request, an exception to that rule pertains to payroll information. Specifically, §87(3)(b) states that each agency shall maintain:

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

Consequently, I believe that each agency, including a school district library, is required to prepare and make available a record that identifies every employee by name, public office address, title and salary.

Lastly, I would like to point out that §89(7) indicates that nothing in the Freedom of Information Law requires the disclosure of the home address of a present or former public employee.

Also enclosed for your consideration are copies of an explanatory brochure and a pocket guide that summarizes 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3368

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

June 8, 1984

Mrs. Harold L. Adams
[redacted]

Dear Mrs. Adams:

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

Your inquiry concerns your unsuccessful efforts to obtain records from the Surrogate's Court in Ontario County.

Although the Freedom of Information Law grants broad rights of access to records, it does not apply to the courts or court records. The scope of the Freedom of Information Law is determined in part by the term "agency", which is defined in §86(3) of the Law to mean:

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

In 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 records in question are outside the scope of the Freedom of Information Law.

It is noted, however, that there are provisions of the Judiciary Law and various court acts that grant substantial rights of access to court records. As such, while I apologize for my incapacity to respond to your inquiry, I am forwarding your letter to the Office of Court Administration. I believe that a representative of the Office of Court Administration could likely provide advice to you regarding both the existence of the records in question and rights of access to them.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Office of Court Administration

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3369

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

June 12, 1984

Mr. Don Taylor
79-A-616
Box 149
Attica, NY 14011

Dear Mr. Taylor:

I have received your recent letter in which you requested various records from this office that pertain to you.

Specifically, you have asked that I provide copies of your "personal history record", a "correctional supervision history", and your "parole violation record".

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 require an agency to grant or deny access to records.

Nevertheless, I would like to offer the follwoing suggestions.

First, as a general matter, a request should be directed to the agency that maintains the records sought.

Second, the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a correctional facility should be sent to the facility superintendent.

Third, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you provide as much detail as possible in order that agency officials can locate the records.

Lastly, enclosed are the regulations of the Department of Correctional Services regarding access to Department records. It is recommended that you closely review those regulations, for I believe that will 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:ew

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOIL-AO-3370

June 13, 1984

Ms. Helen Sequeira
Haverstraw King's Daughters
Public Library
Main Library
Main Street
Haverstraw, NY 10927

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. Sequeira:

I have received your letter of June 4 in which you raised a series of questions regarding disclosure of records of the Haverstraw King's Daughters Public Library.

The first question is whether your library, a "special district library", is subject to the Freedom of Information Law. It is noted in this regard that the Freedom of Information Law is applicable to records of an "agency", which 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."

Therefore, as a general matter, the Freedom of Information Law is applicable to entities of state and local government.

Having engaged in research regarding special district libraries, it appears that the status of such libraries may vary. Some are largely independent of government and may be funded by means of private endowments; others may essentially be extensions of one or more units of local government.

The legislation that created the Haverstraw King's Daughters Public Library, Chapter 427 of the Laws of 1977, in my view indicates that the library in question is an "agency" required to comply with the Freedom of Information Law. Specifically, the legislation refers to Central School District Number One in Rockland County and states in part that:

> "such central school district is hereby authorized to raise money by tax, to equip and maintain such library or libraries and to provide a building or rooms for its or their use. Such tax shall be a charge upon the taxable property of that part of the central school district described above."

Based upon the language quoted above, I believe that the Haverstraw King's Daughters Public Library is a governmental entity and is, therefore, an agency subject to the requirements of the Freedom of Information Law.

Your second question is whether you should "send all the information requested pertaining to employees, although some may not be of significant interest to the requesting party." The correspondence attached to your letter includes a request for existing collective bargaining agreements, the most current budget, and a "payroll record setting forth the name, public office address, title and salary of every employee".

From my perspective, if records requested are accessible under the Freedom of Information Law, and if an offer to pay for photocopies is made, an agency must make the records available. I would like to point out that one of the first judicial determinations rendered under the Freedom of Information Law found that accessible records must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. That principle was confirmed by the state's highest court on May 10 in Farbman and Sons v. New York City Health and Hospitals Corporation [94 AD 2d 576, reversed __NY2d__].

It is also noted that §89(3) of the Freedom of Information Law provides, as a general rule, that an agency is not required to create a record in response to a request. Nevertheless, one of the exceptions to that rule involves payroll information. Section 87(3)(b) requires that each agency maintain and make available"

> "a record setting forth the name, public office address, title and

salary of every officer or employee of the agency..."

Therefore, the payroll information requested in my opinion must be prepared and is clearly available.

Lastly, you asked whether there are "laws protecting individual employees which supersede the requirements..." of the Freedom of Information Law. There may be situations in which other statutes deal with particular types of records identifiable to public employees. For instance, §50-a of the Civil Rights Law exempts from disclosure certain personnel records related to police officers; §3020-a of the Education Law deals with records pertaining to proceedings against tenured teachers. However, I am unaware of any statute that deals specifically with personnel records of employees of libraries.

The Freedom of Information Law in §87(2)(b) indicates that an agency may withhold records to the extent that disclosure would result in an "unwarranted invasion of personal privacy". While disclosure of the payroll information described above would constitute an invasion of privacy, the Legislature and the courts have determined that disclosure would result in permissible rather than an unwarranted invasion of privacy. In brief, there are various judicial decisions that indicate that records that are relevant to the performance of public employees' official duties are available, for it has been found that public employees must be more accountable than others. Conversely, an item of personal information, such as a social security number or a home address, which is irrelevant to the performance of one's official duties, may be withheld or deleted from a record 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3371

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

June 14, 1984

Mr. Carl G. Whitbeck, Jr.
Legal Advisor
436 Union Street
Hudson, NY 12534

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. Whitbeck:

I have received your letter of June 4, as well as the materials attached to it.

Your inquiry deals with a "multiplicity of requests" directed to the City of Hudson and its various component agencies. You wrote that "It is clear to the City employees ..." that the employees submitting the requests "are filing FOI requests solely for the purpose of harassing City employees". One of the applicants for records apparently advised you that he possesses "more than 80% of the documents he has requested". You added that:

> "The City of Hudson is prepared to release all documents required to be released under the appropriate statutes, but does not have the administrative personnel or the space to permit personal inspection of the documents without receiving copies. In addition, the administrative burden upon the City and its agencies in finding and/or compiling the requested information is excessive and does not bear any appropriate relation to the public's right to know."

You have requested my comments regarding the situation. Having reviewed the requests, I would like to offer the following observations.

First, as you are aware, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Some of the requests appear to be rather specific in terms of the records sought; others are broad, and it is questionable whether the terms of those requests indeed reasonably describe the records. From my perspective, the question in determining whether a request reasonably describes the records sought involves the agency's capacity to locate the records. As stated in a recent decision rendered by the Court of Appeals, the Freedom of Information Law "requires only that the records be 'reasonably described'...so that the respondent agency may locate the records in question" [see Farbman and Sons v. New York City Health and Hospitals Corporation, 94 AD 2d 576, reversed __NY2d__, May 10, 1984].

Second, with regard to the administrative burden imposed upon officials of the City of Hudson, that alone would not in my view constitute a valid basis for rejecting a request or withholding records. In United Federation of Teachers v. New York City Health and Hospitals Corporation [428 NYS 2d 823 (1980)], a request was made for 1,500 grievances and decisions. Although the agency contended that it had insufficient manpower to comply with the request, it was found that such a contention would not constitute a defense, for denial on that basis would "thwart the very purpose of the Freedom of Information Law."

In addition, the decision rendered in Farbman, supra, also dealt in part with the potentially burdensome use of the Freedom of Information Law. Since Farbman dealt with the use of the Freedom of Information Law by a litigant, the Court of Appeals wrote:

> "[T]hat FOIL may be used during litigation for improper purposes, such as harassment and delay, is a genuine concern. We note that the Appellate Divisions have addressed such problems as they have arisen in particular cases. In John T. Brady & Co. v. City of New York (84 AD2d 113), for example, the court struck an action from the trial calendar where the plaintiff filed a note of issue and statement of readiness without having conducted discovery under the CPLR, and thereafter submitted a FOIL request. (See also Moussa v State of New York, 91 AD2d 863). The

> potential for abuse through FOIL is in a sense a price of open government, and should not be invoked to undermine the statute."

In short, the decisions cited above in my opinion indicate that if records reasonably described are accessible under the Freedom of Information Law, they must be made available, notwithstanding the reason for which a request is made or the burden that may be imposed upon an agency.

Third, in several instances, the applicant for the records indicated on the request form that he was seeking to "inspect" various records; as such, it does not appear that he requested copies. Nevertheless, several of the responses indicate that existing records that fall within the scope of the requests would be available only after they were copied at a rate of twenty-five cents per photocopy. Assuming that the records are accessible, I believe that any person would have the right to inspect them at no cost. Similarly, I do not believe that an applicant could be required to pay for photocopies if he or she merely requests to inspect the records.

Lastly, pursuant to the regulations promulgated under the Freedom of Information Law by the Committee, one of the responsibilities of a records access officer is to assist an applicant in identifying the records sought, if necessary [see attached, regulations, §1401.2]. It is possible that requests might be narrowed or perhaps made more specific if a records access officer provided direction regarding the nature of records maintianed by the agency. Perhaps it could be clearly stated that certain aspects of the information sought do not exist in the form of a record or records. Further, it is possible that a description of the records maintained by the agency would enable an applicant to focus upon records of particular interest, rather than broad categories 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:ew
enc.
cc: Mr. Alan Friedman
Mr. David K. Kermani

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3372

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

June 14, 1984

Mr. Ernest Icesom, III
82-A-1455
Downstate Correctional Facility
P.O. Box 307
Fishkill, NY 12524

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. Icesom:

I have received your letter of June 4, as well as the correspondence attached to it.

According to the materials, you have requested records concerning budgets for the law library, library and Inmate Occupational Therapy Fund at the Downstate Correctional Facility. Your initial request was directed to the Deputy Commissioner for Administration at the Department of Correctional Services, who informed you that requests for records kept at correctional facilities should be directed to the superintendents of facilities. Having submitted such a request on May 18, you apparently did not receive a response within five business days as required by §89(3) of the Freedom of Information Law. Consequently, on June 1 you appealed to the Commissioner.

You have requested any assistance that I might provide regarding your capacity to obtain the records. 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 noted that the Freedom of Information Law is applicable to existing records and that §89(3) states that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if the information that you are seeking does not exist in the form of a record or records, Department officials would not in my view be obliged to create a record on your behalf. However, to the extent that the information sought exists in a record or records, I believe that it would be available to you.

From my perspective, the records in question would be accessible, if they exist, on the basis of §87 (2)(g) of the Freedom of Information Law. Although the cited provision permits a denial of certain records, it requires the disclosure of others. The cited provision states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. 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 the budget information in which you are interested would consist of "statistical or factual tabulations or data" accessible under §87(2)(g)(i).

Lastly, based upon the correspondence, it appears that you have followed the appropriate procedures under the Freedom of Information Law. It is noted, however, that the person to whom an appeal should be directed at the Department of Correctional Services is Counsel to the Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Judith LaPook, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3373

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

June 15, 1984

Ms. Joan Gerstel
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 Ms. Gerstel:

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

According to your letter and the correspondence attached to it, you requested from the State Liquor Authority various records. The request involved:

> "1. Violations issued to Staten Island establishments in 1983 and 1984 for serving or supplying alcoholic beverages to minors.
>
> 2. License applications for all the above-named premises.
>
> 3. Whether summonses were for 1st, 2nd or 3rd offense.
>
> 4. Copies of the payment receipt for each violations.
>
> 5. Transcripts of any hearings conducted for above violations.
>
> 6. Line-by-line budget of your agency for the past three years.

7. Subject matter list, as defined in the Public Officers Law."

In response to the request, Anthony M. Papa, the Chief Executive Officer for the State Liquor Authority wrote that "the material you seek is generally confidential since it is being processed and under current investigation after being received from the Police Department". Mr. Papa suggested that some of the records might be made available by the Police Department in Staten Island.

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

First, although the records in question might in some instances relate to an investigation, others in my view are likely unrelated to an investigation. Moreover, even though records are used in conjunction with an investigation, that alone would not in my view necessarily remove them from the scope of rights of access.

It is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except 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 introductory language of §87(2) of the Freedom of Information Law refers to the capacity to withhold "records or portions thereof" that fall within one or more of the grounds for denial. Therefore, I believe that the Legislature envisioned situations in which a single record might be both accessible or deniable in part. Additionally, I believe that the language quoted above requires that an agency review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Second, although I am unfamiliar with the specific contents of the records in which you are interested, several areas of your request in my view involve records that must be made available. As such, the ensuing general observations may be relevant or useful to you.

The first area of inquiry involves "violations issued to Staten Island establishments in 1983 and 1984 for serving or supplying alcoholic beverages to minors". From my perspective, if indeed a violation has been found or issued, such an act represents a determination made by an agency to the effect that an establishment has failed to comply with law. Consequently, I do not believe that any ground for denial could justifiably be cited. Moreover, §87(2)(g)(iii) of the Freedom of Information Law requires that final agency determinations be made available.

I would like to point out that §89(3) of the Freedom of Information Law requires that an applicant for records "reasonably describe the records sought". In a recent decision rendered by the Court of Appeals, it was found that an applicant has reasonably described records when the "agency may locate the records in question" [see Farbman & Sons v. NYC Health and Hospitals Corp., 94 AD 2d 576, reversed __ NY 2d __, May 10, 1984]. Therefore, if the agency in receipt of the request has the capacity to locate the records sought, such as the violations that you requested, I believe that it must respond by making the records available or by citing one or more of the grounds for denial listed in §87(2) of the Freedom of Information Law.

With respect to your second area of inquiry, which pertains to license applications of establishments to which violations had been issued, it is possible that portions of the applications might be withheld to the extent that disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)] or perhaps to the extent that disclosure would cause substantial injurty to the competitive position of a particular establishment [see §87(2)(d)].

The third aspect of your request involves "Whether summonses were for 1st, 2nd or 3rd offense". From my perspective, this inquiry might involve a question rather than a request for records. Here I would like to point out that the Freedom of Information Law pertains to existing records and that §89(3) provides as a general rule that an agency is not required to create a record in response to a request. Therefore, unless existing records indicate whether summonses issued pertain to first, second or third offenses, the agency would not in my opinion be obligated to prepare a new record or compile existing records on your behalf in order to respond.

The fourth area of your request involves "Copies of payment receipt for each violations". In my opinion, no ground for denial under the Freedom of Information Law could be cited to withhold such records.

The next area of inquiry concerns transcripts of hearings conducted relative to violations. In my view, rights of access would be dependent upon the specific contents of the transcripts. For instance, the transcripts might identify witnesses or others. As such, it is possible that disclosure of some aspects of transcripts could result in an unwarranted invasion of personal privacy.

The sixth question directed to the agency concerns a "Line-by-line budget" for the past three years. I believe that the budgets would clearly be available, for they represent factual information accessible under §87(2)(g)(i) of the Freedom of Information Law.

The seventh area of your request involves "Names of inspectors assigned to Staten Island". One of the few instances in the Freedom of Information Law in which agencies must prepare a record involves payroll 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..."

It would appear that the information sought would be contained in the payroll record required to be compiled under the Freedom of Information Law or similar documentation.

The final area of your request involves a "subject matter list, as defined in the Public Officers Law". The reference pertains to §87(3)(c) of the Freedom of Information Law, which 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".

As in the case of the payroll listing, a subject matter list must in my view be prepared and made available.

Lastly, the provision cited most often in relation to records regarding law enforcement activities is §87(2)(e), which enables 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..."

Unless I have misinterpreted the contents of the correspondence, it appears that many of the records sought, such as violations, represent the result of investigations. It also appears that many of the records sought were prepared in the ordinary course of business, rather than for law enforcement purposes. Therefore, it is reiterated that while some of the records might relate to an investigation, the propriety of an assertion of §87(2)(e) of the Freedom of Information Law or the other grounds for denial referenced earlier is, in my opinion, questionable.

In sum, I believe that many of the records that you requested are accessible under the Freedom of Information Law. Further, it is reiterated that the capacity to deny access must be based upon one or more of the grounds for denial listed in the Freedom of Information Law, notwithstanding an assertion of confidentiality.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Anthony M. Papa
Anthony Gazzara

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3374

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

June 18, 1984

Mr. Anthony Romandette
#84-A-1849
Fishkill Correctional Facility
Box F
Fishkill, NY 12524

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. Romandette:

I have received both of your letters of June 7, which pertain to a request for records directed to the Town of Colonie Police Department.

According to the materials, you submitted a request on May 14. You apparently received a response on June 7 which indicated that the request was denied on the ground that "law enforcement records are unavailable under the Freedom of Information Law". You have asked that I direct you to the person to whom an appeal may be sent.

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

First, having telephoned the Town of Colonie on your behalf, I learned that an appeal may be sent to the Town Attorney, Ms. Susan Marie Tatro.

Second, 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 prescribed time limits for responses to requests and appeals.

Section 89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days

of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is nexessary 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgement of the receipt of a request, the request is considered "constructively" denied [see regulations, 1401.7(b)].

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

In addition, it 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, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, although your correspondence does not indicate the nature of the records in which you are interested, I do not believe that the response was appropriate. While some "law enforcement records" may be withheld under the Freedom of Information Law, not all such records would in my opinion be deniable. The "law enforcement purposes" exception to rights of access is based in great measure on harmful effects of disclosure. Section 87(2)(e) states that an agency may withhold records that:

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

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Under the circumstances, without knowledge of the nature of the records sought, specific direction cannot be given. However, it may be worthwhile to 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3325

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

June 19, 1984

Mr. Antonio Burgos
#83-A-5428
Collins Correctional Facility
Box B
Dannemora, NY 12929

Dear Mr. Burgos:

I have received your recent letter, which was notarized on June 8, and which reached this office on June 18.

It appears that you have requested a report from this office regarding an incident that occurred in November, 1982, at the New York City House of Detention for Men.

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

First, it is emphasized 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.

Second, as a general matter, a request should be sent to the "records access officer" at the agency where the records are maintained. Therefore, it is suggested that you forward a request to the House of Detention or the New York City Department of Corrections.

Third, §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". While it is possible that your request might have included enough detail to enable agency officials to locate the records sought, it is suggested that the request include additional information in order to ensure that agency officialy can locate the record 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3376

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

June 19, 1984

Mr. Tony Perez
#83-A-1162
Collins Correctional Facility
Box B
Dannemora, NY 12929

Dear Mr. Perez:

I have received your letter of June 11, which reached this office today, in which you requested 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, the Committee 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.

First, as a general matter, a request should be directed to the agency that maintains the records sought. If, for example, the records are maintained at your facility, a request should be sent to the facility superintendent in conjunction with the regulations of the Department of Correctional Services. A request for a rap sheet or criminal history information should likely be directed to the Division of Criminal Justice Services, which is located at the Executive Building, Stuyvesant Plaza, Executive Park Tower, Albany, New York 12203.

Second, it is noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making requests, you should provide as much detail as possible in order to enable agency officials to locate the records sought.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3377

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

COMMITTEE MEMBERS
THOMAS H. COLLINS
ALFRED DELBELLO
JOHN C. EGAN
MICHAEL FINNERTY
WALTER W. GRUNFELD
MARCELLA MAXWELL
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 19, 1984

Mr. Cleveland McCoy
#83-A-4134
Woodbourne Correctional Facility
Pouch 1
Woodbourne, NY 12788

Dear Mr. McCoy:

I have received your letter of June 13 in which you requested from this office a copy of your "N.Y.S.I.D. sheet".

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, 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.

First, as a general matter, a request should be directed to the records access officer at the agency that maintains the records in question. Therefore, you should submit your request directly to the agency that maintains the records that you are seeking.

Second, §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Therefore, when making request, it is suggested that you include as much detail as possible in order to enable agency officials to locate the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3378

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

June 19, 1984

Mr. Gary L. Henderson
[redacted]

Dear Mr. Henderson:

I have received your recent letter in which you requested under the Freedom of Information Law various records, including police records or files, 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.

First, a request for records should be directed to the records access officer of the agency that maintains the records sought. Therefore, if you are seeking records of a police department, a request should be directed to the police department in possession of the records.

Second, since you requested records pertaining to you, it is emphasized that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Consequently, when making a request, it is suggested that you include as much detail as possible, such as names, dates, descriptions of events, index, identification and docket numbers and similar details 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3329

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

June 20, 1984

Ms. Alma DeCesare
[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. DeCesare:

As you are aware, your letter of May 25 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 correspondence attached to it, the Corporation Counsel of the City of Schenectady has refused to permit you to inspect records pertaining to an investigation regarding a claim that you made. The responses to the request by Mr. Alfred L. Goldberger, Corporation Counsel, indicate that an investigation was conducted by his office, and that, as a consequence, the record prepared in conjunction with the investigation "would be privileged and of a confidential nature inasmuch as it was prepared for pending or potential litigation". It is apparently your view that the "privileges" claimed by Mr. Goldberger are applicable to private attorneys but that they "don't apply in the case of the corporation counsel".

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

First, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available , except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, one of the grounds for denial involves records that are "specifically exempted from disclosure by state or federal statute" [see attached, Freedom of Information Law, §87(2)(a)].

Therefore, if a statute other than the Freedom of Information law exempts records from disclosure, the Freedom of Information Law could not serve to enhance rights of access.

With respect to the materials in question, case law, by implication, holds that municipal attorneys do have an attorney-client relationship with officials of the municipalities by which they are employed. Bernkrant v. City Rent and Rehabilitation Administration [242 NYS 2d 753 (1963); aff'd 17 App. Div. 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.

This is the same conclusion that has been reached by New York courts for almost a century. In 1889 in discussing the duties of the New York 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 NYS 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 NYS 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 NYS 2d 897, 898 (1962)].

Therefore, I believe that a municipal attorney, such as a corporation counsel, may engage in a privileged relationship with his client. Further, it is my view that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Laws and Rules.

Another statute that exempts records from disclosure concerns material prepared for litigation. Specifically, if the records sought constitute material prepared for litigation, I believe that they would be exempted from disclosure under the provisions of §3101(d) of the Civil Practice Laws and Rules.

Lastly, it is noted that a recent decision rendered by the Court of Appeals, the state's highest court, in my opinion indicates that records subject to the attorney-client privilege, attorney work project, and material prepared for litigation are deniable under the Freedom of Information Law due to statutory exemptions from disclosure. In its discussion of a request by a litigant for records of an agency, the court found that a litigant may seek records under the Freedom of Information Law, but added that:

> "[A]s we have stated in Matter of John P v. Whelan (54 NY2d 89, 99, supra), 'the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and neither is enhanced (Matter of Fitzpatrick v. County of Nassau, Dept. of Public Works, 83 Misc2d 884, 887-888, aff'd 53 AD2d 628) nor restricted (Matter of Burke v. Yudelson, 51 AD2d 673, 674) because he is also a litigant or potential litigant.' To be distinguished of course would be claimed exemptions from FOIL on the basis of privilege (CPLR 3101, subd b), attorney's work product (CPLR 3101, subd d), none of them tied to the particular status of the party making the request. Since respondents have made no claim that any of its records are being withheld for these reasons, we have no occasion to consider whether these categories would be 'specifically exempted' from disclosure by virtue of Public Officers Law §87 (subd a)" [see

Farbman and Sons, Inc., v. New York City Health and Hospitals Corp., __NY2d__ May 10, 1984].

In sum, if Mr. Goldberger's contentions are accurate, i.e. that the records fall within the scope of an attorney-client relationship or that they constitute material prepared for litigation, it appears that the denial was appropriate.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Mr. Alfred L. Goldberger, Corporation Counsel

STATE OF
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3380

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

COMMITTEE MEMBERS

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BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 20, 1984

Mr. David Epstein
Research Assistant
New York Public Interest
Research Group, Inc.
9 Murray Street
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. Epstein:

I have received your letter of June 11 in which you requested assistance regarding a problem that has arisen under the Freedom of Information Law.

According to your letter:

> "...the Peekskill City School District refuses to grant NYPIRG access to their radiological emergency preparedness documents--though we have contacted them eight times over the course of two and a half months. In fact, they have yet to even acknowledge the acceptance of our two Freedom of Information requests dated March 27, 1984 and May 3, 1984, despite our repeated offers of assistance. Of the 21 school districts, four county and two New York State government bodies, Peekskill remains the only entity which has been uncooperative in our Freedom of Information requests thus far."

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

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.

Second, based upon your letter and the correspondence attached to it, it appears that the records sought pertain to the steps taken by the School District regarding radiological emergency preparedness. If that is so, I believe that they would be accessible. One of the grounds for denial would, due to its structure, appear to require that the records sought be made available. Section 87 (2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. Although inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information must be made available.

Third, 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, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Rickett, Superintendent
School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-385/

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

June 20, 1984

Mr. James A. Goodman
Gannett Rochester Newspapers
55 Exchange Street
Rochester, NY 14614

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. Goodman:

I have received your letter of June 11, as well as the materials attached to it.

You have requested advisory opinions with respect to denials of access to records by Monroe County and by the Division of State Police.

With respect to the former, you requested "all records, including correspondence and memoranda, related to Raytheon Service Company's contracts with Monroe County from 1980 to present". The records were denied under §87(2)(g) of the Freedom of Information Law concerning "inter-agency and intra-agency materials" due to a finding that Raytheon is a "consultant" similar to that described in Sea Crest Construction Corp. v. Stubing [82 AD 2d 546 (1982)].

The other denial concerned a request for records in possession of the State Police pertaining to "demonstrations and protests at the Seneca Army Depot and Sampson State Park since January 1, 1983". In affirming an initial denial, Colonel J.J. Strojnowski wrote that:

> "...your request is for records which we contend were prepared for law enforcement purposes which if disclosed, would interfere with normal law enforcement investigations, tend to identify confidential sources of such information and/or reveal investigative techniques and procedures. In addition, some of the material requested is the product of other agencies and thereby classified as interagency material.
>
> "Finally, disclosure of these records would constitute an unwarranted invasion of personal privacy of those concerned."

In this regard, I would like to offer general comments initially that concern both denials, and ensuing remarks that deal separately with each 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. Further, several determinations rendered by the Court of Appeals have cited the intent of the Freedom of Information Law, stressing that the grounds for denial must be narrowly construed [see e.g., Doolan v. BOCES, 48 NY 2d 341 (1979); Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); Fink v. Lefkowitz, 63 AD 2d 610 (1978), modified in 47 NY 2d 567 (1979); and Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978), 46 NY 2d 906 (1979)].

Second, the introductory language of §87(2) refers to the capacity to deny "records or portions thereof" that fall within one or more of the grounds for denial that follow. Therefore, it is clear in my view that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, I believe that the language of §87(2) requires that an agency review the records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In response to both requests, blanket denials were made. While I am not familiar with the records sought, it appears unlikely that every aspect of the records sought in relation to either request could be withheld.

With regard to the denial by Monroe County, heavy reliance was placed upon §87(2)(g) and the decision rendered in Sea Crest, supra. As indicated earlier, the cited provision of the Freedom of Information Law pertains to "inter-agency or intra-agency materials". 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."

Therefore, as a general matter, inter-agency materials in my view consist of those documents that are transmitted among or between agencies; intra-agency materials would consist of documents transmitted among or between officials of one agency.

Raytheon, a private corporation, falls outside the scope of the definition of "agency". Consequently, it does not appear that the records in which you are interested involving correspondence between Raytheon and the County would fall within the scope of §87(2)(g).

Even if the holding in Sea Crest is appropriate, the decision stressed that the exemption in question may be cited only when a firm is a "consultant", an advisor to the agency that performs a duty that might ordinarily be carried out by the staff of the agency. Specifically, in the opinion, it was stated that:

> "We note that the fact that Wegman was designated a 'consultant' in its contract is not determinative of the question here involved. Rather, it is the actual function served by the outside party which must be considered in deciding whether the communications are encompassed by the intra-agency exemption of the Freedom of Information Law."

Based upon the news articles attached to your letter, it does not appear that Raytheon served as a "consultant". As stated in an article appearing in the Democrat & Chronicle on April 25:

> "[L]egislators and other observers have speculated that the administration study will recommend a continuing role for Raytheon Service Co., the Massachusetts firm that designed the facility and operates it under contract with the county."

Assuming that the language quoted above is accurate, once again, it does not appear that Raytheon could be characterized as a "consultant". If that is so, I do not believe that §87(2)(g) of the Freedom of Information Law could justifiably be cited to withhold the records sought.

With regard to the request directed to the State Police, while some of the records sought might fall within one or more of the grounds for denial, it does not appear that the stated grounds for denial would be applicable as bases for withholding the records sought in their entirety.

One reference made in the denial on appeal pertains to various grounds for denial appearing in the exception regarding records compiled for law enforcement purposes, §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 in my opinion is based upon potentially harmful effects of disclosure. Since the events to which the records sought relate occurred some time ago, it is difficult to envision the manner in which disclosure would at this juncture interfere with "normal law enforcement investigations".

Colonel Strojnowski also contended that disclosure would "reveal investigative techniques and procedures". The specific language of §87(2)(e)(iv), however, refers to the capacity to withhold "criminal investigative techniques and procedures, except routine techniques and procedure". As such, the response refers to investigative techniques and procedures, whether or not they are criminal in nature, and regardless of whether they may be considered "routine".

To the extent that disclosure would identify a confidential source or constitute an unwarranted invasion of personal privacy, those aspects of the records could be deleted. However, it is possible that the remainder might be made available.

The remaining basis for withholding is that some of the records represent the "product of other agencies" and may be "classified as inter-agency material". As stated earlier, the records might be characterized as "inter-agency materials". Nevertheless, to the extent that they consist of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations, I believe that they would be available, so long as no other ground for denial is applicable.

Lastly, in a matter largely unrelated to rights of access to records, County Executive Morin wrote that you could seek review of his determination "in the courts". He added that "Such a proceeding in the courts must be commenced within 15 days of service of this letter to you". You asked that I comment regarding the fifteen day limitation to which County Executive Morin alluded.

In my opinion, the applicable provision concerning the initiation of a judicial proceeding following a denial of access on appeal is §89(4)(b). That provision states in part that:

> "[E]xcept as provided in subdivision five of this section, 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."

The fifteen day limitation deals solely with issues involving rights of access to records characterized as trade secrets submitted to a state agency [see attached, Freedom of Information Law, §89(5)(d)]. That provision does not apply to municipal government entities, such as the County of Monroe. As such, I believe that Mr. Morin's contention is inaccurate and that, in accordance with Article 78 of the Civil Practice Law and Rules, a judicial proceeding may be commenced within four months of his determination.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Lucien Morin, County Executive
Frederick Lapple, Records Access Officer
Carl Baker, Asst. Deputy Superintendent
Colonel J.J. Strojnowski, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3382

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

June 21, 1984

Mr. Jim Callaghan
News 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 June 11, as well as the correspondence attached to it.

You requested an advisory opinion regarding a denial of access to a license application in possession of the State Liquor Authority. In response to your request for the license application, Mr. Anthony M. Papa, Chief Executive Officer for the State Liquor Authority, wrote that "[U]nfortunately, the application itself of a license applicant is not public information and may not be furnished or viewed by the public or press".

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

First, I am unfamiliar with the form and contents of an application for a license. Consequently, the ensuing comments will be general.

Second, notwithstanding the contents of the application, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

I would also 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

grounds for denial that follow. Therefore, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Moreover, the language quoted above in my opinion indicates that an agency is required to review a record sought in its entirety to determine which portions, if any, may justifiably be withheld.

Third, under the circumstances, it appears that two of the grounds for denial might be relevant.

Section 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". If, for example, an applicant is an individual, it is possible that the application might contain various aspects of personal information, including financial information, the disclosure of which would constitute an unwarranted invasion of personal privacy. To that extent, portions of the application might justifiably be deleted, while remaining portions might be accessible.

The remaining ground for denial of possible significance is §87(2)(d), which permits an agency to withhold records or portions thereof that:

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

It would appear that the information sought may be maintained for the regulation of commercial enterprise. The question in my view under §87(2)(d), therefore, would involve to the extent to which disclosure would "cause substantial injury to the competitive position" of a particular commercial enterprise. If certain aspects of an application fall within the scope of §87(2)(d), those portions could in my opinion be withheld.

In sum, I believe that an application must be reviewed in its entirety to determine which portions, if any, might properly be withheld in accordance with the grounds for denial appearing in §87(2) of the Freedon 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:ew

cc: Mr. Anthony M. Papa, Chief Executive Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3383

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

June 21, 1984

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 June 12 in which you requested an advisory opinion under the Freedom of Information Law.

Attached to your letter is a proposed resolution submitted by Paul J. Giacobbe, Superintendent, to the Board of Education of the Ballston Spa Central School District. The resolution if adopted would state that:

> "BE IT RESOLVED,
>
> by the Board of Education of the Ballston Spa Central School District that District Policy GAIB Release of Staff Rosters be amended to read:
>
> Release of Staff Rosters
>
> Staff rosters shall not be released.
>
> be and is hereby approved."

Your question concerns the propriety of such a resolution.

In my opinion, the adoption of the resolution would constitute a violation of the Freedom of Information Law.

As a general rule, the Freedom of Information Law is applicable to existing records. Section 89(3) of the 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..."

Subdivision (3) of §87 provides in relevant part that:

> "[E]ach agency shall maintain:
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

As such, the Freedom of Information requires that the District prepare a payroll record that identifies every officer or employee of the agency.

Further, I believe that the payroll information required to be compiled pursuant to §87(3)(b) is clearly available to any person [see e.g., 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)]. It is noted that the names and pay scales of public employees had been found to be available even prior to the enactment of the Freedom of Information Law [see Winston v. Mangan, 72 Misc. 2d 280 (1972)].

Lastly, as written, the proposed resolution would, in my opinion, diminish rights of access granted by the Freedom of Information Law. In this regard, I believe that a resolution, a statement of policy or a regulation that conflicts with a statute, such as the Freedom of Information Law, is void to that extent. When the Board of Parole promulgated regulations that permitted rights of access less than those provided by the Freedom of Information Law, the Appellate Division found the regulations to be invalid [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976)]; similarly, in Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 55 NY 2d 1026 (1982)], the Court of Appeals found that provisions of the New York City Administrative Code that prohibited access to certain records did not constitute the equivalent of a statute and were, therefore, void to the extent that they restricted rights granted by the Freedom of Information Law.

From my perspective, the proposed resolution would also be void, for §87(3)(b) of the Freedom of Information Law in my view clearly requires that "staff rosters" must be prepared and made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. Paul J. Giacobbe, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3384

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

June 21, 1984

Ms. Beatrice M. Mills
[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. Mills:

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

You indicated that you are a member of the Board of Trustees of the Village of Sylvan Beach and that "we tape record all of our Village meetings". Apparently residents of the Village requested a copy of a tape recording of a meeting. Thereafter, the clerk spoke to the Village attorney and informed the applicant for the tape recording that "the tapes are her personal property".

You have requested an opinion regarding rights of access to the tape recording, which is used by the village clerk as an aide in preparing minutes.

In my opinion, the tape recording is a "record" subject to rights of access granted by the Freedom of Information Law. Section 86(4) of the Freedom of Information Law defines the term "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, compu-

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

In view of the breadth of the language quoted above, I believe that a tape recording prepared by or in possession of the the village clerk constitutes a "record". It is noted that the Court of Appeals, the state's highest court, has interpreted the definition of "record" as broadly as its specific language indicates. In Westchester News v. Kimball, the Court of Appeals held 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, expecially where both are carried on by the same person or persons." [50 NY2d 575, 581 (1980); see also, The Washington Post Co. v. New York State Insurance Department, __NY2d__, March 29, 1984]

Therefore, even if the tape recorder is the personal property of the clerk, the tape recording is apparently prepared and used in the performance of the clerk's official duties. Therefore, once again, I believe that it is a "record" as defined by the Freedom of Information Law.

Second, 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 any 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].

Similarly, it has been found that notes taken at a meeting and later used as an aid in compiling minutes are also available [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)]. Consequently, if a tape recording exists, I believe that it is available to the public for either listening or reproduction.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Mr. Mike Knapp, Trustee
Mr. Ronald Johnson, Trustee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3385

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

June 21, 1984

Mr Thomas Johnson
#82-A-3224
Box 338
Napanoch, NY 12458

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. Johnson:

I have received your letter of June 13 in which you requested advice concerning your capacity to obtain records from your attorneys.

In this regard, as I informed you in a letter dated June 7, the Freedom of Information Law is applicable to records of an "agency". The term "agency" generally means a unit of state or local government, for it 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 entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As I understand the situation, your attorneys likely are not officials of an agency. Therefore, rights of access to records in their possession would not be governed by the Freedom of Information Law.

It is suggested that you continue your attempts to reach your attorneys, perhaps by means of registered mail with a return receipt. The only other suggestion that I can offer would involve discussing the matter with your counselor or perhaps with a representative of Prisoners' Legal Services or a similar group.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

Rjf:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3386

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

June 21, 1984

Mr. Robert W. Berry
[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. Berry:

I have received your recent letters which deal, once again, with your unsuccessful attempts to gain access to records of Westchester County. As such, you have requested additional assistance.

It is noted at the outset that the authority of the Committee involves the capacity to provide advice regarding the Freedom of Information and Open Meetings Laws. Consequently, I do not believe that I can provide specific direction regarding the technical aspects of your complaint. However, I would like to offer the following comments regarding the Freedom of Information Law.

First, since you indicated that you have submitted requests that have not been answered, 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 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 744 (1982)].

Second, if the designated records access officer for the County Department of Public Works has failed to respond within the appropriate time limits, it would appear that your next step would involve the submission of an appeal. It is suggested that you contact Mr. Clarke, the Records Access Officer for the Department of Public Works, in an effort to determine the identity of the person to whom an appeal may be directed.

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- 1039
FOIL-AO-3387

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

June 22, 1984

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 June 15 in which you requested an advisory opinion regarding the activities of New York City Community Board No. 11.

According to your letter and the minutes of meetings of the Community Board attached to it, the minutes do not include information regarding "how each member present voted as an individual". The minutes indicate that several of the actions taken were not adopted unanimously, but rather by "split" votes. You also wrote that the minutes do not refer to a particular motion, which would appear to have been made, since motions are identified by number consecutively.

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

It is noted initially that the Community Board as described in §2800 of the New York City Charter is in my opinion an "agency" subject to the Freedom of Information Law and a "public body" required to comply with the Open Meetings Law.

Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

> state or any one or more municipalities thereof, except the judiciary or the state legislature".

From my perspective, a community board is a municipal entity that performs a governmental function for a municipality, New York City. Therefore, it is in my view an "agency" subject to the Freedom of Information Law.

Section 97(2) of the Open Meetings Law defines "public body" to mean:

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

By breaking the definition into its components, I believe that it may be concluded that a community board is a "public body" subject to the Open Meetings Law. First, it is an entity that may consist of up to fifty persons. Second, §2801 of the City Charter indicates that a community board must act by means of a quorum as described in that provision. Third, based upon §2800 of the City Charter, a community board clearly conducts public business and performs a governmental function. And fourth, the duties of a community board are performed on behalf of a public corporation, the City of New York.

In view of the foregoing, I believe that a community board is clearly a "public body" subject to the Open Meetings Law in all respects.

With respect to the absence of a record indicating the manner in which the members present cast their votes, I direct your attention to §87(3)(a) of the Freedom of Information Law, which states that each agency shall maintain:

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

Since a community board is an "agency" subject to the Freedom of Information Law, it is required to create a record of votes indicating the manner in which each member voted in each instance in which a vote is taken.

Further, if a motion was made, I believe that the minutes must make reference to it, whether or not it was carried. Section 101 of the Open Meetings Law concerning minutes of meetings states in subdivision (1) 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".

Since minutes must refer to all motions and proposals, I believe that any motion introduced should be cited in minutes, even though the motion might not have been adopted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. Bernard Haber, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3388

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

July 3, 1984

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 June 17 in which you requested an advisory opinion under the Freedom of Information Law. Your questions deal with the procedural implementation of the Law by the Middle Island School District.

The first question is whether the District is "wrong in requiring that a special form be filled out before they will respond to a Freedom of Information Law request". Neither the Law nor the regulations promulgated by the Committee, which govern the procedural aspects of the Law, refer to any form. Therefore, it has consistently been advised that a failure to complete a form prescribed by an agency cannot be cited as a means of delaying or denying access. Concurrently, it has been advised that any written request that reasonably describes the records sought should suffice.

In your second question, you asked whether the District is "in violation of the Freedom of Information Law and/or the Committee's regulations by failing to respond to requests within five business days and appeals within seven business days". With respect to requests, §89(3) of the Law requires that an agency respond to a request for a record reasonably described within five business days of its receipt. If more than five business days are needed to locate records or evaluate their contents, a determination may be delayed, but the agency must nonetheless acknowledge the receipt of the request within the five business day period.

At the time of preparation of your letter, an agency was required to respond to an appeal within seven business days of the receipt of an appeal in accordance with §89 (4)(a) of the Freedom of Information Law. The cited provision was recently amended (Chapter 227, Laws of 1984) to extend the agency's time for responding to an appeal from seven to ten business days. The amendment also clearly requires that an agency must forward a copy of an appeal to the Committee when the appeal is received by the agency.

Third, you have asked whether it is "improper for the district's appeals officer to refer correspondence to attorneys from a private law firm for response, such response not bearing a countersignature of the appeals officer." As you are aware, §89(4)(a) of the Freedom of Information Law enables a person denied access to a record to appeal to the head or governing body of an agency, or whomever has been designated by the head or governing body to determine appeals.

Further, §87(1) of the Law requires that the governing body of a public corporation, in this instance, the Board of Education, adopt procedural regulations consistent with the Law and the general regulations promulgated by the Committee. Section 1401.7(b) of the Committee's regulations states that:

> "Denial 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."

As such, the appeals person or body must in my view be clearly designated. With regard to your question, while I believe that agency officials may consult with or seek the advice of an attorney, the determination on appeal should in my view be made by the designated appeals person or body.

Fourth, you have asked whether it is "improper for an attorney...to offer an opinion that [you] have 'abused the public access provisions'..." I cannot comment relative to that question, for the Committee is not authorized to comment regarding the propriety of an attorney's actions.

Lastly, you asked whether the District forwarded copies of appeals and determinations to the Committee as required by the Freedom of Information Law, §89(4)(a). Without approximate dates of the appeals or the determinations, it would be difficult to locate such materials. If you could provide approximate dates, I could determine whether the materials were indeed sent to the Committee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. Jacqueline Lanzarone, Records Acccess Officer
Dr. Nick M. Muto, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3389

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

July 3, 1984

Mr. Mark Fleisher
Star-Gazette
201 Baldwin Street
P.O. Box 285
Elmira, NY 14902-9976

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. Fleisher:

I have received your letter of June 19 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you requested records concerning the "after action" report prepared by the State Police "following the January 8 shootout at the Jones Court Housing Project in Elmira".

The request and subsequent appeal were denied "on grounds that the 'records were prepared for law enforcement purposes which if disclosed would interfere with normal law enforcement investigations, tend to identify confidential sources of such information and/or reveal investigative techniques and procedures. In addition, some of the material requested is the product of other agencies and thereby classified as inter-agency material".

It was also stated in the denial that "disclosure of these records would constitute an unwarranted invasion of personal privacy of those concerned".

It is apparently your view that the records should have been made available, at least in part, because "several of the chief characters of the incident are dead and the City of Elmira's own exhaustive investigation into the shootout was made public last week".

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

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

Second, the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the grounds for denial. Therefore, I believe that the Legislature envisioned situations in which a single record or report might be both accessible and deniable in part. I believe that the quoted language also imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, might justifiably be withheld in accordance with the grounds for denial.

Third, although I am unfamiliar with the contents of the records sought, due to the factual circumstances, it appears that the denial is likely overbroad.

For instance, one of the grounds for denial is apparently based upon §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 porcedures, except routine techniques and procedures;"

From my perspective, the language quoted above is based upon potentially harmful effects of disclosure. Since the shootout resulted in the deaths of the principals of the case, including the perpetrator, it is difficult to envision how disclosure would interfere with an investigation. Further, if the record identifies confidential sources, those aspects of the record might justifiably be deleted while the remainder might be available.

The denial refers to "investigative techniques and procedures"; however, the specific language of §87(2)(e)(iv) permits the denial of records compiled for law enforcement purposes which if disclosed would "reveal criminal investigative techniques or procedures, except routine techniques and procedures". No reference is made in the denial to investigative techniques and procedures that could be characterized as "non-routine" or unusual.

In short, although the records sought might have been compiled for law enforcement purposes, since the investigation has apparently ended, the harmful effects of disclosure described in §87(2)(e) would not appear to arise by means of disclosure. This may be particularly so, since, as you indicated in your letter, the Police Department of the City of Elmira disclosed the result of its own "exhaustive investigation" regarding the incident.

Similarly, one of the grounds for denial involves a finding that disclosure would result in an unwarranted invasion of personal privacy in conjunction with §87(2)(b) of the Freedom of Information Law. Since the principals involved in the shootout are deceased, it is questionable in my view whether there are any implications concerning privacy to be considered. If, for example, the records contain identifying details regarding living persons whose identities have not previously been disclosed, perhaps identifying details could be deleted to protect privacy, while the remainder might be made available.

The final ground for denial cited by the State Police 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. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, insutructions to staff that affect the public, or final agency policies or determinations must be made available.

Lastly, as I understand the situation, no aspect of the requested materials has been made available to you. In this regard, I would like to stress that the state's highest court has on several occasions held that the Freedom of Information Law should be construed liberally and that the grounds for denial should be interpreted narrowly [see e.g., Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978) 46 NY 2d 906 (1979); Fink v. Lefkowitz, 63 Ad 2d 610 (1978): modified in 47 NY 2d 567 (1979); Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. It is noted, too, that an agency has the burden of proof in a judicial proceeding under the Freedom of Information Law and that the agency cannot merely assert a ground for denial and prevail; on the contrary, it must demonstrate that the harmful effects of disclosure described in the grounds for denial would indeed arise [see e.g., Church of Scientology, supra].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Colonel J.J. Strojnowski, Chief Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3390

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

July 5, 1984

Ms. Gloria Diamond
[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. Diamond:

Your letter addressed to the New York State Supreme Court has been forwarded to the Committee on Open Government, which is responsible for advising with respect to the Freedom of Information Law.

Your inquiry concerns access to medical reports requested by a patient. According to your letter, a doctor has refused to grant access to medical records pertaining to your husband.

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

First, the Freedom of Information Law, which is sometimes referred to as the "Sunshine Law", is applicable only to records of government in New York. The Law applies 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, the Freedom of Information Law does not grant rights of access to records of a private doctor or hospital, for example.

Second, there is no law in New York that provides a patient with direct rights of access to medical records pertaining to him or her. However, there is a statute that might enable a patient to seek and obtain medical records indirectly. Specifically, §17 of the Public Health Law provides that a physician, acting on behalf of a competent patient, may request and obtain medical records pertaining to the patient from another physician or hospital. Therefore, it is suggested that you discuss the matter with a physician of your choice, who, on your husband's behalf, may obtain medical records pertaining to your husband. Enclosed for your consideration is a copy of §17 of the Public Health 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3391

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

July 5, 1984

Mr. John R. Tisch
[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. Tisch:

I have received your letter of June 19 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, according to your letter, in 1976, you loaned five thousand dollars to relatives "for their bar business". Those individuals signed a promissory note which is maintained in the files of the Sullivan-Ulster Counties Consolidated A.B.C. Boards. Since the loan was apparently never repaid in its entirety, you requested a copy in order that you could pursue the matter.

In response to your request, Mr. Arthur A. Connell, Executive Officer for the A.B.C. Boards, indicated that the information "cannot be released under the provisions of the Freedom of Information Act". Mr. Connell also indicated that his office does not have a photocopy machine and suggested that you contact the State Liquor Authority at its main office in Albany for the purpose of requesting the information.

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

Second, one of the grounds for denial, §87(2)(b), states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In my opinion, if, for example, a third party requested to inspect or copy the promissory note in question, it could likely be withheld due to the capacity to deny under the privacy provision cited earlier. Nevertheless, since you are a party to the promissory note and presumably are familiar with its contents, I believe that it must be made available to you.

I would like to point out that §89(2)(c) of the Freedom of Information Law states in relevant 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."

As such, although disclosure might constitute an unwarranted invasion of personal privacy if the record were to be released to a third party, I do not believe that it could be withheld on that basis if it is requested by yourself.

Third, as a general matter, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents for a photocopy. However, if the agency does not have photocopying equipment, I believe that you could inspect the record or request that a transcript be prepared. Under the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, §1401.8(c)(2) provides that:

> "[I]n agencies which do not have photocopying equipment, a transcript of the requested records shall be made upon request. Such transcripts may either be typed or handwritten. In such cases, the person requesting records may be charged for the clerical time involved in making the transcript."

In the alternative, it is suggested that you direct your request to the State Liquor Authority as Mr. Connell recommended.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Arthur A. Connell, Executive Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3392

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

July 5, 1984

Mr. Garry Schumacher
[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. Schumacher:

I have received your letter of June 21 in which you requested an advisory opinion regarding the use of the Freedom of Information Law.

According to your letter, on June 15, you requested that Andrew Stein, Borough President of Manhattan, provide copies of records "relative to outside consultant contracts that were personally solicited by Andrew Stein for the Board of Estimate and paid out of the New York City budget". Ms. Barbara Baer of the Borough President's office initially indicated that the information would be available, but that it would take "a few days" to assemble it for you. When you returned on June 20, Ms. Baer indicated that she had not begun to gather the records, "nor would she until the name, telephone number, address, and motives" of the person who "prompted" you to make your inquiries were given to her.

Your question is whether you must provide the information sought by Ms. Baer when making a request under the Freedom of Information Law.

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

In one of the initial landmark decisions rendered under the Freedom of Information Law, it was held by the Appellate Division that accessible records must 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]. Consequently, I believe that any person make seek records under the Freedom of Information Law and that there is no requirement that the reason for the request must be stated or that an applicant identify the person that he or she might be representing.

It is noted, too, that a recent decision of the Court of Appeals indicated that the Freedom of Information Law "does not require that the party requesting records make any showing of need, good faith or legitimate purpose... Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman & Sons, Inc. v. New York City Health and Hospitals Corp., __ NY 2d __, May 10, 1984].

Therefore, I do not believe that you must provide the information requested by Ms. Baer. Concurrently, it is my view that a response to your request must be given within the time limits specified in the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law.

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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401. 7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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: Barbara Baer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3393

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

July 6, 1984

Mr. Jerome P. Cigna
[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. Cigna:

I have received your letter of June 25 as well as the materials attached to it.

Your inquiry concerns a series of requests initially made under the Freedom of Information Law on February 23 for information from the City of Rochester. The requests concern the "origins" and statistics pertaining to alternate parking regulations on residential streets in the City of Rochester. You wrote, however, that the City "has either failed or refused to respond to any of those requests". As of the date of your letter, no records have been made available.

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

First, having reviewed your requests, in several instances you have requested, for example, "the number of convictions", "the amount of money collected" for violations, "the number of letters sent" relative to protests or complaints regarding the system of alternate parking, and information similarly described. I would like to emphasize that the Freedom of Information Law is applicable to existing records. Section 89(3) of the Law provides, as a general matter, that an agency need not create a record in

response to a request. It is possible that although materials related to the information sought exists, it might not have been prepared in such a way that it exists in the form of a record or records. Therefore, if the information sought has not been prepared in the form of a record or records, the City of Rochester in my opinion would not be obliged to compile, tabulate or prepare new records on your behalf in order to respond to your requests.

Second, notwithstanding the possibility that the information sought might not exist in the form of a record or records, 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 made 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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)].

Lastly, to the extent that records exist, 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.

If statistical information has been prepared that is reflective of the information sought, I believe that it would be accessible to you. Section 87(2)(g)(i) requires that those aspects of inter-agency or intra-agency materials consisting of "statistical or factual tabulations or data" must be made available.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Constance B. Wilder, Bureau of Public Information

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOML-AO-1045
FOIL-AO-3394

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

July 9, 1984

Mr. Paul A. Martineau
Village Attorney
Village of Pleasantville
444 Bedford Road
Pleasantville, NY 10570

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. Martineau:

As you are aware, I have received your letter of June 19, in which you requested an advisory opinion regarding a series of requests for records sent to the Village of Pleasantville.

In terms of background, the requests have been made by an attorney representing a firm currently involved in litigation with the Village. The firm has also filed a notice of claim against the Village. Several of the requests indicate that the records sought are intended to be used in pending litigation.

Having reviewed your letter and the materials attached to it, I would like to offer the following observations.

It is noted initially that the Court of Appeals recently unanimously held that:

> "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Art. 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman and Sons, Inc. v. New York City Health and Hospitals Corp., __NY2d__, May 10, 1984].

As such, the pendency or possibility of litigation has no effect upon the use of the Freedom of Information Law or rights of access granted by the Freedom of Information Law, even though the requests have been made by a litigant.

At this juncture, comments will be made regarding the specific requests directed to the Village.

The first area involves a request for copies of materials concerning an approved site plan. In a letter of April 23, John St. Leger, the Village Administrator, indicated that copies would be made available.

The second request, which is dated April 26, involves the names of those attending an executive session of the Board of Trustees held on April 25, "together with a transcript of the minutes required by the Public Officer's Law in the event any action was taken". Here I direct your attention to the Open Meetings Law. Relevant under the circumstances is §101(2), which 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, if, for example, no action was taken during the executive session, minutes would not in my opinion be required to have been prepared. Contrarily, if action was taken, minutes must be prepared in accordance with §101(2) and made available to the public pursuant to the Freedom of Information Law as required by §101(3).

It is noted that the applicant requested a "transcript". In the event that action was taken and minutes must be prepared, the minutes in my opinion need not consist of a verbatim account of the discussion conducted during the executive session. Section 101(2) provides that the minutes must consist only of "a record or summary of the final determination of such action and the date and vote thereon".

It is assumed that the minutes of the meeting would indicate those who attended both the meeting and the executive session. I would like to point out, too, that §87(3)(a) of the Freedom of Information Law requires that a record be prepared in any instance in which a vote is taken that identifies the manner in which each member of a public body cast his or her vote.

The third area of inquiry is similar, for it concerns the identities of those who attended a joint executive session of the Board of Trustees and the Planning Commission on April 23, as well as any minutes that may have been prepared.

Again, it is assumed that the minutes of the joint meeting would indicate the members of public bodies who attended. Further, if indeed action was taken at the executive session, minutes would have to be prepared and made available in accordance with §101 of the Open Meetings Law.

The fourth area of inquiry, which is found in a request dated May 16, involves "a statistical compilation of all expenses incurred by the Village of Pleasantville" with respect to litigation identified in the request. Here I would like to point out that the Freedom of Information Law applies to existing records. Section 89(3) of the Law states that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if no "statistical compilation" exists, I do not believe that the Village would be required to prepare such a compilation in response to the request.

It is noted that, while a municipal board may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. 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 details in the bills might justifiably be withheld, numbers indicating the amounts expended are in my view accessible under the Freedom of Information Law.

The fifth area of inquiry concerns a request for "copies of all parking violations issued for parking violations on Manville Road and Grant Street, Pleasantville, New York from January, 1983, to the present". In my opinion, assuming that the records in question can be located, I believe that they are available. In Johnson Newspapers Corp. v. Stainkamp, it was found that copies of arrest records concerning speeding and other violations in possession of the State Police must be made available [94 AD 2d 826, modified __NY2d__ March 22, 1984]. In a brief opinion, the Court of Appeals upheld the petitioner's rights of access to the records sought, but added that rights of access would not apply to any records that may have been sealed pursuant to the provisions of §160.50 of the Criminal Procedure Law. That statute indicates that when criminal charges against an accused have been dismissed in favor of the accused, records pertaining to the arrest become sealed. The Court stated, however, that "In so doing we are not to be understood as addressing or deciding whether the provisions of section 160.50 are applicable to traffic tickets or to lists of violations of the Vehicle and Traffic Law; the validity of any sealing orders under section 160.50 is not within the scope of our review in this proceeding" (id.). Therefore, as a general matter, I believe that records of violations must be made available.

The final area of inquiry concerns all "blotter entries" regarding complaints made by named individuals "regarding the operation of businesses located on Manville Road...from April, 1980 to the present". From my perspective, the contents of police blotters are generally available, assuming that they consist of a log or diary of events reported by or to a police department [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. The question, however, is whether the terms of this request as well as the request involving parking violations "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. Although the phrase "reasonably describe" is not specifically defined, the Court of Appeals in Farbman, supra, held that a request must contain sufficient information "so that the respondent agency may locate the records in question". Therefore, if the requests enable officials to locate the records sought, the applicants have in my view met the burden of reasonably describing the records sought. Contrarily, if the records cannot be located based upon the information provided by the applicant, it is likely that the Village could require that more detail 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3395

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

July 11, 1984

Mr. Howard Jacobson
#80-A-3899
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. Jacobson:

I have received your letter of June 20, as well as the materials attached to it.

Once again, your inquiry concerns your unsuccessful attempts to obtain records from the Supreme Court, Bronx County, the New York City Police Department, and the New York Medical Examiner's Office. You have asked whether you have a right to the records sought.

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

First, it is noted that the Freedom of Information Law does not apply to records of Supreme Court, Bronx County. The scope of the Law is determined in part by the term "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."

Based upon the provisions quoted above, the courts and court records fall outside the requirements of the Freedom of Information Law. Nevertheless, there are various provisions of law that grant substantial rights of access to court records. For example, enclosed is a copy of §255 of the Judiciary Law, which pertains to the responsibilities of a court clerk to provide access to records in his possession.

Second, it appears that your requests to the New York City Police Department have been answered pursuant to your appeal. Under the circumstances, since your administrative remedies have been exhausted, the only means of challenging the denial would appear to involve the initiation of a proceeding of Article 78 of the Civil Practice Law and Rules.

Third, I have reviewed the provisions of the New York City Charter and Administrative Code concerning the records sought in possession of the Medical Examiner. As Dr. Shaler suggested in a letter to you dated June 6, it is recommended that you submit a request to Dr. Gross, the Chief Medical Examiner.

It is noted that the applicable provisions of the Code do not specifically deal with rights of access to records. However, enclosed is a copy of §879-2.0 which pertains to situations in which the Chief Medical Examiner furnishes copies of records and the 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3396

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

July 11, 1984

Mr. Neil L. Howard
Superintendent
Hudson City School District
401 State Street
Hudson, NY 12534

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 Superintendent Howard:

I have received your letter of June 27 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, the Board of Education is considering naming a school in honor of a former teacher and Board member. Comments from the community were solicited and "[S]ome of the letters have not been favorable and in fact seem to be defamatory."

Your question is whether the letters are available to the news media, to the public generally, or to the former member of the Board who is the subject of the letters. In this regard, I would like to offer the following comments.

First, under the Freedom of Information Law, §86(4) defines "record" broadly to include "any information kept, held, filed, produced or reproduced by, with or for an agency...", such as the District. Therefore, I believe that the letters in question are "records" subject to rights of access granted by the Freedom of Information Law.

Second, the Freedom of Information Law is based on 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, §87(2) states that an agency may withhold "records or portions thereof" that fall within one or more of the grounds for denial. As such, I believe that the Legislature envisioned situations in which a single record might be both accessible or deniable in part. Moreover, due to the quoted language, I believe that an agency is required to review records sought in their entirety to determine which portions, if any, could justifiably be withheld.

Third, under the circumstances, it appears that one ground for denial is relevant. Specifically, §87(2)(b) permits an agency to withhold records or portions thereof that:

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

In turn, §89(2) list five examples of unwarranted invasions of personal privacy. Since the cited provision states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the five examples, I believe that the examples may be considered illustrative.

From my perspective, considerations of privacy likely arise with respect to those who sent letters to the District, as well as the subject of the letters. It is emphasized that general direction to grant or deny access would likely be inappropriate, for the contents of the records must in my view be considered individually to determine which letters, and the extent to which the letters would, if disclosed, result in an unwarranted invasion of personal privacy.

With respect to requests for the letters by the public, once again, privacy considerations might arise regarding both the correspondent and the Board member. In some instances, it is possible that identifying details regarding the correspondent might be deleted to protect privacy, while the remainder of the letter would be available, if, for example, the comments are innocuous or contain no personal information. In others, due to the sensitive nature of comments, it may be possible to withhold a letter in its entirety.

The same actions would be applicable to requests by the news media, for the media enjoy no special rights of access 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], if a record is accessible, it must be made equally available to any person, "without regard to status or interest". Conversely, if a record may be withheld from the public under the Freedom of Information Law, it would be equally deniable if it is requested by the news media.

If a request is made by the former Board member, the subject of the records, it is possible that she might have rights of access greater than the public generally, for the letters pertain to her. Depending upon the contents of the letters, in some cases, it may be appropriate to delete the identifying details concerning the correspondents, for the disclosure of those details might constitute an unwarranted invasion of their privacy. However, since the letters pertain to the former Board member, it would appear that the substance of the letters, perhaps after the deletion of identifying details, would be available to her. It is suggested, however, that the foregoing should be viewed as general advice, for I am unfamiliar with the degree of sensitivity of the contents of the letters.

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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3397

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

July 12, 1984

Mr. Gordon B. Barber
81-C-343
P.O. Box 51
Comstock, NY 12821

Dear Mr. Barber:

I have received your letter of July 9 in which you asked that this office intercede on your behalf with respect to an appeal made under the Freedom of Information Law.

Specifically, according to your letter, on May 30, you requested a copy of the "master index" prepared by the Department of Correctional Services and asked that the fee be waived. In response to your request, you were informed that the index would be made available, but only upon payment of the fees described in that response. On June 15, you appealed, and as of the date of your letter to this office, no determination had been rendered.

As you requested, I have contacted the Office of Counsel at the Department of Correctional Services on your behalf. I was informed that a determination regarding your appeal has been or soon will be rendered. I was also told that the fee would not be waived, but that a new policy has been established under which a copy of a master index will be placed in the law library of each facility.

It is noted that, under the Freedom of Information Law, §87(1)(b)(iii), an agency may charge up to twenty-five cents per photocopy, unless a different fee is prescribed by statute. Further, unlike the federal Freedom of Information Act, there is nothing in the New York Freedom of Information Law concerning the waiver of fees.

Lastly, with regard to your question regarding the duties of this office, in brief, the Committee provides advice to any person regarding rights of access to records granted by the Freedom of Information Law, a copy of which is attached.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3398

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

July 12, 1984

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 June 24.

You have indicated that various agencies require that forms be completed in order to request records under the Freedom of Information Law.

In this regard, as you may be aware, the Freedom of Information Law does not refer to the use of any particular form to be used when requesting records. Consequently, it has consistently been advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for delaying or denying a record. So long as a written request reasonably describes the record sought as required by §89(3), such a request should suffice.

You also alluded to the Personal Privacy Protection Law, which becomes effective on September 1. Please note that the statute in question will not apply to a school district or other municipal entity. The scope of the Personal Privacy Protection Law is determined in part by the term "agency", which is defined in §92(1) to mean:

> "...any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Lastly, as you requested, your name will be placed on the Committee's mailing list.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stanley Kakalios

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3399

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

July 13, 1984

Paul J. Giacobbe
Superintendent of Schools
Ballston Spa Central School District
70 Malta Avenue
Ballston Spa, NY 12020

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 Superintendent Giacobbe:

I have received your letter of June 28, which relates to an opinion prepared at the request of Ms. Mary Furey involving rights of access to a "staff roster".

According to your letter, the "staff roster has nothing to do with payroll", for it consists of "staff persons' name, home phone and home address". You have requested a clarification regarding rights of access.

Relevant under the circumstnaces are several provisions of the Freedom of Information Law, Public Officers Law, Article 6, §§84 through 90 (see attached).

First, one of the few instances in the Freedom of Information Law in which a record must be created by an agency concerns payroll information. Specifically, §87 (3) states in part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

The payroll information, although identifiable to particular public employees, is in my view clearly available to any person [see e.g., 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)]. It is noted that payroll information had been found to be available even prior to the enactment of the Freedom of Information Law [see e.g., Winston v. Mangan, 338 NYS 2d 654 (1972)].

Second, with regard to the staff roster, I believe that home addresses and home telephone numbers could justifiably be withheld. One of the grounds for withholding under the Freedom of Information Law involves situations in which disclosures would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

In a variety of contexts, it has been found that public employees enjoy a lesser degree of privacy than others, for the courts have determined that public employees are required to be more accountable than others. Further, it has been held that records that are relevant to the performance of a public employee's official duties are often accessible, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Gannett, supra; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980]. Conversely, it has been determined that records or portions thereof which are irrelevant to the performance of one's official duties may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see e.g., Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977; and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

In my opinion, neither the home address nor the home telephone number of public employees would, in the siutation described, be relevant to the performance of their official duties. Consequently, I believe that those items of personal information may justifiably be withheld.

To bolster that contention, I direct your attention to §89(7), a relatively new provision, which states in part that:

> "[N]othing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or a retiree of a public employees' retirement system..."

As such, the Freedom of Information Law does not require the disclosure of public employees' home addresses. While the Law does not refer specifically to home telephone numbers, I believe that the direction provided in the statutory provisions and judicial determinations cited earlier indicate that home telephone numbers need not 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3400

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

July 13, 1984

Ms. Darlene F. Cusumano
[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. Cusumano:

I have received your letter of June 28, which was addressed to "COPAR" and the Solicitor General. Please note that the name of the Committee, which had been the Committee on Public Access to Records, is now the Committee on Open Government. Further, the Committee is housed in the Department of State rather than the Department of Law. The statutory responsibilities of the Committee include providing advice to any person under the Freedom of Information Law.

According to your letter, you have engaged in various attempts to obtain records from the Seaford Union Free School District. In response to a request dated June 15, you were informed by the President of the Board on June 21, that the District's freedom of information officer would be on vacation until July 2. He added that:

> "[D]ue to the present testing period, together with the increased activity and gathering information for year-end reports and further information for the possible resubmission of the budget, our work load, together with decreased staff personnel makes it impossible for us to find the information that you request.

> "It will take approximately 20 to 30 days to comply for the reasons above stated. If, however, you would care to come up yourself and go through the year's bills and school documents to find those materials that you request, we shall be only too happy to allow you access to them."

The information sought involves expenditures of public monies regarding several areas.

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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of a 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 ten 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 ten 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 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,the absence of the freedom of information officer could not in my view constitute a valid basis for delaying access beyond the time required by the Freedom of Information Law and the regulations. Although §1401.2 of the Committee's regulations indicate that a "records access officer" must be designated, that person is responsible for "coordinating" an agency's response to requests for records. As such, in my view, the Board of Education or the access officer should have designated an alternate to deal with requests made in his or her absence.

Third, it has been held that a shortage of staff cannot constitute a valid basis for delaying or denying access to records, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law" United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)].

Fourth, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, while individual records, such as bills, might enable you to prepare figures indicating total expenditures in certain areas, if no such totals have been prepared by the District, there would be no obligation to do so on your behalf in response to a request made under the Freedom of Information Law.

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

Further, to the extent that the records sought exist, I believe that they would consist of "statistical or factual tabulations or data" that must be made accessible pursuant to §87(2)(g)(i) of the Freedom of Information Law.

Lastly,enclosed are copies of §§1720 and 1721 of the Education Law, which requires, at certain times of the year, the publication of a "full and detailed account of all moneys received by the board or the treasurer of said district, for its account and use, and of all the moneys expended therefor, giving the items of expenditure in full..."

I hope that I 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 McCoy, III, President, Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3401

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

July 13, 1984

Mr. Jose Velez
82-B-1155
Auburn Correctional Facility
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. Velez:

I have received your recent letter in which you requested assistance regarding your capacity to obtain court records. The records are apparently needed to prepare for an appeal.

In this regard, although the Freedom of Information Law is broad in its coverage, it does not in my view include the records in which you are interested. The scope of the Freedom of Information Law is determined in part by the term "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."

Based upon the provisions quoted above, I do not believe that the Freedom of Information Law is applicable to the courts or court records.

It is noted, however, that various provisions of the Judiciary Law and other statutes often grant substantial rights of access to court records. It is suggested that you attempt to discuss the matter with your attorney, or perhaps 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3402

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

July 13, 1984

Ms. Ann Ruzow Holland
Executive Director
Friends of Keeseville, Inc.
Civic Center
Keeseville, NY 12944

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. Holland:

Your letter of July 2 addressed to the Division of Legal Services at the Department of State has been forwarded to the Committee on Open Government. The Committee, which is also a unit of the Department of State, is responsible for advising with respect to the Freedom of Information Law.

According to your letter, you represent the Friends of Keeseville, Inc., "a private, not-for-profit, tax exempt corporation incorporated in 1981." You wrote further that the corporation receives both public and private funds. Your question involves the responsibilities of the Corporation under the Freedom of Information Law.

In this regard, the scope of the Freedom of Information Law is determined in part by the term "agency", which 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."

Based upon the language quoted above, as a general matter, the Freedom of Information Law is applicable to entities of state and local government.

While it is unlikely that the Corporation in question is subject to the requirements imposed by the Freedom of Information Law, it has been advised that, in some instances, due to the nexus between a not-for-profit corporation and government, certain not-for-profit corporations are subject to the Freedom of Information Law. For instance, it has been found by the state's highest court that volunteer fire companies which exist due to their contractual relationships with one or more municipalities, are "agencies" that fall within the coverage of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. It has also been advised that an ambulance corps and local development corporations may be subject to the Freedom of Information Law.

In short, while it is doubtful in my view that the Friends of Keeseville, Inc. is subject to the Freedom of Information Law, if you could provide more detail regarding the functions, purposes and duties of the corporation, perhaps I could provide a more specific response.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3403

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

August 2, 1984

Mr. Donald R. Brailsford
#84-C-296
Great Meadow Correctional Facility
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. Brailsford:

As you are aware, I received your letter of July 10. Please accept my apologies for the delay in response.

The question raised in your letter is whether a "special form" must be used to request records under the Freedom of Information Law. In this regard, the Freedom of Information Law (see attached) is silent with respect to the use of a particular form for the purpose of making a request. Section 89(3) of the Law requires that an applicant submit a request in writing that reasonably describes the records sought.

You indicated that you are interested in obtaining the number of your New York State driver's license. I believe that the provisions applicable to driving records are found in §202 of the Vehicle and Traffic Law, a copy of which is attached. After reviewing the Freedom of Information and §202 of the Vehicle and Traffic Law, perhaps you will have the capacity to prepare an appropriate request for the information in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3404

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

August 3, 1984

Mr. Anthony J. Ardito
[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. Ardito:

As you are aware, I have received your letter of June 22, as well as the materials attached to it. Please accept my apologies for the delay in response and note that your letter did not reach this office until July 9.

According to your letter and the correspondence, you have attempted to obtain information from SUNY at New Paltz since April. Specifically, in a request dated April 19, you sought:

> "All records for the last 6 years indicating the number of nonstudent employees at SUNY at New Paltz that were paid under the temporary service program....With these records, also include the average hourly wage that is paid to the above mentioned employees..."

On April 26, Mr. Harry R. Gianneschi, Public Information Officer, responded, stating that:

> "[I]n regard to obtaining this information for the past fiscal year, FY 83, I should have no significant problems. I do want to point out, however, that it may be difficult attempting to isolate non-student from student employees.

> "[I]n regard to previous years, it will be very difficult for us to compile accurate data regarding temporary service employee 'numbers.' The material is available but it can only be compiled by a manual search and selection process.
>
> "[D]ue to this difficulty, I would greatly appreciate your talking with me before any procedures are started. Quite possibly we can discover some other means for answering your questions."

Since you were dissatisfied with Mr. Gianneschi's letter, you wrote to him on May 1 and indicated that "there is nothing for us to discuss", and his "standard answer about the information being difficult to compile is not a very valid reason to not comply with a freedom of information request".

Thereafter, a memorandum was apparently prepared and sent to you which specifies the number of staff funded through Temporary Service for the past four years.

Since you have not yet received the information sought, you have requested assistance.

First, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not an access to information law, but rather a law that pertains to existing records. Section 89(3) of the Freedom of Information Law provides that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if SUNY at New Paltz does not maintain the information sought in the form of a record or records, officials of that agency would not in my opinion be required to create a new record on your behalf in response to a request. Consequently, although you referred to the difficulty of compiling information as an insufficient reason for making it available, if the information does not exist in the form of a record, such a contention would be an appropriate response to your request.

Second, assuming that the records in question do exist, I believe that they would be available. Section 87(2)(g) of the Freedom of Information Law provides that an agency may withhold records that:

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

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

As such, if the statistical information that you requested exists, I believe that it would be accessible to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. Harry Gianneschi, Public Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 3405

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

August 3, 1984

Mr. Leonard Dare
#84-A-3542
Box F
Fishkill, NY 12524

Dear Mr. Dare:

I received today your letter appealing a denial of access to a request for records directed to Mr. Guido Loyola, whose address and phone number are included in your letter.

In brief, the records sought involve papers relating to a proceeding in which you are involved.

I have contacted Mr. Loyola's office on your behalf to obtain additional information regarding the situation. In this regard, I would like to offer the following comments.

First, I was informed that you are the client of Mr. Loyola, who is an attorney. Please note that, under the circumstances, the Freedom of Information Law is not in my view applicable to the records in question. The Freedom of Information Law is generally applicable to records in possession of government agencies in New York, and the scope of the Law is determined in part by §86(3), which defines "agency" to mean:

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

Since Mr. Loyola is acting as a private attorney, the records sought do not fall within the coverage of the Freedom of Information Law.

Further, although the Committee on Open Government may advise with respect to the Freedom of Information Law, an appeal following a denial made by an agency subject to the Freedom of Information Law should be directed to the head of the agency that denied access, rather than 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:ew

cc: Mr. Guido Loyola, Attorney at Law

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3406

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

August 3, 1984

Mr. John Bonner
#80-B-0733
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. Bonner:

As you are aware, I have received your letter of July 9.

According to your letter, in response to your request for records from Family Court in Suffolk County, you were informed that these records fell outside the scope of the Freedom of Information Law.

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

First, the coverage 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 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."

Therefore, the courts and court records in my view fall outside of the requirements of the Freedom of Information Law.

Second, since I am unfamiliar with the nature of the records in which you are interested, I cannot provide specific direction. However, there are various statutes within the Judiciary Law and court acts that pertain to access to court records. For example, enclosed is a copy of §166 of the Family Court Act, which deals generally with Family Court records.

Lastly, it is suggested that you discuss the matter with an attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3407

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

August 6, 1984

Mrs. Shirley Furtick
#82-G-45
247 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 Mrs. Furtick:

As you are aware, I have received your letter of July 4. Please accept my apologies for the delay in response.

In brief, you have indicated in your letter that various information apparently available or known to you is inconsistent with information disclosed at your trial. In this regard, you have asked how you may obtain the report of the Medical Examiner of New York and whether you may seek an investigation regarding the inconsistencies to which you referred in your letter.

First, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. While the issues raised in your letter refer to various types of information, most do not appear to pertain to the Freedom of Information Law. It is noted that the Freedom of Information Law (see attached) is applicable to records of an "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 governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

I would also like to point out that §86(1) defines "judiciary" to mean:

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

Therefore, the courts and court records fall outside the scope of the Freedom of Information Law.

Second, with respect to records of the Medical Examiner, it is suggested that you submit a request to Dr. Gross, the Chief Medical Examiner of New York County. Section 879-2.0 of the New York City Administrative Code pertains to situations in which the Chief Medical Examiner furnishes copies of records. Enclosed in a copy of the cited provision, which also contains a schedule of fees for copies.

Lastly, in conjunction with your question regarding the means by which an "investigation" might be sought, all that I can suggest is that you discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3408

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

August 6, 1984

Mr. Donald Faison
#83-C-541
Box 149
Attica Correctional Facility
Attica, NY 14011

Dear Mr. Faison:

I have received your letter of July 31 in which you requested from this office your "personal history record" and other records pertaining to you. In this regard, I would like to offer the following comments and suggestions.

First, 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.

Second, it appears that the records that you are seeking are maintained at the Attica Correctional Facility. Consequently, pursuant to regulations promulgated under the Freedom of Information Law by the Department of Correctional Services, a request should be made in writing to the Superintendent of the facility or his designee.

Third, it is noted that §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 you include as much detail as possible, such as descriptions of events, dates, identification numbers, and similar information that might enable agency officials to locate the records sought.

Fourth, enclosed is a copy of the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services. It is suggested that you review them closely, for the regulations make specific reference to several of the types of records in which you are interested.

Lastly, in your request to this office, you cited the provisions of the federal Freedom of Information and Privacy Acts. Please note that those statutes pertain to records in possession of federal agencies. The New York Freedom of Information Law, Public Officers Law, Article 6, §§84-90 is applicable to records is possession of agencies in New York, such as those kept at the 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3409

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

August 7, 1984

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:

As you are aware, I have received your letter of July 3 in which you requested an advisory opinion under the Freedom of Information Law. Please accept my apologies for the delay in response.

Your question is whether the Freedom of Information Law grants access

> "to copies of the actual charges or specifications preferred against pedagogical staff when the Board of Education is making a final determination to take adverse action after full consideration of charges".

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

Second, while the language of your letter is in my view somewhat unclear with respect to the particular records that you are seeking, there is case law which I believe provides clarification regarding rights of access to records involved in proceedings brought under §3020-a of the Education Law.

Section 3020-a of the Education Law contains direction regarding the procedure relative to a situation in which charges are made against a tenured person. That provision also includes direction regarding disclosure of information relative to a tenure proceeding. Relevant, according to Herald Company v. School District of the City of Syracuse [430 NY2d 460 (1980)], are various grounds for denial appearing in the Freedom of Information Law. For instance, prior to the making of a final determination that upholds a charge, it was found that disclosure of the charges would result in an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. It was also found that such records could be withheld on the ground that they constitute intra-agency materials deniable under §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

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

In terms of the application of §87(2)(g) to the records in question, and based on Herald Company, supra, I believe that charges are accessible on the ground that they constitute a final determination only when such charges have been upheld pursuant to a final determination rendered under §3020-a of the Education Law. Conversely, it would appear that charges that have been dismissed, or which have not been upheld in a final determination, may be denied under §87(2)(b) or 87(2)(g) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3410

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

August 7, 1984

Mr. Anthony Romandette
84-A-1849
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. Romandette:

As you are aware, I have received your letter of July 12. Please accept my apologies for the delay in response.

You wrote that, in a determination rendered pursuant to an appeal, Ms. Susan Tatro, Town Attorney of the Town of Colonie, indicated that "The FOIL does not require an agency to create any records in response to a FOIL request". Your question is whether her assertion is correct.

In this regard, as a general matter, the Freedom of Information Law pertains to existing records and does not require that any agency create or prepare a record in order to fulfill a request. Section 89(3) of the Freedom of Information Law states in relevant 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..."

Subdivision (3) of §87 requires an agency to maintain records of votes of members of public bodies, payroll information regarding officers and employees, and a list of categories of records it maintains. Those are the only records required to be maintained under the Freedom of Information Law. Therefore, I agree with Ms. Tatro's statement that the information that you are seeking need not be compiled in response to your request.

Your second question involves the party or parties to be named as respondent in an Article 78 proceeding. As I have suggested in prior correspondence, it is suggested that you discuss that issue 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
Executive Director

RJF:jm

cc: Susan Tatro, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMLAO- 1050
FOIL-AO-3411

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

August 8, 1984

Mr. John D. Abbott
[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. Abbott:

As you are aware, I have received your letter of July 12. Please accept my apologies for the delay in response.

According to your letter, "the Hilton Central School Borad of Education recently elected its officers by ballot. At the direction of the Board, the Clerk will publish the vote of each member in the minutes of that meeting". Although the votes of each member will be included in the minutes, you indicated that the Board "declined to release the votes of individual members during the meeting even though requests were made by members of the board, press and public".

Your question is "whether or not the legislature intended that there be this kind of delay in allowing the public, especially those who are interested enough to have attended the meeting, to gain access to this information".

From my perspective, the provisions of two statutes, the Freedom of Information Law and the Open Meetings Law, are relevant to your inquiry. In this regard, I would like to offer the following comments.

First, although the Freedom of Information Law is generally applicable to existing records, a vote taken by a public body represents one of the few situations in which a record must be prepared. Specifically, §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 agency proceeding in which the member votes..."

As such, in any instance in which the Board takes a final vote, a record must be prepared that indicates the manner in which each member cast his or her vote.

Second, the provisions of the Open Meetings Law relative to minutes include reference to a vote. Section 101(1) of the Open Meetings Law states that:

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

Therefore, when §87(3)(a) of the Freedom of Information Law and §101(1) of the Open Meetings Law are viewed in conjunction with one another, I believe that the record of votes required to be prepared under the Freedom of Information Law should be included within minutes required to be prepared under the Open Meetings Law.

It is noted that §101(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks of such meetings.

Nevertheless, it is my view that it was the intent of the legislature to require that members of public bodies, when casting votes, should do so openly, and not by means of a paper ballot that may later be used in the preparation of a record of votes. Perhaps most important in terms of legislative intent is §95 of the Open Meetings Law, the "Legislative Declaration". The first sentence of the cited provision states 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."

From my perspective, when a school board or any other public body takes action by means of a vote, the vote of the members should be taken publicly and in such a manner that the members can be identified with affirmative or negative votes. In my opinion, unless members of public bodies vote in the manner described above, the ability of those in attendance to "observe the performance of public officials" would be diminished to an extent inconsistent with the intent as expressed in the legislative declaration regarding 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3412

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

August 9, 1984

Mr. Rick Blake
84-A-2071
P.O. 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. Blake:

As you are aware, I have received your letter of July 15. Please accept my apologies for the delay in response.

In brief, you asked how you may use the Freedom of Information Law to obtain information concerning a case in which you are involved. In this regard, I would like to offer the following comments and suggestions.

First, the Freedom of Information Law is applicable to records of an "agency", which 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 or district court, whether or not of record."

Based upon the language quoted above, it is clear in my view that the Freedom of Information Law does not apply to the courts or court records. Court records, however, are in many instances accessible purusant to various other provisions of law.

Second, assuming that the records in which you are interested are in possession of an "agency", a written request should be addressed to the agency's "records access officer".

Third, §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". As such, when making a request, it is suggested that you include as much detail as possible, such as names, dates, descriptions of events, identification numbers, and similar information that might enable agency officials to locate the records sought.

Lastly, as you requested, enclosed are copies of the Freedom of Information Law, as well as an article regarding the Law. It is suggested, too, that you confer 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
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3413

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

August 9, 1984

Mr. Steve Deberry
84-B-684
Box 500
Elmira, NY 14902

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. Deberry:

As you are aware, I have received your letter of July 15. Please accept my apologies for the delay in response.

According to your letter, you are facing a problem regarding a determination made in relation to parole. You indicated that you are interested in obtaining copies of records regarding your parole revocation hearing and stated that you do not have the funds to purchase the transcripts. Consequently, you requested the cooperation of this office in assisting you in obtaining the records in question.

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

First, to seek a copy of the records, it is suggested that you send a request to the "records access officer" of the agency that maintains the records, which would appear to be the Division of Parole. It is noted that §89(3) of the Freedom of Information 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, such as names, dates, identification numbers and similar information that would enable agency officials to locate the records sought.

Second, although you may be without funds, there is nothing in the Freedom of Information Law concerning a waiver of fees for copies of records. Further, as a general matter, an agency may charge up to twenty-five cents per photocopy.

Lastly, it is suggested that you discuss the problem with an 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-3414

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

August 10, 1984

Mr. Gerald A. Scotti
President
Mohawk Valley Comunity
College Professional Association
1101 Sherman Drive
Utica, NY 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. Scotti:

As you are aware, I have received your letter of July 16. Please accept my apologies for the delay in response.

According to your letter, at the end of meetings held by the Board of Trustees of Mohawk Valley Community College, an "information packet" in made available to the public. The packet apparently includes "copies of minutes of the previous meetings, resolutions acted upon by the Board and other relevant data". You also wrote that "[W]ithout exception, copies of the formal Board resolutions contain other relevant information, besides the actual resolutions, under the caption BACKGROUND". Although the information appearing under the the heading of "background" had been made available in the past, it was deleted from the materials recently. You indicated that the President of the College, Dr. Michael Shafer, believes that the portion of the records in question fall under the "interagency communication" exception in the Freedom of Information Law.

You have included copies of resolutions containing and excluding material characterized as "background" and have requested an advisory opinion regarding the denial of "background" information. 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 of the

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

Second, the exception in question, §87(2)(g), states that an agency may withhold records that:

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

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

Conversely, those aspects of inter-agency or intra-agency materials consisting of advice, opinion, recommendations and the like may in my view justifiably be withheld.

Under the circumstances, the records in question in my opinion clearly constitute intra-agency materials. Once adopted, the resolutions represent "final agency determinations" and, therefore, are accessible. The "background" information would be accessible or deniable, depending on its contents.

In the sample that you provided containing "background" information, that portion of the records states that a named individual "will fill a Programmer/Trainee position which was vacated through the promotion of the incumbent...", another named individual. From my perspective, the quoted language constitutes factual information that would be available under §87(2)(g)(i). If the "background" portions of the memoranda in question always consist of factual statements analogous to that appearing in the sample, I believe that they would be available. Nevertheless, without having viewed additional samples, it is impossible to conjecture as to their contents. If, for example, the "background" portions consist of opinions or advice regarding the qualifications of prospective employees, those aspects of background information could in my opinion be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Michael I. Shafer, President, MVCC

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3415

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

August 14, 1984

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:

As you are aware, I have received your letter of July 16. Please accept my apologies for the delay in response.

You requested an opinion regarding an issue raised in correspondence with Nathan Quinones, the Chancellor of New York City Schools. In brief, you submitted a request for records under the Freedom of Information Law to Community School District No. 24. In the denial, you were informed that you could appeal within thirty days to the Chancellor. Rather than hearing from the Chancellor, you indicated that the denial was upheld by Ms. Lilliam DelSeni, who was apparently identified as "Records Access Officer". It is your view that it should be demonstrated in a determination on appeal that the Chancellor is aware of the decision.

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

First, with respect to an appeal made under the Freedom of Information Law, §89(4)(a) of the Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the

person requesting the record the reasons for further denial, or provide access to the record sought."

Based upon the language quoted above, it is clear in my view that, as the head of the agency, the Chancellor may designate a member of staff, such as Ms. DelSeni, to render a determination on his behalf. Consequently, I do not believe that the response to your appeal by Ms. DelSeni was inconsistent with the requirements of the Freedom of Information Law.

Second, however, it appears that the delegation of authority to render such a determination should likely have been indicated more clearly. Stated differently, if Ms. DelSeni is responsible for responding to appeals made under the Freedom of Information Law on behalf of the Chancellor, I believe that her role as appeals officer should have been indicated more clearly in the determination.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3416

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

August 14, 1984

Ms. Barbara Baer
Counsel
President of the Borough of Manhattan
City of New York
New York, New York 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 Ms. Baer:

As you are aware, I have received your letter of July 20, as well as the correspondence attached to it. Please accept my apologies for the delay in response.

You have requested an advisory opinion regarding a request made under the Freedom of Information Law. Specifically, on June 21, Mr. Garry Schumacher requested:

> "...copies of any and all expense consultant contracts that were solicited by the Manhattan Borough President's Office under Andrew Stein for the Board of Estimate. Please also send me the names of all current employees, independent contractors, and consultants, who are currently receiving compensation from the Office of the Manhattan Borough President."

In response to Mr. Schumacher's request, you wrote that "[C]urrently there are no expense consultant contracts solicited by the Manhattan Borough President's office for the Board of Estimate" and enclosed "a list of the names of all current employees, independent contractors and consultants who are receiving compensation from the office of the Manhattan Borough President."

Notwithstanding your response, Mr. Schumacher wrote to you again on July 16, when he expressed his dissatisfaction with the response and requested various lists. By means of example, the first area of his request involved:

> "A list of the employees of the Manhattan Borough President's Office who have received compensation from that office at any time after January 1, 1981 through the present. This list should be prepared in an easily readable fashion, so that the information request in a-d below lines up with the names listed; should be on official stationery of the Manhattan Borough President's Office and be signed by you; and should include:
>
> "a. The total sum of money each of these individuals has received as compensation from the Manhatten Borough President's Office since January 1, 1984;
>
> "b. The different rates of compensation, i.e., fluctuations in salary/payments from January 1, 1981, if any;
>
> "c. The time period (months, days or hours, etc.) each individual has worked for the Manhattan Borough President's Office since January 1, 1981;
>
> "d. A brief description of what each individual did to receive that compensation."

The remainder of the request involved lists of independent contractors and consultants who may have received compensation during particular periods of time.

In this regard, it appears that your response was consistent with the requirements of the Freedom of Information Law. It is emphasized that the Freedom of Information Law is a statute that generally pertains to existing records. Section 89(3) states in 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..."

Section 87(3) requires that each agency prepare a record of votes relative to action taken by a public body, a payroll record containing information regarding agency employees, and a subject matter list which categorizes the types of records maintained by an agency.

One aspect of Mr. Schumacher's initial request involved payroll information, which is required to be prepared under §87(3)(b), and was apparently made available to him.

With regard to the remaining "lists" and related data sought by Mr. Schumacher, it would appear that no such lists exist. Similarly, it would appear that other aspects of information sought would involve the preparation of compilations or data that do not now exist in the form of a record. If that is so, as indicated in §89(3), you would not in my view be required by the Freedom of Information Law to create a list or otherwise prepare a record in response to a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Garry Schumacher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1055
FOIL-AO- 3417

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

August 14, 1984

Ms. June Maxam
North Country Gazette
Route 9
Box 408
Chestertown, NY 12817

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, unless otherwise indicated.

Dear Ms. Maxam:

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

Your inquiry concerns the implementation of the Freedom of Information and Open Meetings Laws by the North Warren School District and its Board of Education.

According to your letter and our conversation, although notice of "special" meetings of the Board of Education may be posted, no additional notice is given. In this regard, it is noted that the term "meeting" as defined in §97(1) of the Open Meetings Law has been broadly construed by the courts. In a landmark decision rendered in 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 [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Appellate Division decision, which was later unanimously affirmed by the Court of Appeals alluded to "closed work sessions", "agenda meetings", and similar "informal" gatherings which were found to be "meetings" subject to the Open Meetings Law in all respects, which must be convened open to the public and preceded by notice given in accordance with §99 of the Law.

Section 99 of the Open Meetings Law requires that notice of the time and place of every meeting be given to the public by means of posting and to the news media. Subdivision (1) pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous, public locations not less than seventy-two hours prior to such meetings. Subdivision (2) of §99 pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and 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. Therefore, even if a meeting is characterized as "special" or "emergency", an effort must in my opinion be made to provide notice to the public and the news media. In the case of the news media, notice is often given by phone when a meeting is scheduled less than a week in advance.

In our conversation, you alluded to executive sessions held by the School Board to discuss "school business" and "renovations". Here I direct your attention to §100(1) of the Law, which prescribes the procedure that must be followed by a public body prior to entry into an executive session. The cited provision states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Based upon the language quoted above, a motion to enter into an executive session must indicate, in general terms, the subject or subjects to be considered during an executive session. Further, it is clear in my view 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) specify and limit the topics that may appropriately be considered during an executive session. Without additional description, I do not believe that "school business" or "renovations" would constitute appropriate characterizations of topics for consideration in an executive session.

Lastly, you indicated that requests made under the Freedom of Information Law have gone unanswered. Please be advised 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 concerning 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Enclosed are copies of the Freedom of Information Law, Open Meetings Law, and a pocket guide that summarizes both statutes. Please note that the responses made in the preceeding comments pertain to the current Open Meetings Law. On September 1 the Open Meetings Law will be renumbered. A copy of the Law as it will appear on September 1 has been enclosed. Copies of this opinion and the same materials will be sent to School District officials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Mr. Donlon, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3418

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

August 15, 1984

Mr. Abdul Rahmon Muhammad - I
#83-C-294
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. Muhammad:

As you are aware, I have received your letter of June 30. It is noted that your letter did not reach this office until July 23. Nevertheless, please accept my apologies for the delay in response.

According to your letter, you are interested in obtaining forms used by correction officers that your wife was "forced to sign" in order to visit you at the facility. You apparently requested copies of the forms from the facility superintendent without success.

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

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the Law. In turn, §87(1) requires each agency to adopt its own regulations consistent with the Law and the regulations adopted by the Committee. Enclosed are the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law.

Section 5.45 of the Department's regulations indicate that a denial of a request for records may be appealed to counsel to the Department, whose address is included in the cited provision. With respect to the right to appeal generally, §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."

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.

Without knowledge of the contents of the forms in question, I cannot provide specific advice regarding rights of access.

It is suggested that you closely review the Department's regulations, as well as the Freedom of Information Law and an explanatory brochure on the subject, copies of which are also enclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3419

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

August 15, 1984

Mr. Bruce D. Smith
New York State Organizer
509 North Goodman Street
Rochester, NY 14609

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. Smith:

As you are aware, your letter addressed to the Attorney General of New York has been forwarded to the Committee on Open Government, which is responsible for advising with respect to the Freedom of Information Law. Please accept my apologies for the delay in response.

According to your letter, you are interested in requesting information from the Department of Motor Vehicles. As such, you have asked which, if any, "Freedom of Information" statutes might be applicable. Further, you inquired with respect to the procedures to follow when requesting information.

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

First, the New York Freedom of Information Law is applicable as a general matter to records in possession of entities of state and local government. The scope of the Law is determined in part by §86(3), which defines "agency" to mean:

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

Based upon the language quoted above, the Department of Motor Vehicles is in my view clearly an "agency" 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Third, §89(3) of the Freedom of Information Law requires that an applicant submit a request that "reasonably describes" the records sought. Consequently, 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. It is noted, too, that an agency may require that a request be made in writing.

Fourth, with respect to records of the Department of Motor Vehicles that are most frequently sought , perhaps most important is §202 of the Vehicle and Traffic Law. That provision deals in part with the manner in which a reqeust is made, the Department's capacity to locate records, and the fees that may be charged for copying Department records. Enclosed for your review are copies of both the Freedom of Information Law and §202 of the Vehicle and Traffic Law.

Lastly, it is suggested that you contact the regional office of the Department in Rochester to determine whether particular forms might be used to facilitate your requests. The phone number for the regional office is 454-6699.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3420

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

August 15, 1984

Mr. Nickolas C. Yanni
[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. Yanni:

As you are aware, I have received your letter of July 21. Please accept my apologies for the delay in response.

In brief, you raised questions regarding your capacity to determine whether files or records exist "under [your] name" and which may be in possession of the "FBI or a local court".

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

First, there are various provisions of law pertaining to access to government records. As a general matter, the New York Freedom of Information Law (see attached) is applicable to records in possession of units of state and local government in New York. With respect to records in possession of federal agencies, such as the FBI, rights of access are determined by a different provision of law, the federal Freedom of Information Act.

Second, both the state and federal freedom of information provisions are 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 the Freedom of Information Law or the Freedom of Information Act, depending upon which statute is applicable.

Third, under both the state and federal laws, an applicant for records must submit a request in writing that "reasonably describes" the records sought. As such, when directing a request to a state, local, or federal agency, it is suggested that you provide as much detail as possible in order to enable agency officials to locate the records sought.

Lastly, neither the federal nor the state freedom of information statutes applies to court records. Nevertheless, with respect to New York courts, most records in possession of a court are available. Therefore, if you believe that records pertaining to you have been filed with a court, it is suggested that you direct your request to the clerk of that 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

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3421

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

August 20, 1984

Mr. James V. Callaghan
News 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:

As you are aware, I have received your letter of July 23. Please accept my apologies in the delay in response.

You have requested an advisory opinion in relation to requests for records of the Division of the Lottery. According to the correspondence attached to your letter, on June 12, one of your staff requested:

> "1. Names, addresses and latest sales figures for the 106 Staten Island sales agents for Lotto and Numbers.
>
> "2. Copies of applications for Lotto and Numbers sales agents for the last two years."

In response, Mr. Yamin, chief of public relations for the Division, wrote that a list of names and addresses of sales agents on Staten Island would be available conditionally. Specifically, he wrote that the Division "would, however, request your written assurance that you understand that as a State agency, the Lottery is required not to release or sell lists such as these if they are to be used for commercial or fund-raising purposes and that publication without the permission of the individuals would expose them to such intrusion." The "sales figures" and applications were also denied.

Notwithstanding Mr. Yamin's response, Mr. William Knowlton of the same office indicated by letter on June 6, "Your Yellow Pages lists local agents under 'Lottery'".

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

First, since references were made to privacy, it is noted that §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". Further, §89(2)(b)(iii) 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..."

From my perspective, if a list of sales agents is requested for a commercial purpose, it might justifiably be withheld in conjunction with the language quoted above. Moreover, there is case law indicating that an agency may inquire as to the purpose for which a list of names and addresses is requested in order to determine whether the list would indeed be used for commercial or fund-raising purposes [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980)]. As such, it is suggested that you inform Mr. Yamin that the list would not be used for commercial or fund-raising purposes, if such a statement would be accurate.

With respect to the comment that publication of the contents of a list without consent of the individuals named would be prohibited, I am unaware of any such prohibition. In my opinion, once a record is made available under the Freedom of Information Law, the recipient may do with it as he or she sees fit.

Further, if Mr. Knowlton's statement is accurate, i.e., that the names and addresses of slaes agents appear in the Yellow Pages, there would appear to be no valid rationale for the denial by the Lottery.

The second area of the request involves "sales figures" relative to sales agents. That information was withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Unless I am mistaken, the information sought has no relevance to personal privacy. If the information sought could be used to determine the gross

income, for example, of a sales agent, perhaps a denial could be justified. Nevertheless, as I understand the situation, the sales data would represent merely one aspect of the income of a sales agent, only that relative to the sales of lottery tickets.

The remaining area of your request involves applications to be "lotto and numbers sales agents". Without additional information regarding the contents of applications, I cannot provide specific advice relative to rights of access. It is possible that the application might require the submission of personal information that might if disclosed result in an unwarranted invasion of personal privacy. On the other hand, if the application does not require the submission of personal information, it might be accessible. In short, without additional knowledge of the contents of the application, it is difficult to conjecture as to rights of access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. George D. Yamin, Chief, Public Relations

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3422

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

August 20, 1984

Mr. Raymond Whetstone
83-C-970 D-2-12
Great Meadow Correctional Facility
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. Whetstone:

I have received your letter of July 25 concerning your unsuccessful attempts to obtain a police report.

According to the correspondence attached to your letter, you submitted a request to Commissioner Myers of the Buffalo Police Department on April 3 for copies of reports made by named police officers concerning a specific event. In response to your request, Commissioner Myers wrote that:

> "In the event that such a record does exist, I believe that it would be exempt from disclosure under the Freedom of Information Law because it would necessarily be part of the Police Investigatory File and it is questionable from the information provided in your letter what interest you would have in this matter."

The Commissioner also indicated that you could contact him should further questions arise, and added that you could appeal the denial to the Corporation Counsel of the City of Buffalo.

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

First, without knowledge of the contents of the records sought, I cannot provide specific advice regarding rights of access. Nevertheless, it would appear that the denial is based upon §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 adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

From my perspective, the language quoted above is based upon potentially harmful effects of disclosure. Consequently, the status of an investigation as well as the contents of any such reports would be determinative in terms of rights of access as well as the capacity to withhold. For instance, if an investigation is ongoing, it is possible that disclosure of records compiled for law enforcement purposes concerning an investigation would interfere with the investigation. Under such a circumstances, §87(2)(e)(i) might justifiably be cited to withhold the records. On the other hand, if the investigation has ended, and disclosure would no longer interfere, it is possible that §87(2)(e)(i) might no longer be appropriately asserted as a basis for denial. In short, it is reiterated that rights of access would in my view be dependent upon the nature and contents of the records sought.

A second possible ground for denial is §87(2)(g), which 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 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, a report prepared by a police officer could likely be characterized as "inter-agency" material. Once again, the nature and content of such a report would determine the capacity to deny or an obligation to disclose.

Lastly, Commissioner Myers informed you of your right to appeal his denial. In this regard, §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 ten 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."

Since the time for submission of an appeal has passed, it is suggested that you resubmit a request. If the request is denied, an appeal may be made within thirty days of the denial. It is also suggested that you confer 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
Executive Director

RJF:jm

cc: Commissioner Myers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3423

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

August 21, 1984

Mr. Ernest Franklin
#83-A-6034 BW#22
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. Franklin:

I have received your letter of July 30. Please accept my apologies for the delay in response.

You indicated that you "want to obtain copies of [your] probation report committment papers and any recommendations from the sentencing Judge, D.A., or any other person". You also expressed interest in obtaining "the recent ruling by the Supreme Court on inmate personal property".

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

First, with respect to the decision by the Supreme Court, it is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As a general matter, this office does not maintain records, or legal reference materials, such as the decision in which you are interested. It is recommended, however, that your law library likely maintains U.S. Law Week or a similar publication in which the decisions of the Supreme Court can be located.

Second, it is assumed that the "probations report" to which you referred is a "pre-sentence" report. In terms of rights of access to pre-sentence reports, it is noted that the Freedom of Information Law is based upon a presumption of access. In brief, §87(2) of the Law states that all records are available, except those records or portions thereof that fall within one or more grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

Section 87(2)(a) of the Freedom of Information Law states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances in §390.50 of the Criminal Procedure Law concerning presentence reports. Subdivision (1) and (2) of §390.50 state that:

> "1. [A]ny pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence in 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 descretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are not disclosed, the court shall state for the record that a part or parts of the report or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to appellate review."

In view of the foregoing, it appears that a presentence report may be made available only by a court, and only under the circumstances described in §390.50. As such, it is suggested that you might want to discuss the issue further with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3424

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

August 21, 1984

Ms. Helen Rattray
Publisher
The East Hampton Star
153 Main Street
East Hampton, NY 11937

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. Rattray:

As you are aware, I have received your letter of July 30. Please accept my apologies for the delay in response.

According to your letter and the correspondence attached to it, Chief Harrington of the Sag Harbor Police Department has imposed various restrictions regarding the capacity of your staff to inspect or copy the police blotter kept by the Department. Specifically, Chief Harrington wrote that your staff must request "a specific entry in the Police Blotter that they wish to see". He also wrote that "They will not be given photo copies unless they have a special court order for a specific item".

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

With respect to your initial area of inquiry concerning the Chief's insistence that you request a "specific entry" in the police blotter, both the Freedom of Information Law and its judicial interpretation provide guidance. It is noted that when the Freedom of Information Law was initially enacted in 1974, it required that that an applicant request "identifiable" records. That standard, however, led to difficulties inconsistent with the spirit of the Law, for without specific knowledge of the ex-

istence or contents of particular documents, a person might have no capacity to seek "identifiable" records. Consequently, one among a series of changes in the Law involved a new standard concerning requests. Specifically, §89(3) of the Freedom of Information Law currently requires that an applicant request a record "reasonably described". As such, a person seeking records under the Freedom of Information Law need not identify a record sought or a portion of a record with specificity. On the contrary, as stated recently by the Court of Appeals, the state's highest court, the Freedom of Information Law "requires only that the records be 'reasonably described'...so that the respondent agency may locate the records in question [M. Farbman & Sons v. New York City, 62 NY 2d 75, 476 NYS 2d 69, 72 (1984)]. Therefore, in my opinion, your staff is not required to request a "specific entry" in the police blotter. On the contrary, I believe that a request to review a police blotter in terms of a period of time, such as a day or week, would "reasonably describe" the records sought and conform with the requirements of the Law.

With regard to rights of access, police blotters have long been available. As indicated in your correspondence with Chief Harrington, it has been held that a 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. The court indicated that since the blotter merely contains a summary of events or occurrences, rather than investigative information, it is available under the Freedom of Information Law [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

It is noted, too, that the focal point of the Freedom of Information Law, §87(2), states that "Each agency shall...make available for public inspection and copying all records...", except to the extent that records or portions thereof fall within one or more of the grounds for denial that follow. Therefore, it is clear in my opinion that an accessible record must be made available for inspection and copying. With respect to photocopies, §89 (3) states in part that:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..."

Section 87(1)(b)(iii) provides that an agency may charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches, unless a different fee is prescribed by some other statute.

Based upon the provisions of the Freedom of Information Law cited in the preceding paragraph, assuming that a record is accessible under the Law, I do not believe that any "special court order" is required in order to obtain copies. In short, if a record is accessible, copies must in my view be made "upon payment of, or offer to pay" the requisite fees.

In order to attempt to settle the controversy, copies of this opinion and the Freedom of Information Law will be sent to Chief Harrington.

I hope that I 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 Harrington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3425

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

August 22, 1984

Mr. Donald J. Durant
[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. Durant:

As you are aware, I have received your letter of July 30, and the correspondence attached to it. Please accept my apologies for the delay in response.

Attached to your letter is a request directed to the Board of Trustees of the Village of Vernon under the Freedom of Information Law. Specifically, you sought permission "to view the video-tape recordings" made of meetings held by the Board on May 9 and June 13. The meetings were held in Village Hall and, according to your letter, "were made with equipment owned by board member William Osborne". You added that "these tapes were authorized to be made and passed by resolution of the entire board" and that the contents of the tapes would apparently clarify a situation in which you are involved with the Village. As of the date of your letter to this office, there had been no response to your request.

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 term "record". Section 86 (4) of the Law expansively defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited

> to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the definition, it is clear in my opinion that the Freedom of Information Law is not only applicable to what might be characterized as traditional types of records, i.e., papers, but that it also applies to information kept or stored by means of various newer technologies. To bolster such a contention, it is noted that the courts have held that the definition of "record" includes within its scope items such as tape recordings [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978], as well as computer tapes and discs [see e.g., Babigian v. Evans, 427 NYS 2d 688 (1980) and Szikszay v. Buelow, 436 NYS 2d 558, 107 Misc. 2d 886].

Under the circumstances, since the use of a videotape machine and the preparation of the videotape were apparently authorized by the Board of Trustees, I believe that the videotape constitutes a "record", for it consists of information kept or produced for an agency, the Village of Vernon.

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.

From my perspective, since the videotape consists of an account of events occurring at on open meeting of a public body, I do not believe that any ground for denial would exist. I would like to point out that a similar holding was reached in Zaleski, supra, which involved a request for a tape recording of an open meeting.

Lastly, 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten business days of the receipt of the appeal is 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance with the Law, a copy of this opinion will be sent to the Board of Trustees of the Village of Vernon.

I hope that I 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1059
FOIL-AO-3426

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

August 22, 1984

Ms. Ann Ruzow Holland
Executive Director
Friends of Keeseville, Inc.
Civic Center
Keeseville, NY 12944

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. Holland:

As you are aware, I have received your letter of July 25 and the materials attached to it.

Your inquiry concerns the responsibilities of the Friends of Keeseville, Inc., a not-for-profit corporation, under the Freedom of Information and Open Meetings Laws. As I understand the functions of the corporation, although much of its funding comes from various governmental entities, the Corporation performs its duties through various contractual agreements.

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

The language quoted above indicates, as a general matter, that the Freedom of Information Law is applicable to units of state and local government. Based upon the information that you have supplied regarding the Corporation, it does not appear that the Corporation is an "agency", for it is not a governmental entity, nor does it perform a governmental function. If those assumptions are accurate, the Corporation would not in my view be required to comply with the Freedom of Information Law.

The Open Meetings Law is applicable to meetings of public bodies, and the phrase "public body" is defined in §97(2) of the Law to include:

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

From my perspective, the Corporation likely does not conduct public business. Consequently, I do not believe that it could be characterized as a "public body" required to comply with the Open Meetings Law.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws.

I hope that I have been of some asssistance. 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-3427

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

August 22, 1984

Mr. Bart M. Carrig
City Attorney
City of Little Falls
New Temperence Hall
37 North Ann Street
P.O. Box 1049
Little Falls, NY 13365

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. Carrig:

I have received your letter of July 31 in which you requested an advisory opinion under the Freedom of Information Law. Please accept my apologies for the delay in response.

According to your letter, the City of Little Falls has received a request:

> "...for disclosure by the City of the names and addresses of recipients of Federal Grants for Home Improvements and Repairs, which Grants are based and issued soley on applicant income, or more appropriately the lack thereof."

You expressed concern:

> "...that the disclosure of such information will (1) deter needy persons from making applications, and therefore defeat the purpose of the Federal Program and (2) violate the privacy rights of

> the individual applications, since the low income standards of eligibility are published throughout the community."

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

Second, as you intimated, 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 in my opinion that the names of recipients 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)].

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 issue 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 a grant 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, in an effort to analogize, 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. Contrarily, if 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.

I hope that I 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-3428

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

August 22, 1984

Mr. Merrill E. 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 30, as well as the correspondence attached to it. Please accept my apologies for the delay in response.

You have requested an opinion as to whether you are entitled to receive "salary information" from the Maryvale-Cheektowaga School District "without further delay". Specifically, on July 11, you requested from the Cheektowaga-Maryvale Union Free School District:

> "(1) Teachers' Salary Schedules: 1984-1985; 1985-86; 1986-87 & sheets from the Contracts explaining compensation for any graduate hours teachers earn beyond their columns.
>
> "(2) Also, any sheets explaining longetivity pay."

In response to your request, Assistant Superintendent Wesley C. Starkweather indicated that the materials in question "are presently at the printers and will not be available until the first or second week of August". He indicated further that he would inform you of when the materials would be available to you. As such, your question is in essence whether a response to your request could have been denied due to a contention that the records sought were in the process of being printed.

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

First, assuming that your request at this juncture has been fulfilled, it is my hope that the ensuing remarks will help to avoid similar problems from occurring in the future.

Second, it is noted that the Freedom of Information Law is applicable to all records of an "agency", such as a school district. Section 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, pamphlets, forms, papers, designs, drqwings, maps photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the language quoted above, any information "in any physical form whatsoever" in possession of the school district would in my view constitute a record subject to rights of access granted by the Freedom of Information Law.

If the only records that fell within the scope of your request were in use by the printer, I believe that the delay would be appropriate. Nevertheless, if the school district maintains duplicates of records sent to the printer or other records containing the information sought, the reason explained for the delay would not in my view have been proper. Stated differently, although the District might maintain the information sought in a format different from that being printed, such a factor would not in my view diminish public rights of access to those records.

Lastly, in terms of rights of access, since the records sought are part of a negotiated agreement, I believe that they would clearly be available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. Wesley C. Starkweather, Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3429

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

August 22, 1984

Mr. William W. Watson
[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. Watson:

I have received your letter of July 28. Please accept my apologies for the delay in response.

According to your letter and the correspondence attached to it, you submitted a request for records on July 18 to Charles P. Skiptunas, Superintendent ofSchools in the City of Tonawanda. Your request involved records pertaining to a "mandate" to include "$20.00 per aidable pupil unit in the budget as an expenditure". As of the date of your letter to this office, there had been no response to your request.

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

Second, if indeed there is a "mandate" imposed by state law regarding the expenditure to which you alluded, a record or records indicating such a requirement would in my opinion clearly be available. Such records would likely represent the law or perhaps a statement of policy or directive that seeks to implement the law. As such, assuming that the records sought exist, I do not believe that any ground for denial could appropriately be cited to withhold such records.

Third, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, 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 in necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to attempt to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Superintendent Skiptunas.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Charles P. Skiptunas, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3430

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

August 22, 1984

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 of July 31 as well as the correspondence attached to it.

The correspondence consists of a request directed under the Freedom of Information Law to the New York City Board of Education. You indicated that the request was sent by certified mail and that it was received on July 27. At the end of your request you asked that a response be given to the extent practicable within five days of its receipt and that the remaining aspects of the request be answered within fifteen days. Your question is whether the request was made "in accord with the law".

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

First, having reviewed your request, in several instances, you did not seek records, but raised questions. Here I would like to point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, records do not exist that indicate whether certain procedural steps were taken, numbers of hearings, situations in which recommendations were accepted or rejected, or similar types of inquiries the Freedom of Information Law would not be applicable. Stated differently, if records have not been prepared which indicate the type of analyses or statistics that you are seeking, the Board of Education would not in my opinion be required to create such records or totals on your behalf in response to a request made under the Freedom of Information Law.

Second, with respect to the time limits for response to a request, 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 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

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3431

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

August 23, 1984

Mr. Scott Robins
Nassau/Suffolk Law Services Committee, Inc.
Mental Health Law Project
91 North Franklin Street
Hempstead, NY 11550

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. Robins:

I have received your letter of July 27 and the materials attached to it. Please accept my apologies for the delay in response.

According to your letter, the Nassau/Suffolk Law Services Committee, Inc., Mental Health Law Project sought to obtain from the Nassau County Department of Social Services various records regarding Interim Assistance payments to clients. Specifically you requested information:

> "concerning the names and/or case numbers of all Interim Assistance recipients since August 1981, the amount received from the Social Security Administration (SSA) for each recipient, the amount refunded to each recipient, the dates upon which NCDSS received each Supplemental Security Income check from SSA and the date NCDSS forwarded the refund and/or accounting to the recipient".

The request was denied pursuant to §136 of the Social Services Law and 18 NYCRR §357.

The correspondence appears to indicate that you agree that the names of recipients need not be disclosed. However, it is your contention that if the records sought identify recipients only by means of a case number, and not by name, the records should be made available. In your letter to Commissioner D'Elia, you expressed the contention that the

Department of Social Services is the only entity that can match names with case numbers and, therefore, the recipients' privacy would be protected by the disclosure of this information.

Nevertheless, the material has not been made available despite an appeal made on April 2, for which there was no reply. You have requested an advisory opinion regarding rights of access to the information sought. 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, §87(2)(a) of the Freedom of Information Law permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". As you are aware, one such statute that exempts records from disclosure is §136 of the Social Services Law. From my perspective, §136 generally ensures that records pertaining to applicants for or recipients of public assistance be kept confidential due to an intent to protect personal privacy.

If there were no such provision, and if the issue could be decided under the provisions of the Freedom of Information Law alone, it is possible that much of the information in which you are interested would be accessible. As indicated earlier, §87(2) permits an agency to withhold "records or portions thereof" that fall within one or more of the grounds for denial. Among the grounds for denial is §87(2)(b), which permits an agency to withhold records or portions thereof the disclosure of which would constitute an "unwarranted invasion of personal privacy". Further, §89(2)(a) permits an agency to delete identifying details from records that are "otherwise available" in order to protect against unwarranted invasions of personal privacy.

However, I believe that §136 of the Social Service Law is phrased in such a manner that none of the information can be made available. Subdivision (1) of §136 generally exempts from disclosure the names and addresses of persons who apply for or receive public assistance, as well as the amounts received by such persons. Subdivision (2) of §136 provides that:

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

Due to the breadth of the language quoted above, which includes reference to "all communications and information relating to a person receiving public assistance and care", it appears that all of the information that you have requested would fall within the statutory exemption from disclosure. I would like to point out that the Court of Appeals has determined that if records are wholly exempted from disclosure under a statutory provision, the language concerning the deletion of identifying details found in the Freedom of Information Law is not applicable [see Short v. Board of Managers of Nassau County Medical Center, 57 NY 2d 399 (1982)]. Stated differently, if a class of records is exempted from disclosure by statute, the records are exempt from disclosure in their entirety. The language of §136 of the Social Services Law in my view appears to require that records sought be kept confidential in their entirety.

Moreover, it is noted that I have contacted officials of the State Department of Social Services, who indicated that, although it might be difficult to identify recipients by means of case numbers rather than names, there may be some capacity to do so. As such, disclosure of the case numbers might enable a user of such information to identify recipients.

Lastly, having reviewed our file of appeals for April, I was unable to locate your appeal with regard to the situation in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Commissioner D'Elia
Edward J. Schenk, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3432

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

August 23, 1984

Mr. Frank Suprina
Suprina's Sportland
P.O. Box 756
Melville, NY 11747

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. Suprina:

I have received your letter of July 31. Please accept my apologies for the delay in response.

Your question is:

> "[D]oes the New York State Freedom of Inforamtion Act require tax supportive institutions to show records on purchasing when asked to specify to bidders on bids."

While I am not sure that I understand the question, I hope that the following general comments will be helpful to you.

First, the coverage of the Freedom of Information Law (see attached) is determined in part by the term "agency", which is defined in §86(3) of the Law to mean:

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

As such, as a general matter, the Freedom of Information Law applies to records of units of state and local government in New York.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Third, of possible relevance to your inquiry is §87(2)(c), which permits an agency to withhold records which:

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

By means of example, if an agency seeks bids regarding the purchase of particular goods or services, and a request is made for a bid prior to the date for the final submission of bids, disclosure might result in an unfair advantage to the recipient of the information. Consequently, bids might justifiably be withheld on the ground that disclosure would "impair present or imminent contract awards". Conversely, if the deadline for submission of bids has been reached and all bids have been submitted, as a general matter, I believe that they would be available to any person under the Freedom of Information Law, for disclosure would no longer "impair" the bidding process. It is noted that there is case law indicating that a successful bid is available [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1980)]. Further, I believe that any bid that results in a contract between an agency and a firm that supplies goods or services is available to the public 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1060
FOIL-AO-3433

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

August 23, 1984

Mr. Len Chaimowitz
Editor & Publisher
The Greenwood Lake News
Windermere Avenue
Box K37
Greenwood Lake, NY 10925

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. Chaimowitz:

I have received your letter of July 28. Please accept my apologies for the delay in response.

You have raised a series of questions regarding the Open Meetings Law.

The first area of inquiry pertains to a situation in which members of a village board of trustees met in the village clerk's office after a meeting had ended. You wrote that the gathering in question involved a quorum of the members of the board who were engaged in "animated conversation". You indicated further that they appeared to have been involved in discussions of matters of public business.

From my perspective, based upon the facts as you have described them, the gathering in the clerk's office was likely a "meeting" subject to the requirements of the Open Meetings Law. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, held that the definition of "meeting" [§97(1)] includes within its scope 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 might be characterized [see Orange County Publications v. Council of the City of Newburgh,

60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, it appears that the gathering described in your letter was a "meeting" that fell within the scope of the Open Meetings Law.

Your second area of inquiry concerns an event that occurred during a meeting of a village board of trustees. Specifically, two members sought "to discuss something outside of the meeting room". Your question is whether two members of a board may "discuss something in another room away from the public". In this regard, I believe that the Open Meetings Law applies to public business conducted by a quorum, a majority of the total membership of a public body. If, for example, a village board of trustees consists of five members, a discussion conducted by two of its members would fall outside the requirements of the Open Meetings Law, for less than a quorum would be present.

With respect to your third question, you asked whether a board can meet in an executive session in private prior to the convening of an open meeting. For the reasons expressed below, I believe that an open meeting must always be convened prior to entry into an executive session.

First, the phrase "executive session" is defined in §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded.

Second, §100(1) prescribes a procedure that must be followed by a public body during an open meeting before it may enter into an executive session. Specifically, the cited provision states in relevant part that:

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

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

Lastly, you asked whether "the laws of a municipality must be made available". In this regard, you wrote that "a newly codified village set of laws" is available at a cost of $100. You have asked whether there is a requirement that specifies where local laws must be made available or whether there is precedent for making local laws available free of charge to a local newspaper, such as the "official" newspaper of a village.

Here I direct your attention to the Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof that fall within one or more grounds for denial appearing in §87 (2)(a) through (h) of the Law.

Laws adopted by any public body are in my view clearly available for inspection and copying, for no ground for denial would be applicable with respect to a law.

I believe that such laws would have to be made available at the village hall by the clerk, who, under §4-402 of the Village Law, is the legal custodian of village records.

Further, I am unaware of the volume of the set of village laws. It is noted, however, that §87(1)(b)(iii) of the Freedom of Information Law indicates that an agency may generally charge no more than twenty-five cents per photocopy. Therefore, if you are interested in obtaining a copy of a particular municipal law, I do not believe that you could be charged more than twenty-five cents per photocopy. Further, as indicated previously, inspection of such records could be made at no charge.

Lastly, I have no knowledge of any provision that would require that copies of municipal laws be made available free of charge to the news media generally, or to an "official" newspaper.

I hope that I 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-3434

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

August 23, 1984

Mr. Darryl Boyd
#77-B-1424
135 State Street
Auburn, NY 13024-9000

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. Boyd:

I have received your letter of July 30. Please accept my apologies for the delay in response.

According to your letter, you unsuccessfully sought copies of records of the Buffalo Police Department involving "the interrogation of exculpatory witnesses". The denial was apparently based upon "Section 87 of the FOIL". You have asked for information regarding steps that might be taken.

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

Second, it appears that one or more of the grounds for denial might be relevant with respect to the records sought. Perhaps of greatest 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..."

In my opinion, the language quoted above and the capacity to deny are based upon potentially harmful effects of disclosure. By means of example, when records are compiled for law enforcement purposes and disclosure would interfere with an investigation, §87(2)(e)(i) could likely be cited with justification as a basis for a denial. Conversely, if an investigation has ended and disclosure would no longer "interfere" with the investigation, the cited provision might not serve as a basis for withholding.

It is possible that other grounds for denial might be applicable in part. For instance, §87(2)(b) permits an agency to withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy". Section 87(2)(f) enables an agency to withhold records when disclosure would "endanger the life or safety of any person".

The extent to which any of the grounds for denial described above would be applicable is unknown to me, for I am unfamiliar of the contents of the records in which you are interested.

Third, §89(4)(a) of the Freedom of Information Law indicates that a denial may be appealed. The cited 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 ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought..."

Lastly, as you requested, enclosed are copies of the Freedom of Information Law and various explanatory materials 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3435

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

August 23, 1984

Mr. Richard Flory
Chairman of Taxpayers
Advocating Fair Taxes
[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. Flory:

As you are aware, I have received your letter of August 1, in which you complained in relation to unsuccessful efforts to obtain records from the City of Yonkers.

In this regard, I recently received a copy of a memorandum sent by Harold J. Peterson, Commissioner of Fiscal Services for the City of Yonkers, to Rodney H. Irwin, City Manager. The memorandum pertained to your request made on August 1, the subject of the correspondence sent to this office. Assuming that the City Manager has agreed with Mr. Peterson's contentions, I believe that your request would have been fulfilled in a manner consistent with the Freedom of Information Law.

For future reference, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law. With respect to the types of records that you requested, it appears that the records consist of statistical or factual data which is clearly available under the Freedom of Information Law, §87(2)(g)(i) and which have long been available under the provisions of §51 of the General Municipal Law.

I would also like to point out that the Freedom of Information Law and the regulations promulgated by the Committee, which govern the precedural 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 in necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five bisiness 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 ten business days from the receipt of an appeal to render a determination. Moreover, copies of appeal 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 ten 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 87 AD 388, appeal dismissed 57 NY 2d 774 (1982)].

Enclosed for your consideration are copies of the Freedom of Information Law and the regulations promulgated by the Committee.

If my assumption that the records have been made available is inaccurate, please inform me.

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

Sincerely,

Robert J. Freeman

RJF:ew

Enc.
cc: Rodney H. Irwin, City Manager
Harold J. Peterson, Commissioner of Fiscal Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3436

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

August 24, 1984

Mr. Merrill E. 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 August 1 and the materials attached to it.

Your inquiry pertains to requests directed under the Freedom of Information Law to four school districts. The requests involve provisions of collective bargaining agreements which in my view are accessible. You have requested advice regarding the responses by school district officials. In addition, you asked whether the Districts "have an obligation to immediately send the information requested".

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

First,although a school district is not in my opinion required to respond to a request "immediately", 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 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 87 AD 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, one of the responses indicates that it is not the District's "practice to send material through the mail...", and you were advised that you could pick up the materials at the district's office. In my view, so long as an applicant for records is prepared to pay the requisite fees for photocopying and postage, an agency must mail records to the applicant. To require an applicant to travel to an office would in my opinion conflict with the spirit of the Law and, in some instances, be unreasonable. By means of example, I do not believe that a state agency with records located in Albany could require a resident of Erie County to travel to Albany to obtain copies of accessible records.

Third, in one case, although you requested particular aspects of a collective bargaining agreement, you were informed that the entire agreement, consisting of a 48 page booklet, could be sent to you upon payment of photocopying and postage fees. From my perspective, if the information sought was found in certain portions of the 48 page booklet, rather than the entire booklet, the response should have involved only those portions for which you applied.

As you requested, copies of this opinion will be sent to the districts to which the applications were 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:ew

cc: George Navik
Raymond E. Morningstar
Henry M. Narducci
Dr. Andrew P. Mulligan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3437

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

August 24, 1984

Mr. Joseph Werner
[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. Werner:

I have received your letter of August 3 and the correspondence attached to it.

As I understand the situation, you have requested from certain officials of the School District that employs you "copies of everything they have on file which pertains to [you]". You were given the opportunity to review the contents of your personnel folder, the "official file". It appears, however, that you believe that other records kept outside of the official file exist, and those records are the subject of your inquiry.

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 term "record", which is defined in §86(4) of the Law to mean:

> "any information kept, held, filed, porduced 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, memorandums, 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 a school district, not only those found within a personnel folder or "official file", fall within the coverage of the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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, in my opinion, there may be two possible grounds for denial that might appropriately be raised regarding records pertaining to you.

Section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof which if disclosed would result in "an unwaranted invasion of personal privacy". Further, §89(2)(b) lists five examples of unwarranted invasions of personal privacy. The first example includes "personal references of applicants for employment". Therefore, if, for example, a person transmitted to the District a reference concerning you, I believe that the reference would be deniable on the ground that disclosure would result in an unwarranted invasion of personal privacy. In other instances, there may be situations in which individuals other than yourself are identified and in which disclosure might result in an unwarranted invasion of personal privacy.

Another basis for denial that may be relevant is §87(2)(g). The cited provision states that an agency may deny access to records or portions thereof that:

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

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

statistical or factual data, such as time sheets, payroll information and the like are accessible. Similarly, if, for example, an employee has been involved in a disciplinary proceeding which has resulted in a determination, the determination would be accessible. Nevertheless, records or portions thereof in the nature of advice, recommendation or impression, for example, are likely deniable.

In terms of intent, Assemblyman Mark Siegel, the Assembly sponsor of the amended Freedom of Information Law, wrote that §87(2)(g) was intended to be interpreted as follows:

> "[F]irst, it is the intent that any so-called 'secret law' of an agency be made available. Stated differently, records or portions thereof containing policy, or determinations upon which an agency relies is accessible. Secondly, it is the intent that written letters transmitted from an official of one agency to an official of another or between officials within an agency might not be made available if they are advisory in nature and contain no factual information upon which an agency relies in carrying out its duties. As such, written advice provided by staff to the head of an agency that is solely reflective of the opinion of staff need not be made available."

It is noted that there may be provisions contained in collective bargaining agreements that expand upon rights of access granted by the Freedom of Information Law. In such cases, the contractual provisions would provide rights of access in excess of those 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:ew

cc: Dr. Richard Shaughnessy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3438

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

August 24, 1984

Ms. Dinah Morrison
Staff Attorney
Department of Correctional Services
The State Office Building Campus
Albany, NY 12226

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. Morrison:

I have received your letter of August 8 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter:

> "The Department of Correctional Services periodically finds itself confronted with requests for records, allegedly based upon New York State's Freedom of Information Law, in which the records sought are not yet in existence."

By means of example, you attached a request made under the Freedom of Information Law in which the applicant asked he be provided "on a continuing basis all reports of the Division of Program Planning, Research and Evaluation."

It is your view that such requests fall outside the scope of the Freedom of Information Law. I concur with your contention for the following reasons.

First, the scope of the Freedom of Information Law is determined in part by the term "record", which is defined in §86(4) 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."

Although the language quoted above is expansive, from my perspective, the definition clearly pertains to information that exists in the form of a record or records. I do not believe that it includes information or a record that has not yet been prepared.

Second, §87(2) in its introductory language states that "Each agency shall... make available for public inspection and copying all records...", except to the extent that one or more of the ensuing grounds for denial might be applicable. In my opinion, §87(2) requires that an agency grant or, as the case may be, deny access to a "record" as defined by §86(4). The obligation to grant or deny access in my view pertains to an existing record "kept, held, filed, produced or reproduced by, with or for an agency". Once again, if a record does not exist, I do not believe that §87(2) or the Freedom of Information Law generally would be applicable, for access could neither be granted nor denied.

Third, §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 approximante date when such request will be granted or denied..."

It is clear in my view that the procedural requirements concerning an agency's response to a request pertain to situations in which there is extant information in the form of a "record" for which access can be granted or denied.

In sum, I believe that the Freedom of Information Law is applicable to existing records and that the type of request described in the correspondence could not be construed as 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3439

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

August 24, 1984

Mr. Robert E. McDonald
Claim Superintendent
State Farm Mutual Automobile
Insurance Company
140 Metro Park
Rochester, NY 14623

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. McDonald:

I have received your letter of August 3, in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns your efforts in gaining copies of police accident reports from the Sheriff of Wyoming County. It is apparently your belief that the reports in question must be made available upon payment of a fee of fifty cents. The Sheriff, however, wrote that the fee is $5.50 for an uncertified copy, and $6.50 for a certified copy of an accident report. You also indicated that the Sheriff requires that an applicant for records must "show up in person, complete a lengthy form, wait about a week and then return in person".

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 defferent 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, 1982, a local law, for example, 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 suf-

ficient, 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:ew

Enc.

cc: Allen L. Capwell, Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3440

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

August 27, 1984

Mr. Donald J. Averill
Dundee Central School
Dundee, NY 14837

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. Averill:

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

You have requested an advisory opinion under the Freedom of Information Law concerning rights of access to "permanent teaching certificates". 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 of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

Second, it appears that the only relevant ground for denial under the circumstances is §87(2)(b), which states in general that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

It is noted that there have been several judicial interpretations of the privacy provisions to which reference was made earlier with respect ot public employees. I would like to point out initially that the courts have found that public employees enjoy a lesser right to privacy than any other identifiable group, for public employees have a responsibility to be more accountable to the public than any group. In addition, the courts have found in essence that records that are relevant to the performance of the official

duties of a public employee are available on the ground that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been held that records concerning public employees that are not relevant to the performance of their official duities may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In conjunction with the standards described in the preceding paragraphs, it would appear that the most important document regarding the qualifications of a teacher is a certification. As I understand it, the issuance of a certification, which I believe is the equivalent of a license, is based upon findings by the State Education Department that a particluar individual has met the qualifications to engage in a particular area or areas of teaching. As such, the certification is likely the best and most accurate source of determining a teacher's qualifications. Further, I believe that it is clearly relevant to the performance of a teacher's official duties.

Therefore, it is my view that "permanent teaching certificates" are available under the Freedom of Information Law, for disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1063
FOIL-AO-3441

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

August 27, 1984

Ms. Julie Krug
[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. Krug:

I have received your letter of August 6 in which you requested an advisory opinion.

Specifically, you wrote:

> "...in order to save time, that several items on a school board agenda by grouped together and instead of individual votes on each item, the board might be able to take a 'consensus vote.'"

You added that the "consensus vote" involved a series of personnel matter identified on the attached agenda.

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

Although the phrase "consensus vote" has arisen in previous situations, in all honesty, I have no recollection of the phrase being used in a situation similar to that which you described. Most often, the phrase "consensus vote" has been used where a public body deliberates and appears to reach a determination, but does not vote "officially". In this instance, it appears that an official vote was taken with respect to a series of issues, rather than taking separate votes regarding each issue.

In my view, the Open Meetings Law provides little guidance regarding the legality of the so-called "consensus vote". The only requirement that may be relevant to the issue involves the preparation of minutes.

With respect to minutes, §101 provides what might be characterized as minimum requirements concerning the contents of minutes. The cited provision states that:

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

While the language quoted above does not specify that each issue must be determined by means of separate votes, it is clear that minutes must include reference to all motions, proposals and resolutions. Therefore, if for example, motions are introduced with respect to each item on the agenda, even though one vote may have been taken with respect to all, the minutes would nonetheless have to indicate those motions.

It is also noted that, in the past, a "consensus vote" may have been taken in such a way that the manner in which members of a public body cast their votes would not be known. Here I direct your attention to the Freedom of Information Law. One of the few instances in which an agency must create a record under the Freedom of Information Law involves a situation in which a public body votes. Section 87(3)(a) of the Freedom of Information Law 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 any instance in which a public body votes, a record must be prepared, presumably as a part of the minutes, which specifies the manner in which each member cast his or her vote.

As you requested, a copy of this opinion will be sent to the Superintendent and the President of 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

cc: Sandra Holden, President
Dr. Lewis Grell, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3442

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

August 27, 1984

Mr. Gary C. Decker
78-D-5
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. Decker:

I have received your letter of August 4 in which you raised questions regarding rights of access to various types of records.

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

First, the Freedom of Information Law is applicable 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 state, including any municipal or district court, whether or not of record."

As such, the Freedom of Information Law applies generally to records of units of state and local government. It does not apply, however, to courts and court records or newspapers, for example.

Second, although the Freedom of Information Law does not include court records within its scope, those records are often available under other provisions of law. For instance, §255 of the Judiciary Law grants broad rights of access to records kept by clerks of courts.

Third, rights of access to birth and death records are not governed by the Freedom of Information Law, but rather §§4173 and 4174 of the Public Health Law. Further, those records need not be made available unless they are requested for "judicial or other proper purposes". It is noted, too, that birth and death records are not kept at the office of a county clerk. Original birth and death records are generally kept by the State Health Department; duplicates are kept by city or town clerks.

Fourth, with respect to verification that a person attended a particular school, I believe that rights of access are determined by the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g). In brief, assuming that the individual attended a public school, an indication of attendance would in my view be available if the school district has adopted a policy under the Act regarding "directory information". If no such policy has been adopted, a record of attendance might be confidential.

Lastly, when directing a request to an agency under the Freedom of Information Law, it is noted that §89(3) requires that an applicant "reasonably describe" the record sought. As such, a request should include enough detail, such as names, dates, descriptions of events 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3443

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

August 27, 1984

Mr. Myron H. Blumenfeld
[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. Blumenfeld:

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

According to your letter, the "Board of Zoning and Appeals of the Town of North Hempstead does not have any facility to reproduce blueprints of large plans which are often part of zoning applications". You have asked "What obligation, if any, does the Board have to make copies of these blueprints available to the public?"

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

First, as you are likely aware, §87(2) of the Freedom of Information Law requires that an agency must "make available for public inspection and copying all records...", except to the extent that a ground for withholding might be applicable. It has been suggested in the past that an applicant might be able to copy a blueprint or other large document by means of a photograph. Perhaps you or another applicant could use camera equipment to prepare a copy of a blueprint.

Second, §89(3) of the Freedom of Information Law in my view imposes an obligation on an agency to make a copy of an accessible record in conjunction with the payment of a fee. The cited provision states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonable described, shall make such record available to the person requesting it...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..."

Therefore, I believe that an agency must prepare a copy of an accessible record upon payment of the requisite fee.

Third, §87(1)(b)(iii) indicates that an agency's procedural regulations must 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."

Since the blueprint is larger than nine by fourteen inches, the fee for copying should be based upon the "actual cost" of reproduction. If, for example, the blueprint can be reproduced by a facility outside of Town offices, the "actual cost" might include the charge made by the facility preparing the duplicate, as well as the time involved and perhaps the mileage.

I hope that I 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-3444

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

August 28, 1984

Mr. William D. Bavoso
Cohen, Bavoso, Weinstein & Fox
19 East Main Street
P.O. Box 3139
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. Bavoso:

I have received your letter of August 9 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, enclosed with your letter is a copy of a resolution adopted by the Town Board of the Town of Mount Hope which indicates that the fee for copies of records of the Town is $1.50 per page. You indicated that you were unable to "find any justification in the law for this charge" and asked whether I am aware of any provision that would permit the assessment of such a fee.

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 Town of Mount Hope, 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 must 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 for records up to nine by fourteen inches, unless a different fee is prescribed by statute.

Third, it is noted by way of background that §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 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, 1982, a local law, for example, 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, I believe that the resolution adopted by the Town Board is invalid to the extent that it is inconsistent with the Freedom of Information Law, which now generally prohibits an agency from charging 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: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3445

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

August 28, 1984

Mr. Richard Hodza
Attorney at Law
Route 35
South Salem, NY 10590

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. Hodza:

I have received your letter of August 7 in which you raised questions regarding fees assessed by a New York City agency.

Specifically, you wrote that the New York City Department of Buildings charged a fee of $5.00 for a copy of a violation. You indicated that the charge would have been $5.00 whether or not the record was certified. Attached to your letter are copies of the violation and a fee schedule regarding certain services rendered by the Department of Buildings.

You have asked why New York City through its Department of Buildings charges $5.00 per photocopy, whether or not the document is certified. In this regard, I would like to offer the following comments.

First, §87(1)(b)(iii) of the Freedom of Information Law requires that an agency's procedural regulations adopted under the Freedom of Information Law must 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".

Based upon the language quoted above, an agency cannot in my view charge more than twenty-five cents per photocopy for a record up to nine by fourteen inches, unless a different fee is prescribed by a statute other than the Freedom of Information Law.

Second, the fee of $5.00 is based upon a provision of the New York City Administrative Code, §C26-34.0, which, according to the fee schedule, was apparently revised in March of 1982. From my perspective, the New York City Administrative Code could not be equated with a "statute". It is noted that the Court of Appeals has found that records characterized as confidential under the New York City Administrative Code could not be considered as exempted from disclosure by statute under §87(2)(a) of the Freedom of Information Law [see Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)].

The determination rendered in Morris, supra, was based in part upon a finding that the Administrative Code could not be considered a "statute" that could be cited to exempt records from disclosure. Similarly, I do not believe that the Administrative Code could be cited as a statute for the purposes of justifying a fee of $5.00 for photocopying.

In sum, it is my view that the Department of Buildings may not charge more than twenty-five cents per photocopy with respect to the record in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Office of Counsel, Department of Buildings

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3446

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

August 29, 1984

Mr. Michael A. De Vasto
[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. De Vasto:

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

According to your letter, you are interested in obtaining "a list of all the pistol license holders in New York State with the addresses and telephone numbers". It is apparently your understanding that "such information is available under the Freedom of Inforamtion Act".

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

First, the Committee on Open Government 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.

Second, to the best of my knowledge, there is no "list" of all holders of pistol licenses. I would like to point out, too, that §89(3) of the Freedom of Information Law states that an agency is not required to create a record, such as a list, in response to a request. Therefore, if no list of pistol license holders exists, the Freedom of Information Law would not impose an obligation upon an agency to create a list on your behalf.

Third, as a general matter, approved applications for pistol licenses are accessible in conjunction with the provisions of §400.00 of the Penal Law. Subdivision (5) of the cited provision states in relevant part that:

> "The application for any license, if granted, shall be a public record. Such application shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York and, in the counties of Nassau and Suffolk, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof, and in the county of Suffolk the county clerk is hereby authorized to transfer all records or applications relating to firearms to the licensing authority of that county."

Therefore, it would appear that requests to inspect approved pistol license applications should be directed to county clerks outside of New York City, as well as Nassau and Suffolk Counties. With respect to New York City, Nassau and Suffolk Counties, the police departments of those units of government apparently maintain approved applications.

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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1065
FOIL-AO-3447

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

August 29, 1984

Defend Our Environmentally Concerned
Citizens and Establish a Pollution
Free Atmosphere
27 Waring Road
Newburgh, New York 12550

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. Augustine, Ms. Augustine and Ms. Smith:

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

According to your letter, you have attempted to determine whether or when the City of Beacon has designated a records access officer under the Freedom of Information Law. You wrote that the access officer appears to have been designated "by word of mouth". Further, you indicated that the City of Beacon has apparently failed to adopt procedures under the Freedom of Information Law or prepare a "subject matter list". In a related area, you stated that the City of Beacon has been asked to post notices of all of its meetings on the bulletin board in the City Hall lobby, but that your request has not been fulfilled.

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

First, in terms of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural aspects of the Freedom of Information Law as well as the subject matter list required to be prepared under §87(3)

(c). In turn, §87(1)(a) of the Freedom of Information Law requires that the governing body of a public corporation, such as the City of Beacon, must adopt uniform rules and regulations for all agencies under the aegis of the City consistent with the Law and in conformity with the Committee's regulations.

Second, one aspect of the Committee's regulations involves the responsibility of the governing body of a public corporation to designate one or more "records access officers" [see 21 NYCRR, §1401.2]. In brief, the records access officer has the duty of coordinating the agency's response to requests for records and maintaining an up to date subject matter list.

Therefore, I believe that the governing body for the City of Beacon has the duty under the Freedom of Information Law to promulgate regulations, which would include the designation by name or title of one or more records access officers.

Third, as a general matter, an agency is not required to prepare a record under the Freedom of Information Law [see §89(3)]. However, an exception to that rule involves the preparation of a subject matter list. Specifically, §87(3)(c) 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."

It is emphasized that a subject matter list is not intended to consist of an index that identifies each and every record of an agency. Nevertheless, the list is required to identify by category the types of records maintained by an agency. Further, §1401.6 of the regulations promulgated by the Committee states that:

> "The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought."

Your remaining question pertains to the posting of notices of meetings. Here I direct your attention to the Open Meetings Law. Section 104 requires the posting of notice prior to all meetings of a public body. Subdivision (1) of §104 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 public locations" not less than seventy-two hours prior to such meetings.

Subdivision (2) of §104 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 §104(1) "to the extent practicable" at a reasonable time prior to such meetings.

Consequently, it is clear in my view that notices of meetings must be conspicuously posted in one or more locations that are designated by a public body in order that the public can know where notices will be consistently displayed. Although there is no requirement that notice be posted on a bulletin board in a city hall, for example, I believe that posting in that type of location is common.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3448

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

September 4, 1984

Mr. Hank Purcell, Jr.
#84-C-357
Box 187
Wende Road
Alden, NY 14004-187

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. Purcell:

I have received your letter of August 10, 1984 in which you requested advice in obtaining access to records maintained by the Department of Correctional Services and the Division of Parole.

First, while your letter does not specify the type of information you are seeking, §89(3) of the Freedom of Information Law requires that the records you request be "reasonably described".

Second, both the Department of Correctional Services and the Division of Parole have promulgated regulations which decribe the procedure for seeking access to records. I have enclosed these regulations (7 NYCRR 5.1 et. seq. and 9 NYCRR 800-.1 et. seq.) for your information.

In addition, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government require that an agency respond to a request within certain 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations,§1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Finally, the enclosed regulations provide that requests be directed to specified officers at their business addresses. In the case of the Department of Correctional Services, requests may be directed to:

Deputy Commissioner for Administration
Department of Correctional Services
Building 2
State Office Building Campus
Albany, NY 12226

With respect to the Division of Parole, a request may be sent to:

Public Information Officer
Division of Parole
1450 Western Avenue
Albany, NY 12203

Written appeals should be directed to "Counsel" of each agency at the addresses listed above.

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

Sincerely,

Cheryl A. Mugno

ROBERT J. FREEMAN
Executive Director

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3449

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

September 4, 1984

Ms. Sylvia Rosenblum
[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. Rosenblum:

I have received your letter of August 15, as well as the materials attached to it.

In brief, it is your view that the Police Department of the City of Yonkers "has ignored all the responsibilities relegated to them by the provisions of the Freedom of Information Law...". You indicated that, over the course of several months, the Police Department has failed to respond to your correspondence or state the reasons for denying your requests.

Having reviewed the correspondence attached to your letter, your initial request of December 28, 1983, involved records pertaining to you in possession of the Police Department. In response, Edmund G. Fitzgerald, Assistant Corporate Counsel, indicated that the department was "unable to comply with your request due to its breadth and constraints on manpower". On February 2, you submitted a second request in which you provided more specific information, such as dates and descriptions of events. It does not appear that you have received a response since sending the request of February 2, even though you appealed to the Police Commissioner and the Mayor.

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

First, it is noted that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". While your initial request of December 28 might not have reasonably described the records sought, it would appear that the ensuing request of February 2 would likely have enabled officials of the Police Department to locate the records in which you are interested. Although the standard is flexible, the state's highest court, the Court of Appeals, recently held that the standard of reasonably describing records is met when "the respondent agency may locate the records in question" [see Farbman and Sons v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 476 NYS 2d 69, 72 (1984)]. It is noted, too, that it has been held judicially that a shortage of manpower cannot justify a denial, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law" [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823 (1980)].

Second, 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law. While I am unfamiliar with the contents of the records sought, a denial could be based only upon the grounds for denial listed in the Law.

Lastly, having reviewed our files of appeals for the month of May, I do not believe that a copy of your appeal of May 3 was sent to the Committee as required by §89(4)(a) of the Freedom of Information Law.

In an effort to enhance compliance with the law, copies of this opinion will be sent to Mr. Fitzgerald, Commissioner Fernandes, and Mayor Martinnelli.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. Joseph Fernandes, Commissioner of Police
Honorable Angelo Martinelli, Mayor, City of Yonkers
Mr. Edmund G. Fitzgerald, Assistant Corporate Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3450

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

September 4, 1984

Mr. Ronald L. Morris
#83-C-702
Clinton Correctional Facility
Box 367
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. Morris:

I have received your letter of August 13 in which you raised questions regarding access to records.

According to your letter, you are in the process of appealing a conviction. Your problem is that your attorney has failed to send you copies of transcripts, sentencing minutes, and other materials relevant to your appeal. It is your view that he should, as a matter of courtesy, forward them to you.

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

First, it is noted that the Freedom of Information Law is applicable only to records of government agencies. Section 86(3) of the Law defines "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public coproration, 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, if the attorney in question is a private attorney, the Freedom of Information Law would not be applicable to records in his possession.

Second, although the courts and court records fall outside the scope of the Freedom of Information Law, it is possible that the materials that you are seeking might be made available from a court. Even though the courts are not subject to the Freedom of Information Law, various provisions of law often grant significant rights of access to court records. Consequently, it is suggested that you might want to contact the clerk of the court of record.

Third, it may be worthwhile to discuss the matter with your counselor at the facility or with 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3451

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

September 4, 1984

Mr. Joseph DiBenedetto
Cole & Deitz
Counselors at Law
40 Wall Street
New York, NY 10005

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. DiBenedetto:

I have received your letter of August 13 in which you requested an advisory opinion under the Freedom of Information Law.

In brief, you wrote that you are seeking from the State Insurance Department complaints sent to the Department made against a particular insurance carrier. Attached to your letter is a response to an appeal rendered by Mr. Paul F. Altruda, Principal Attorney for the Department, who wrote that:

> "1. Your request to inspect insured's complaint files was denied on the ground that if granted, such access would constitute an unwarranted invasion of personal privacy, Such denial is authorized by Section 87(2)(b) of the Public Officers Law and was well taken and is hereby affirmed.
>
> "2. Your request to inspect market conduct investigation reports was denied on the ground that they are intra-agency materials. Such denial is authorized by Section 87(2)(g) of the Public Officers Law and was also well taken and is hereby affirmed".

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

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 (i) of the Law (see attached).

Second, it is emphasized that the introductory language of §87(2) states that an agency may withhold "records or portions thereof" that fall within one or more 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. Therefore, even though some aspects of a record might be deniable, the remainder might be accessible as of right.

Third, with respect to written complaints submitted to an agency, it has been advised that the substance of the complaint is available, but that identifying details regarding a complainant may be generally 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. It is noted, however, that §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.

The remaining portion of your request pertained to "market conduct investigation reports", which were denied pursuant to §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. 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, final agency policies or determinations must be made available.

Since I am unaware of the nature or content of the reports in question, I could not conjecture as to the propriety of the denial. Nevertheless, it is emphasized that the reports should in my opinion be reviewed in their entirety to determine which portions may indeed be withheld. To the extent that the reports are reflective of "statistical or factual tabulations or data", for example, those portions should be made available [see e.g., Ingram v. Axelrod, App. Div., 90 AD 2d 568 (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:ew

Enc.

cc: Paul F. Altruda, Principal Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3452

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

September 5, 1984

Mr. R. Gagne
[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. Gagne:

I have received your letter of August 9, which pertains generally to access to "job analyses", "validity studies" and similar materials.

You referred to the decision rendered in Public Education Association v. Board of Examiners [93 AD 2d 838, 461 NYS 2d 60 (1983)] in which it was held that validity studies and job analyses were properly withheld under §87(2)(g) of the Freedom of Information Law. You also cited various determinations indicating that the New York Freedom of Information Law, as well as access statutes in other states, are modelled on the federal Freedom of Information Act (5 USC §552).

In this regard, you asked "what would happen if a federal agency or a federal court" held that the records in question are accessible.

From my perspective, federal court decisions might be persuasive; however, I do not believe that they would be binding. As you may be aware, the federal Freedom of Information Act is applicable only to records of federal agencies. State access laws pertain to records maintained within the states to which those statutes apply. Further, while the New York Freedom of Information Law may be similar in structure to its federal counterpart, the two laws differ in many ways. Enclosed is an article that I prepared that points out several of the distinctions. In short, even though certain types of records might be found accessible or deniable in other jurisdictions, issues concerning rights of access to records of agencies in New York are in my view determined on the basis of the New York Freedom of Information Law.

You asked whether an advisory opinion that I wrote was "used" in Public Education Association. Since the decision made no reference to the opinion, I am unaware of whether the court reviewed it.

The next question involves jurisdiction of the courts relative to the Board of Examiners. In all honesty, I do not have sufficient knowledge to respond.

In your final question, you asked whether I agree with your contention that Board of Examiners refused to disclose the records in question because "they are neither valid nor reliable" and that, therefore, "the examinations based on them as a framework would be adjudicated not valid". Since I am unfamiliar with the process, I can neither agree nor disagree with your contention.

Lastly, enclosed as requested is the Committee's most recent annual report, which contains an updated index to written advisory opinions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3453

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

September 5, 1984

Mr. Peter Chin
Chin's Furniture Co., Inc.
11 Division Street
New York, NY 10002

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. Chin:

I have received your letter of September 2, 1984 in which you requested your fingerprints, photographs and sealed court records from this office.

Please be advised that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. However, the Committee does not generally maintain possession of records, such as those in which you are interested.

Moreover, the Freedom of Information Law prescribes certain requirements for access to agency records. "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."

"Judiciary" is defined in §86(1) of the law as:

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

Thus, the Freedom of Information Law does not pertain to records maintained by the Criminal Court of the City of New York.

Nevertheless, enclosed for your information is a copy of §160.50 of the Criminal Procedure Law, which may be applicable to your situation. Under the cited provision, a court may, upon the termination of a criminal action against a person in favor of such person, enter an order directing that photographs and fingerprints be returned to such person or his or her attorney and that the court records be sealed. It is suggested that you contact the Clerk of the Criminal Court of the City of New York and/or your attorney regarding this matter.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3454

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

September 5, 1984

Mr. David Pietrusza
[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. Pietrusza:

I have received your letter of August 15, 1984, in which you requested an advisory opinion regarding the "subject matter lists" maintained by the Amsterdam Industrial Development Agency and the Amsterdam Urban Renewal Agency.

Specifically, you asked whether the lists meet the requirements of the Freedom of Information Law. In this regard, I would like to offer the following comments.

First, §87(3)(c) requires each agency to maintain:

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

Second, the regulations promulgated by the Committee on Open Government (21 NYCRR 1401.1 et seq.) require that the subject matter list be "sufficiently detailed to permit identification of the category of the record sought" [21 NYCRR 1401.6(b)].

In my opinion, the Amsterdam Industrial Development Agency's list, describing the types of records it maintains as "Financial", "Minutes", "Correspondence and Project Files" and "Contracts, Leases, Deeds and Agreements", likely complies with the requirements of the Freedom of Information Law. Similarly, the list maintained by the Amsterdam Urban Renewal Agency, describing the types of its records as "Payroll and Financial", "Minutes", and "Correspondence and Project Files" and "Contracts and Agreements" might comply with the Law. Nevertheless, without greater knowledge

of the records maintained by those agencies, I cannot advise with certainty that the lists in question are appropriate.

Please note that the Freedom of Information Law does not require an agency to maintain a list of every record in its possession, but rather the categories of records that it maintains. However, the designated records access officer of each agency is required to "assist the requester in identifying requested records, if necessary" [21 NYCRR 1401.2(b)(2)]. Therefore, if you have difficulty identifying the records that you seek, the records access officer may be able to assist 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3455

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

September 6, 1984

Ms. Rosina Abramson
Counsel
Gallet & Dreyer
Counsellors at Law
32 Broadway
New York, NY 10004

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. Abramson:

I have received your letter of August 10 as well as the materials attached to it.

According to your letter, you represent various companies that perform "pre-employment screening services" pursuant to the state and federal Fair Credit Reporting Acts, which appear respectively in Article 25 of the General Business Law and 15 USC §1681. You indicated that those statutes permit "verification of criminal history records for a seven year period, with proper notification and consent of prospective employees" and added that pre-employment criminal history screening is required for many positions of trust, including "security guards, child care workers, bank tellers" and other "security sensitive" positions relating to financial intitutions.

Having recently applied to the Division of Criminal Justice Services (DCJS) for "non-confidential criminal history data" to be made available to your clients in order that they could "efficiently perform their verification services", your request was denied.

According to your letter, Mr. John J. Biggins, Assistant Counsel at DCJS, indicated "that the data was not publicly available and that its use for pre-employment screening was restricted to requests by specified government agencies". You wrote that the denial by Mr. Biggins was based upon the provisions of the Executive Law, §837, General Business Law, §359-e, and the regulations promulgated by the Division, 9 NYCRR Part 6051.

In my opinion, the "non-confidential criminal history data" in which you are interested, particularly records of convictions, is likely accessible under the Freedom of Information Law for the reasons described in the ensuing paragraphs.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as DCJS, are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective there may be four grounds for denial that are relevant to your inquiry.

The first ground for denial appearing in the Freedom of Information Law, §87(2)(a), involves records that are "specifically exempted from disclosure by state or federal statute". Since Mr. Biggins referred to a restriction relevant to disclosure to "specified government agencies", it appears that he was alluding to "qualified agencies". That phrase is defined in §835(9) of the Executive Law to mean:

> "courts in the unified court system, the administrative board of the judicial conference, probation departments, sheriffs' offices, district attorneys' offices, the state department of correctional services, the state division of probation, the department of correction of any municipality, the insurance frauds bureau of the state department of insurance, the temporary state commission of investigation and police forces and departments having responsibility for enforcement of the general criminal laws of the state".

Reference to qualified agencies is made in subdivision (6) of §837 of the Executive Law, which states that the Division of Criminal Justice Services shall:

> "[E]stablish, through electronic data processing and related procedures, a central data facility with a communication network serving qualified agencies anywhere in the state, so that they may, upon such terms and conditions as the commissioner, and the appropriate officials of such qualified agencies shall agree, contribute

> information and have access to information contained in the central data facility, which shall include but not be limited to such information as criminal record, personal appearance data, fingerprints, photographs, and handwriting samples..."

As I understand the language quoted above, DCJS has the authority to contribute to and obtain criminal history information from "qualified agencies". The provision does not in my view specify that criminal history information must be considered "confidential" or "exempted from disclosure". Rather, under the language of §837(6), DCJS is required to establish a "communications network" that serves both DCJS and qualified agencies.

It is noted, too, that §837(8) requires that the Division "adopt appropriate measures to assure the security and privacy of identification and information data". While the language quoted above alludes to "security and privacy", it does not in my opinion exempt records from disclosure.

The regulations promulgated by the Division in 9NYCRR Part 6050 et. seq. impose restrictions on the dissemination of criminal history information. To the extent that the regulations conflict with rights of access granted by a statute, such as the Freedom of Information Law, I believe that they would be void, for it has been held that regulations cannot abridge rights granted by statute [see e.g., Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405; see also Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)].

Moreover, the materials attached to your letter, which include federal regulations, indicate that there is no federal law that would exempt from disclosure the records that you are seeking, which you characterized as "non-confidential criminal history data". If anything, a review of the federal regulations appears to result in a different conclusion. The regulations were promulgated pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Crime Control Act of 1973 [42 USC §3701, et. seq. 28 USC 534], and were published in 41 FR 11714, March 9, 1976. Section 20.20, which applies to "State and Local Criminal History Record Informations Systems", states in subdivision (c) that:

> "[N]othing in these regulations prevents a criminal justice agency from disclosing to the public criminal history record information related to the offense for which an indivi-

> dual is currently within the criminal justice system. Nor is a criminal justice agency prohibited from confirming prior criminal history record information to members of the news media or any other person, upon specific inquiry as to whether a named individual was arrested, detained, indicted, or whether an information or other formal charge was filed, on a specified date, if the arrest record information disclosed is based on data excluded by paragraph (b) of this section".

Paragraph (b) of §20.20 provides that the regulations "shall not apply to criminal history record information contained in...(2) original records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required by law or long standing custom to be made public, if such records are organized on a chronological basis; (3) court records of public judicial proceedings...". Since many aspects of criminal history information are based upon the data described in §20.20(b)(2) and (3), such as court records, there would appear to be no limitation regarding disclosure of the records sought imposed by federal regulations. Further, the commentary regarding §20.21(b) of the federal regulations, which is entitled "Limitations on dissemination", states that "conviction data as stated in §20.21(b) may be disseminated without limitation".

If my interpretation of the provisions of the Executive Law is accurate, §87(2)(a) of the Freedom of Information Law could not be cited as a basis for withholding, for the records in question would not be "specifically exempted from disclosure" pursuant to the provisions of Article 35 of the Executive Law, which pertains to the Division of Criminal Justice Services. Nor would conviction information be considered confidential under federal regulations.

A second ground for denial of possible relevance is §87(2)(g), which permits an agency to withhold records that:

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

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

Under the circumstances, although criminal history data might properly be characterized as "inter-agency or intra-agency material", I believe that it would consist solely of factual information. It is noted that in a somewhat similar situation in which §87(2)(g) was cited by the Division of State Police to withhold records regarding traffic infractions, the Appellate Division chose:

> "...to read the exemption narrowly, as protecting only those materials involving subjective matters which are 'integral to the agency's deliberative process' in formulating policy (Matter of Miracle Mile Assoc., supra p182). Copies of speeding tickets and lists of traffic violations are obviously not within this category, and as they provide the traffic violation information being requested, they should be made available to petitioner" [Johnson Newspaper Corporation v. Stainkemp, 94 AD ad 825, 827; modified, 61 NY 2d 958 (1984)].

In view of the foregoing, I do not believe that §87(2)(g) could be cited as a basis for withholding.

Another 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..."

The capacity to deny in conjuction with the language quoted above is in my opinion based largely upon potentially harmful effects of disclosure. It does not appear that disclosure of the types of records that you are seeking would, if disclosed, interfere with any investigation, deprive a person of a right to a fair trial, identify a confidential source or reveal non-routine criminal investigative techniques or procedures. Consequently, I do not believe that §87(2)(e) could be cited to justify a denial.

The remaining basis for withholding of relevance is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof the disclosure of which would constitute "an unwarranted invasion of personal privacy".

Although the records sought would identify particular individuals, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Assuming that a conviction occurs in open court, and that the record of a conviction is accessible from a court that maintains possession of such a record [see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a], it is difficult to envision a rationale for withholding the same information when it is in the possession of a second government office such as DCJS. As such, a record of a conviction accessible from a court should in my view be made available by DCJS to the public under the Freedom of Information Law.

With respect to arrest data, I believe that there may be significant privacy considerations. For example, if an individual has been arrested but not convicted, disclosure of a record of arrest might cause hardship to the subject of the record. Consequently, perhaps disclosure would result in an unwarranted invasion of personal privacy. Further, records pertaining to charges that have been dismissed in favor of an accused are often sealed under §160.50 of the Criminal Procedure Law. In such circumstances, those aspects of criminal history information might be withheld under §87(2)(a) of the Freedom of Information Law concerning records that are exempted from disclosure by statute.

Assuming that the criminal history information that you are seeking has not been sealed, it is in my view subject to rights of access granted by the Freedom of Information Law. As suggested earlier, I believe that conviction data is accessible, for the same information is generally made available by the courts that have possession of conviction 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:ew

cc: Jay Cohen, Counsel, Division of Criminal Justice Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3456

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

September 6, 1984

Mr. Ralph Katz
[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. Katz:

I have received your letter of August 17 in which you raised questions regarding your capacity to obtain information from the East Ramapo School District.

Specifically, according to your letter, you were ill for a lengthy period beginning in 1978. During the period of your illness, a contract was negotiated between the Teachers' Association and the District, which included provisions for a "sick bank" for teachers who might become seriously ill. Both your application and appeal to the "bank" were rejected.

You have asked for information regarding the manner in which your rejection was determined and how the four members voted. The information sought was not made available and you have been unable to confront the "bank" committee.

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

First, the Freedom of Information Law is applicable to records of an "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 entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Consequently, the School District as well as entities operating under the aegis of the District could in my view be characterized as an "agency" subject to the requirements of the Freedom of Information Law.

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

Third, I believe that any determination made by the School Board or the "bank" committee pertaining to you would be accessible to you. Relevant under the circumstances would be §87(2)(g) of the Freedom of Information Law. 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. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available. Under the circumstances, a decision concerning your application to the bank committee would in my opinion constitute a "final agency determination" that would be accessible to you.

It is noted that the same record might be deniable if requested by a third party. One of the grounds for denial in the Freedom of Information Law permits an agency to withhold records or portions thereof which if disclosed would result in "an unwarranted invasion of personal privacy". In addition, §89(2)(b) lists five examples of unwarranted invasions of personal privacy, the first of which pertains to medical histories. However, §89(2)(c) states that the individual to whom records pertain has rights of access to the records, unless a different ground for denial may justifiably be cited. In short, if a written determination concerning your application exists, I believe that it would be accessible to you.

Fourth, one of the few instances in the Freedom of Information Law in which a record must be prepared concerns a record of votes. Specifically, §87(3)(a) states that:

> "[E]ach agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Therefore, assuming that the bank committee is an agency subject to the Freedom of Information Law, a record should have been created indicating the manner in which each of the four members individually cast their votes.

Lastly, it is suggested that you closely review the terms of the collective bargaining agreement as it pertains to the "sick bank".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Board of Education, East Ramapo School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-1
OML-AO- 1069
FOIL-AO-3457

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

September 6, 1984

Mr. E.M. Knapik
Box 93
RD #1
Fonda, NY 12068

Dear Mr. Knapik:

I have received your letter of September 3. As requested, enclosed are two copies each of the Freedom of Information and Personal Privacy Protection Laws. Also enclosed are copies of the Open Meetings Law. In addition, one copy of each of those statutes will be sent to Mr. Stratton.

You expressed a complaint regarding the conduct of business by a local government agency. In this regard, I would like to offer the following general comments.

First, the Freedom of Information Law is applicable to records of an "agency", which is defined in §86(3) of that statute to include:

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

Based upon the language quoted above, it is clear that the Freedom of Information Law is applicable to records of virtually all units of state and local government.

Second, the scope of the Personal Privacy Protection Law, however, is not as extensive as that of the Freedom of Information Law. The Personal Privacy Protection Law is also applicable to records of agencies; however, the term "agency" is defined in §92(1) of that statute to mean:

> "any state board, bureau, committee, commission, council, department, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Therefore, although the Personal Privacy Protection Law is applicable to state agencies, it does not apply to units of local government, such as a county, city, town, or school district, for example.

Third, since you alluded to "supervisors meetings", it appears that you are referring to meetings of a county legislative body. Here I would like to point out that the Open Meetings Law pertains to meetings of a "public body", which is defined in §102(2) of that statute 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."

Therefore, the Open Meetings Law pertains to meetings of commissions, county legislative bodies, town boards, city councils, and the like.

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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-2
FOIL-AO-3458

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

September 6, 1984

Mr. Rocco J. Palmer
[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. Palmer:

I have received your letter of August 31, which reached this office today, in which you sought information regarding the Personal Privacy Protection and Freedom of Information Laws.

As you requested, enclosed are various materials, including the Freedom of Information Law, an article that attempts to explain its provisions, a pocket guide that summarizes the Freedom of Information Law, and the Personal Privacy Protection Law. In addition, to provide you with guidance regarding the Personal Privacy Protection Law, enclosed are various memoranda that have been distributed to state agencies in an effort to enhance compliance with that statute.

You asked whether you can assert your rights under the two statutes on your own, or whether you would need a lawyer to do so on your behalf.

In this regard, it is noted that each agency subject to the Freedom of Information Law, which includes units of both state and local government, should have designated one or more "records access officers". As a general matter, a request for records in possession of an agency should be addressed to a records access officer. Similarly, with respect to requests made under the Personal Privacy Protection Law, which applies only to state agencies, a "privacy compliance officer" should be designated by state agencies to coordinate responses to requests.

Both laws requires that an applicant submit a request for records "reasonably described". Therefore, when making a request, it is suggested that you include as much detail as possible, such as names, dates, description of events, and similar information that may enable agency officials to locate the records sought.

Lastly, in terms of seeking records, I do not believe that it is necessary to employ an attorney. Further, general advice regarding both laws can be provided by this office.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1072
FOIL-AO-3459

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

September 7, 1984

Ms. Karen Kleparek
[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. Kleparek:

I have received your letter of August 17 in which you expressed concern regarding the practices of the Akron Central School District Board of Education.

Your first area of inquiry pertains to the manner in which the School Board gives, or fails to give, notice of its regular meetings. In response to your initial question, there is no provision in the Open Meetings Law which exempts a school board meeting from compliance with the Law's notice requirements. Specifically, §104 of the Open Meetings Law provides in relevant part that:

> "1. Public 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.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

In view of the language quoted above, I agree with your understanding of the Law. Although §104(3) provides that a public body need not pay to publish notice of its meetings as "legal notice", §104(1) requires that a public body give notice to the news media and to the public by means of posting in one or more designated public locations at least seventy-two hours prior to each meeting scheduled at least one week in advance. Public notice of meetings scheduled less than a week in advance must be given to the news media and posted in the same manner as described above "to the extent practicable" at a reasonable time prior to such meetings. In short, notice, in my opinion, must be given prior to both special meetings and regular meetings of the Board. Additionally, you may want to inquire as to which public locations have been designated by the Board for the purpose of posting notices of meetings.

Second, you questioned the appropriateness of an executive session held by the Board regarding the report and recommendations of the "non-teaching salary committee". Specifically, you stated that you believe that matters discussed by the Board fell outside the grounds for conducting an executive session. Based upon the information which you have provided, it appears that the Board improperly entered into executive session to discuss the matters referenced in the minutes.

As you may be aware, §105 of the Open Meetings Law specifies and limits the purposes for which a public body may conduct an executive session. I agree with your contention that the only grounds for entry into executive session that might have been relevant to the matters discussed by the Board are §§105(1)(e) and (f).

Section 105(1)(e) permits a public body to enter into an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law". Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains generally to the relationship between management and public employee unions or "employee organizations". As such, §105(1)(e) does not permit entry into an executive session to discuss "negotiations" generally, but only negotiations between a public employer and a public employee union pursuant to the Taylor Law. Consequently, if the non-teaching/administrative employees are not unionized, §105(1)(e) would not, in my view, be applicable as a basis for entering into executive session.

With regard to §105(1)(f), which you quoted in your letter, I agree that a discussion of benefits affecting the non-teaching/administrative employees as a group would not involve a "particular" person and, therefore, could not have been conducted during an executive session. If, however, the performance of a particular employee is reviewed, the discussion might involve consideration of the employment history of a particular person. To that extent, an executive session would likely have been proper. The fact that people and personalities might be discussed would not alone, in my view, result in an appropriate basis for entry into an executive session, for, once again, §105(1)(f) is limited to discussions relative to a "particular person" and only in conjunction with the topics listed in §105(1)(f).

In addition, you asked what, if anything, can be done to void the action of the Board. Here I direct your attention to §107 of the Open Meetings Law. That section provides in §107(1) that:

> "Any 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."

It is emphasized that while a court may, upon "good cause" shown, void any part of the Board's action taken in violation of the Law, that power is solely within the court's discretion.

Third, you expressed concern and frustration regarding your requests for records from the School District pursuant to the Freedom of Information Law. Specifically, you stated that on at least one occasion, you had to wait twelve days for records, despite various written and telephone contacts made during that period. I agree with your understanding of the Freedom of Information Law, which contains specific time limits within which an agency must act upon a request 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond with the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Finally, you asked whether the Open Meetings Law or the Freedom of Information Law have been recently amended to exclude boards of education or school superintendents from the application of those statutes. I have enclosed the most recent provisions of each law and note that neither has been amended to exclude school boards or school district officials from coverage of either of those laws.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3460

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

September 7, 1984

Mr. Alan Lyons
71-A-0408
354 Hunter Street
Ossining, NY 10562

Dear Mr. Lyons:

I have received your appeal regarding a denial of a request that you had directed to the Division of Criminal Justice Services on August 17.

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.

Further, §89(4)(a) of the Freedom of Information Law pertaining to appeals 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 ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In view of the language quoted above, it is suggested that you direct your appeal to the Commissioner of the Division of Criminal Justice Services in conjunction with §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-3461

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

September 7, 1984

Mr. William D. Epolito
[redacted]

Dear Mr. Epolito:

I have received your letter of September 4 in which you requested record access forms as well as various types of records.

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 have possession of records generally, such as those in which you are interested, nor does it have the capacity to compel an agency to grant or deny access to records.

I would also like to point out that there is no requirement under the Freedom of Information Law that a particular form be used for the purpose of requesting records. Section 89(3) requires that an applicant submit a written request for records "reasonably described". Therefore, any such request should in my view be sufficient.

Lastly, it appears that the records in which you are interested may be maintained by either the Department of Motor Vehicles or the State Insurance Department. Consequently, it is suggested that you submit requests for the records in question to the records access officers of the two Departments as appropriate.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-41
FOIL-AO-3462

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

September 7, 1984

Ms. Sharon A. McCormick
[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. McCormick:

I have received your letter of September 4 in which you requested information concerning the means by which you may obtain records pertaining to yourself.

Enclosed as requested are copies of the Freedom of Information and Personal Privacy Protection Laws.

It is noted that the Freedom of Information Law is applicable to records in possession of 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

The Personal Privacy Protection Law, which became effective on September 1, is applicable only to records in possession of state agencies. As such, it does not apply to units of local government , such as a county, city, town, village, or school district, for example.

The Personal Privacy Protection Law generally permits an individual to obtain personal information pertaining to him or her in possession of state agencies. The provisions concerning access are found in §95 of that statute.

It is noted that each agency subject to the Freedom of Information Law, which includes units of both state and local government, should have designated one or more "records access officers". As a general matter, a request for records in possession of an agency should be addressed to a records access officer. Similarly, with respect to requests made under the Personal Privacy Protection Law, which applies only to state agencies, a "privacy compliance officer" should be designated by state agencies to coordinate responses to requests.

Both laws require that an applicant submit a request for records "reasonably described". Therefore, when making a request, it is suggested that you include as much detail as possible, such as names, dates, descriptions of events, and similar information that may 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

Robert J. Freeman
Executive Director

RJF:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-3
FOIL-AO-3463

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

September 7, 1984

Paul Meyers, Ph.D.
[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 Dr. Meyers:

I have received your letter, as well as the materials attached to it.

According to the correspondence attached to your letter, you were employed by the Department of Microbiology at the SUNY Upstate Medical Center. While employed, you made various allegations against the Medical Center and the Department of Microbiology, which resulted in the preparation of a report by an ad hoc committee. Having requested a copy of the report of the ad hoc committee, you were denied access. A letter from Dr. George F. Reed, acting President of the Medical Center, indicates that the committee was convened at the request of Dr. Reed, Dr. Schmidt, the former President of the Medical Center, and the SUNY Research Foundation. The rationale for the denial as expressed by Dr. Reed is based upon a contention "that the Research Foundation, as a private nonprofit corporation, is not subject to the New York State Freedom of Information Act. The information you request is the property of the Research Foundation and has been submitted to their Albany Office at their request".

You have asked for assistance regarding your capacity to obtain the report in question, and in this regard, I would like to offer the following comments.

First, there may be two statutes of relevance to the situation. The Freedom of Information Law generally pertains to rights of access to records of units of government in New York. In addition, on September 1, the Personal Privacy Protection Law became effective. That statute enhances rights of access by individuals to records pertaining to them that are maintained by state agencies, such as SUNY.

Second, in terms of the Freedom of Information Law, even though it has been contended that the report in question is the "property" of the Research Foundation, if a copy is maintained by any office of SUNY, including the offices of officials at the Upstate Medical Center, I believe that it would be a "record" subject to rights of access granted by the Freedom of Information Law. As an aside, it has been contended in the past that the SUNY Research Foundation is not an "agency" subject to the Freedom of Information Law. While I disagree with that contention due to the significant nexus between the Research Foundation and SUNY, once again, if the report in question is in possession of SUNY, the Freedom of Information Law would in my view be applicable.

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

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

Based upon the language quoted above, if the report was produced for SUNY, which appears to be the case, or if it is kept or held by a SUNY official, it would be a "record" falling within the requirements of the Freedom of Information Law. I would like to point out, too, that the Court of Appeals has construed the definition of "record" expansively to include even those documents that may have been submitted to an agency voluntarily by a third party outside of government [see Washington Post Co. v. New York State Insurance Department, 61 NY 2d 557 (1984)]. In any event, if the report is in possession of SUNY, I believe the Freedom of Information Law would apply, notwithstanding the role of the Research Foundation.

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Under the circumstances, it would appear that there would be but one ground for denial of relevance that might be cited under the Freedom of Information Law. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

Although the role of the ad hoc committee and the contents of the report are unclear on the basis of the correspondence, it would appear that the report constitutes "inter-agency or intra-agency material". If the report constitutes a "final determination", it would likely be available to you. Contrarily, to the extent that the report contains advice, opinion, recommendations and the like, it might justifiably be withheld under the Freedom of Information Law. In short, without greater knowledge of the contents of the report, it is difficult to provide clear advice regarding rights of access granted by the Freedom of Information Law.

Fourth, it is possible that the Personal Privacy Protection Law might serve to increase rights of access beyond the scope of the Freedom of Information Law.

Section 92(3) of the Personal Privacy Protection Law defines "data subject" to mean "any natural person about whom personal information has been collected by an agency". In turn, §92(7) defines "personal information" to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject". Section 92(9) defines "record" for the purposes of the Personal Privacy Protection Law to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject...".

Section 95(1)(a) of that statute states in part that "each agency subject to the provisions of this article, within five business days of the receipt of a written request

from a data subject for a record reasonably described pertaining to that data subject, shall make such record available to the data subject...". Further, based upon review of §95, which is entitled "access to records", I do not believe that any basis for withholding the report, to the extent that it pertains to you, could justifiably be cited.

In sum, assuming that the report was produced for or is maintained by any official of SUNY, it appears that it would be available to you, at least in part, under the provisions of either the Freedom of Information Law or the Personal Privacy Protection Law.

In an effort to communicate this opinion on your behalf, copies will be sent to Dr. Reed as well as the Office of Counsel at SUNY.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Dr. George F. Reed, Acting President, The Medical Center
Ms. Carolyn Pasley, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3464

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

September 10, 1984

Mr. Jose Lopez
#83-A-30
C-6-2
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. Lopez:

I have received your letter of August 17 in which you requested assistance in obtaining records.

Specifically, in order to prove your innocence, you are interested in gaining access to "finger prints that were taken at the scene of the crime that were suppose[d] to be [yours]". You also expressed the belief that the finger prints are kept at the "bureau of criminal identification". In this regard, I would like to offer the following comments.

In my opinion, the Freedom of Information Law requires that a copy of the finger prints which you seek be made available to you. In addition, I believe that you may able to obtain the finger prints from two agencies, the police department which took the prints and the Division of Criminal Justice Services.

It is noted initially as a general matter that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Two of those grounds for denial may be relevant to your situation.

First, §87 (2)(e) permits an agency to withhold records which are compiled for law enforcement purposes and which, if disclosed, would "interfere with law enforcement or judicial proceedings" or "reveal criminal investigative techniques or procedures, except routine techniques and procedures". Since fingerprints are the product of routine procedures, however, and since it appears that the disclosure of your fingerprints would not interfere with any investigation or judicial proceedings, §87(2)(e), in my view, would not permit an agency to withhold your fingerprints [see Kotter v. Suffolk County Police Department et al., Sup. Ct., Suffolk Cty., April 7, 1983].

Second, §87(2)(g) enables an agency to withhold "inter-agency or intra-agency materials" unless such materials consist of "statistical or factual tabulations or data", or "instructions to staff that affect the public", or "final agency policy or determinations". In my opinion, your fingerprints are "factual data".

Finally, you may be able to obtain your fingerprints from the police department which took them by writing to the "records access officer" of the department. You may also seek the fingerprints from the Division of Criminal Justice Services. The Division's regulations (9 NYCRR 6050.1 et seq.) permit a person to review criminal history data maintained by the Division pertaining to such person and allows an individual to challenge the completeness or accuracy of such data. It is suggested that a request be directed to:

Records Access Officer
Division of Criminal Justice Services
Identification and Information Services
Executive Park Tower, Stuyvesant Plaza
Albany, NY 12203

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3465

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

September 10, 1984

Mr. Anthony J. Ardito
[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. Ardito:

I have received your letter of August 16 regarding your efforts to obtain records from SUNY at New Paltz.

Specifically, you stated that Mr. Freeman's letter of August 3 was not helpful to you, since Mr. Gianneschi neither granted nor denied your request, nor "did he give [you] the name of a person to whom an appeal could be directed". Additionally, you stated that you believe "if Mr. Gianneschi was able to give [you] records for [four] years, that he should also be able to give [you] the average hourly wage paid for those years". Finally, you wrote that "[A]ny agency could by your memo deny the [existence] of records requested and be off the hook". You questioned whether this is "really in the spirit of the Freedom of Information Law".

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

First, as explained in Mr. Freeman's letter of August 3, §89(3) of the Freedom of Information Law provides that as a general rule, an agency is not required to prepare any record not possessed or maintained by such agency in response to a request. In other words, if SUNY at New Paltz does not maintain a record of the "average hourly wage paid to those nonstudent employees", it is not required to create a new record containing information derived from other records that it might maintain in order to respond to your request. Perhaps, your review of other records at SUNY at New Paltz might enable you, in effect, to create your own record.

Second, you claimed that Mr. Gianneschi neither granted nor denied your request, nor did he inform you of the appeal process. If, however, the requested records do not exist, as Mr. Gianneschi has explained to you, no records were denied. Therefore, there would be no denial to appeal.

For future reference, I have enclosed a copy of the regulations regarding public access to records maintained by the State University of New York (8 NYCRR 311.1 et seq.). Please note that §311.6(c) provides the title and address of the person to whom an appeal may be directed.

Finally, you expressed concern over the possibility of an agency avoiding the requirements of the Freedom of Information Law by merely denying the existing of records. In a situation in which an agency indicates that no record exists, you may, pursuant to §89(3) of the Law, request that the agency "certify that it does not have possession of such record or that such record cannot be found after diligent search".

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

Sincerely,

Robert J. Freeman
Executive Director

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3466

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

September 11, 1984

Mr. Howard Jacobson
80-A-3899
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. Jacobson:

I have received your letter of August 27 in which you requested assistance from this office.

As you may be aware, the Freedom of Information Law provides public rights of access to records maintained by state and local agencies. At the same time, the federal Freedom of Information Act grants similar rights to individuals with respect to records maintained by federal agencies.

Since I am not familiar with the entities which make grants to the New York City Police Department, I suggest that you contact the Department's Records Access Officer for the records which you seek. The Department likely maintains budgetary records which would reflect federal aid, grants, subsidies, etc. which are given to the New York Police Department. When making your request, it is important that you "reasonably describe" the records in order for the access officer to locate the records sought. Similarly, if you believe that other agencies maintain records pertaining to grants awarded to the Police Department, requests may be sent to the records access officers at those agencies individually.

I regret that I cannot be of greater assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3467

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

September 12, 1984

Mr. Thomas Davis Sr.
#82-A-6032
Ossining Correctional Facility
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. Davis:

I have received your letter of August 31 in which you requested assistance in obtaining records from the New York City Department of Corrections.

Specifically, you explained that you have been trying to obtain "Inmate Cash Receipts" and "Inmate Property Receipts" as well as medical records from the Warden of the Brooklyn House of Detention for Men for the purpose of proving your innocence. In this regard, I would like to offer the following comments.

First, the Freedom of Information Law provides the public with a general right of access to records maintained by a state or local agency and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, in my view the "receipts" that you are seeking likely do not fall within any of the categories of deniable records, for they pertain to you.

I would like to point out, however, that §89(3) of the Law requires that an applicant "reasonably describe" the records sought in order that the agency can locate them.

In other words, your request should include details such as names, dates, identification numbers, etc. Further, the request should be directed to the "Records Access Officer" of the New York City Department of Corrections.

Third, the Freedom of Information Law and the regulations promulgated by the Committee provide time limits within which an agency must respond 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 business days to grant or deny access. Further, if no response is given within five business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In brief, the cited provision does not grant direct rights of access to medical records to the subject of the records. However, a physician designated by a competent patient may request and obtain medical records pertaining to the patient from another physician 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3468

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

September 13, 1984

Mr. Darryl Boyd
#77-B-1424
135 State Street
Auburn, NY 13024-9000

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. Boyd:

I have received your letter of August 31.

According to your letter, it is your belief that the records that you seek do not fall within any of the grounds for denial enumerated in the Freedom of Information Law. Further, you explained that, after the Buffalo Police Department denied your request for records, you promptly appealed the denial on August 2, 1984 to the Corporation Counsel of the City of Buffalo. However, you have not yet received a response from that office.

With regard to this matter, I would like to offer the following suggestions.

It has been held that when an appeal is made but a determination is not rendered within ten 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, 87 AD 2d 388, app. dis. 57 NY 2d 774]. It appears, therefore, that you may bring an Article 78 proceeding for review of the City's denial of your request for records.

You also indicated that the records in question would be "exculpatory". In this regard, it is noted that there may be distinctions, in terms of the duty to disclose, between the Freedom of Information Law, which pertains to public rights of access to records, and criminal discovery under Article 240 of the Criminal Procedure Law.

Under the circumstances, it is suggested that you discuss the matter 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
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1076
FOIL-AO- 3469

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

September 13, 1984

Mr. William F. Brown, Jr.
General Manager
Batavia Broadcasting Corporation
WBTA Radio 15
438 East Main Street
Batavia, NY 14020

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. Brown:

I have received your letter of August 31 which concerns the minutes of an executive session held by the Genesee County Legislature.

According to your letter, the "purpose of the meeting was to discuss a personnel matter involving an employee of the Genesee County Nursing Home". You explained that the "matter may involve felony criminal charges in the theft of social security checks from nursing home patients". According to your letter, at the meeting, "at least one legislator who attended the Executive Session spoke vigorously on the matter and insisted to the clerk that her remarks be taken down and included in the minutes of that session". It is your belief, therefore, that two sets of minutes exist, one of which is attached to your letter, and another that includes the remarks made by legislators.

You questioned whether the situation, as you described it, violates the Open Meetings Law and the "requirement that minutes of both open meetings and executive sessions must be compiled and made available". In this regard, I would like to offer the following comments.

First, I direct your attention to §106 of the Open Meetings Law concerning minutes. The cited provision states:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> "2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> "3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Please note that the requirements for taking minutes of an executive session are less expansive than those regarding minutes of open meetings. Specifically, minutes are required to be taken at executive sessions only with respect to action that is taken by formal vote. The minutes need only consist of a record or summary of the final determination of such action. Therefore, if the County Legislature did not take formal action with regard to the nursing home employee, in my view, there would have been no requirement that minutes be prepared.

Second, while it is not clear on the basis of your letter that the remarks of the legislator were recorded as minutes of the executive session, I would like to point out that §106 of the Open Meetings Law does not require a public body to record the remarks of an individual made during an executive session merely because that person so requests.

Section 106(3) requires that the minutes of an executive session, taken pursuant to subdivision two, be made available to the public within one week from the date of the executive session. I would point out, however, that the summary of any final determination required to be included in the minutes "need not include any matter which is not required to be made public by the freedom of information law" [see §106(2)]. Stated differently, even though a public body might take formal action during an executive session, information that would be deniable under the Freedom of Information Law need not be made available as part of the minutes of the executive session.

With respect to your situation, it appears that no action was taken by formal vote. Therefore, the minutes of the executive session that are attached to your letter likely comply with §106 of the Open Meetings Law.

However, if another set of minutes exists or a record of the comments made by the legislators was kept, those documents would, in my view, constitute "records" that fall within the scope of the Freedom of Information Law.

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

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

As such, if a "second" set of minutes has been prepared, it would be a "record" subject to the Freedom of Information Law.

In brief, the Freedom of Information Law requires that all records be made available, except to the extent that they contain information considered deniable in conjunction with the grounds for denial listed in §87(2)(a) through (i) of the Law.

Under the circumstances, it appears that there may be considerations present relative to personal privacy as well as law enforcement functions. In order to provide additional information regarding rights of access, enclosed are copies of both the Freedom of Information and Open Meetings Laws.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3470

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

September 14, 1984

Mr. Clarence E. Winans
[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. Winans:

Your letter of August 23 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.

According to your letter, an individual is seeking from local government "data similar to that first granted at his request". The individual is "now informed that such data is kept by an official not on the courthouse premises and is thus accessible to [the individual] only through that official". Specifically, you asked "Can the data-base that guides the issuance of notifications of violations be denied under the Freedom of Information Act?" In this regard, I would like to offer the following comments.

First, the Freedom of Information Law provides public access to "records", rather than "information" maintained by state and local governments. Record is defined broadly by §86(4) of the Law as:

> "...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, microfilims, computer tapes or discs, rules, regulations or codes."

Thus, if the information exists in the form of a "record" or records, I believe that it would be subject to rights of access granted by the Freedom of Information Law.

Second, when a request is made, it must "reasonably describe" the records sought. Further, the regulations promulgated by the Committee, which have the force and effect of law, require that the head or governing body of an agency designate one or more "records access officers". A records access officer is responsible for coordinating an agency's response to requests for records. Therefore, a request should be sent to the "records access officer", who is usually the clerk of a town or village.

Third, the Freedom of Information Law is based upon a presumption of access; all records of an agency are accessible, except those records or portions thereof that fall within one or more among nine grounds for denial appearing in §87(2)(a) through (i) of the Law. Generally, the language of many of the exceptions is clearly based upon potentially harmful effects of disclosure.

Finally, I regret that I cannot be more specific with respect to the circumstances described in your letter, for it is unclear which agency or what types of records are the subject of your inquiry. As you requested, I have enclosed a copy of the Freedom of Information Law and hope that my comments will be helpful to you. If you have any further questions, please do not hesitate to contact this office.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3471

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

September 10, 1984

Mr. Paul Lester
News Director
WTSX/WDLC
Neversink Drive
P.O. Box 290
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. Lester:

I have received your letter of August 21 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, a vacancy on the Port Jervis School Board arose due to the resignation of a Board member prior to the expiration of his term. As such, you asked whether the names of persons who have applied for appointment to the Board are accessible.

It is your belief that, under the circumstances, the situation is similar to "candidates filing for election to the school board" and that, as a consequence, the names of those who seek appointment to the Board should be a matter of public record. I agree with your contention and, in this regard, I would like to offer the following comments.

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.

Second, it would appear that there is only one ground for denial of possible significance. Specifically, §87(2)(b) permits an agency to withhold records or portions thereof when disclosure would constitute an "unwarranted invasion of personal privacy". I addition, §89(2)(b) lists five examples of unwarranted invasions of personal privacy. From my perspective, none of those examples could likely be cited to withhold records indicating the names of those who seek appointment to the Board.

Moreover, while the Freedom of Information Law permits an agency to withhold certain personally identifiable information, it is clear that not every disclosure of personally identifying details represents an "unwarranted" invasion of personal privacy. On the contrary, some invasions of privacy might be characterized as permissible. In this instance, I agree with your analogy, in that candidates for election to a board are publicly known and in fact attempt to publicize their credentials and qualifications prior to an election. Disclosure represents the only means by which the public can know who the candidates for appointment to the Board might be, and I believe that the names of those candidates would be accessible under the Freedom of Information Law on the ground that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3472

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

September 11, 1984

Mr. Reynard K. McClusky
JOB PAC
Box 307
Delmar, NY 12054

Dear Mr. McClusky:

As you are aware, Secretary of State Shaffer has asked that I respond on her behalf to your letter of August 7.

Your inquiry pertains to a request sent to the Center for Women in Government for a questionnaire involving comparative worth to which reference was made in the June issue of News on Women in Government.

Having contacted the Director of the Center, Ms. Nancy Perlman, I was informed that the questionnaire will be made available to you when it is in its final form, which should be in approximately a month.

The document that you sought, which you characterized as a "pilot study", was apparently distributed to various state agency officials for the purpose of determining the validity of questions; it was not intended to be viewed as the final questionnaire. Further, the draft questionnaire that has been withheld might be deniable under the Freedom of Information Law at this juncture. Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold "inter-agency or intra-agency materials" under certain circumstances. In addition, as I informed you by phone, there is a judicial determination which upheld a denial of "validity studies" [Public Education Association v. Board of Examiners, 93 AD 2d 838 (1983)].

I was also informed that the draft questionnaire was developed, at least in part, by the SUNY Research Foundation, a not-for-profit corporation. As such, it was contended that the record in question was the property of the Research Foundation, rather than the Center, which is part of the State University. For future reference, it is noted that such a contention would be inconsistent with the Freedom of Information Law.

The Freedom of Information Law is applicable to records of an agency, such as SUNY, and the term "record" is defined 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, even though a document might be prepared by a third party outside of government, once that document is maintained by an agency, it is a "record" subject to rights of access granted by the Freedom of Information Law.

Once again, please accept my apologies for the delay in response. It is suggested that you seek the final questionnaire in approximately a month.

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: Secretary Shaffer
Nancy Perlman
Counsel, SUNY Research Foundation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3473

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

September 11, 1984

Mr. Tom Robbins
Editor
City Limits
424 West 33rd Street
New York, NY 10001

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. Robbins:

I have received your letter of August 27 in which you requested an advisory opinion under the Freedom of Information Law.

According to the correspondence attached to your letter, you requested from the New York City Department of Housing Preservation and Development a report of the Inspector General concerning "the misuse of funds" by the Sunset Park Redevelopment Committee. You indicated in the correspondence that the report in question apparently led to "important public decisions" that were "made based virtually solely on the report". You added that a memorandum that you obtained indicates that the report shows that the Inspector General found that there was no "personal benefit to anyone from the Community Management funds".

The report was denied on the grounds that it:

> "1. Contains information 'compiled for law enforcement purposes' which would, if disclosed, identify a 'confidential source'; and
>
> 2. Is an inter-agency report.
>
> Therefore, your request is denied pursuant to Section 87(2)(e)(iii) and Section 87(g) of the Public Officers Law".

Since I am unaware of the contents of the report, it is impossible to provide specific direction regarding rights of access. I hope, however, that the following comments will be useful to you.

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 (i) 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 grounds for denial. Consequently, I believe that the legislature envisioned situations in which a single record or report might be both accessible and deniable in part. Moreover, it is my view that the quoted language requires that an agency review a record sought in its entirety to determine which portions, if any, might justifiably be withheld.

Third, with respect to the bases for withholding offered by the Department, the first pertains to §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..."

From my perspective, the language quoted above is based upon potentially harmful effects of disclosure. As you intimated in your letter, if records compiled for law en-

forcement purposes would, if disclosed, interfere with an investigation, to that extent, records may be withheld under §87(2)(e)(i). Nevertheless, if an investigation has ended, disclosure would no longer "interfere" and, therefore, §87(2)(e)(i) might no longer justifiably be cited as a basis for withholding.

Mr. Fiocca, the Appeals Officer for the Department, indicated that disclosure would identify a "confidential source". If that is so, perhaps the Department could delete or withhold those portions of the report which would identify a confidential source, while granting access to the remainder. In short, even though a confidential source might be identified in the report, that factor alone would not in my view permit the Department to withhold the report in its entirety.

The second basis for withholding offered by the Department is based upon the notion that the document in question "is an inter-agency report". Here I direct your attention to §87(2)(g), which states that an agency may withhold records that:

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

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

Under the circumstances, the report in question might properly be characterized as "inter-agency or intra-agency material". However, as suggested earlier, I believe that the Department must review the report in its entirety to determine which portions of the report are accessible pursuant to subparagraphs (i),(ii) or (iii) of §87(2)(g) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. Joseph V. Fiocca, Records Access Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3474

COMMITTEE MEMBERS
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GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

September 11, 1984

Mr. Donald J. Barnett
[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. Barnett:

I have received your letter of August 23 in which you requested that this office conduct an "investigation and review of the policies, practices and procedures" of the New York City Board of Education relative to response to requests made under the Freedom of Information Law.

The correspondence attached to your letter indicates that the Board has acknowledged the receipt of your requests. However, Board officials have estimated that responses to the requests will be made in several months.

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

First, although the Committee on Open Government does not have the authority to "investigate", I have discussed the matter with a representative of the Board. I was informed that responses to your requests are in the process of being prepared.

Second, 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 business 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 ten 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 ten 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 remediesm 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 87 AD 2d 388, appeal dismissed 57 NY 2d 7744 (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: Ruth Bernstein, Deputy Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3425

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

September 14, 1984

Mr. Robert P. Strom
Watertown Bureau Chief
P.O. Box 248
Watertown, NY 13601

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. Strom:

I have received your letter of August 27 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter:

> "[T]he Agriculture Committee of the Jefferson County Board of Supervisory last month disciplined Kenneth Sutton, Jefferson County Dog Warden, for using illegal methods (drowning and an outlawed decompression chamber) to destroy dogs and cats, and other inequities with regard to the operation of the Jefferson County Dog Shelter. My sources tell me that Mr. Sutton lost two of his three weeks of vacation in the reprimand, which was inserted in his personnel file."

Upon your request to inspect the reprimand in question, the County Attorney, J.T. King, wrote that in his opinion, requests for "personnel records of individual employees of Jefferson County should be denied".

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

First, the Freedom of Information Law is applicable to records of an agency, such as Jefferson County. It is emphasized that §86(4) of the Law defines "record" expansively to include:

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

As such, I believe that all records of the County, including those characterized as "personnel records", are subject to rights of access granted by the Freedom of Information Law.

Second, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Third, it appears that two of the grounds for denial may be relevant. Nevertheless, based upon the language of the law and its judicial interpretations, neither in my view could be cited to withhold the record sought.

One of the grounds for denial, §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 questions regarding privacy often of necessity require the making of subjective judgments, there have been a number of judicial decisions which in my view clarify issues regarding the privacy of public employees. In a variety of situations, the courts have found that public employees enjoy a lesser degree of privacy than others, for it has been found that public employees must be more accountable than others. Further, with respect to records pertaining to public employees, it has been held on several occasions that records concerning to public employees that are relevant to the performance of their official duties are accessible, for disclosure in such instances would constitute a permissible rather than an unwarranted invasion of personal privacy [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 (1975); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Geneva Printing Co. v. Village of Lyons,

Sup. Ct., Wayne Cty., March 25, 1981; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Sinicropi v. County of Nassau, 76 AD 2d 838 (1980)]. Conversely, if records are not relevant to the performance of one's official duties, they may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see e.g., Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

From my perspective, based upon the case law, particularly the holdings in Farrell and Geneva Printing, supra, a written reprimand would be accessible. As stated in Geneva Printing, which upheld rights of access, the issue is whether the Freedom of Information Law "entitles the press to ascertain the result of a disciplinary action against a public employee even though the matter was concluded by a settlement which the municipality involved agreed would remain confidential". It is noted, too, that the fact that a record might be found within a personnel file or personnel record would not in my view remove it from the scope of rights of access [see Steinmetz, supra]; it remains a "record" within the scope of the Freedom of Information Law.

The remaining ground for denial of possible significance is §87(2)(g), which permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is 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 determinations must be made available.

It would appear that a reprimand would be reflective of a "final agency determination" and would be accessible on that basis [see Farrell and Geneva Printing, supra].

In sum, for the reasons expressed above, I believe that the reprimand in question should be made available, for no ground for denial could justifiably 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:ew

cc: Mr. J.T. King, County Attorney
Mr. James A. Merritt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3476

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

September 17, 1984

Michael Lepak, Legislator
County of Cayuga
Cayuga County Office Building
Auburn, New York 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. Lepak:

I have received your letter of September 4 in which you requested assistance in obtaining information from Cayuga Community College.

According to your letter, you have requested certain financial records regarding the operation of Cayuga County Community College, however, your requests have been "ignored". In addition, you explained that Cayuga County does not have a "Public Access Officer".

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

First, as a member of the Cayuga County Legislature, you may be interested in §208 of the County Law, which concerns books and records maintained by the county. Section 208 provides in part that:

> "1. The board of supervisors of each county shall have the general charge of all records, books, maps, papers of the county, subject to such right of custody of a county officer as may be directed or authorized by law and shall make adequate provision for their safekeeping, repair and maintenance.

> 2. Each county officer shall have custody and control of all records, books, maps or other papers, required or authorized by law to be recorded, filed or deposited in his office; all other records, books, maps or papers shall be in the custody and control of such officer as the board of supervisors shall designate. It shall be the duty of each such officer to keep and preserve the same. No such record, book, map or other paper, shall be sold, destroyed or otherwise disposed of, except pursuant to law."

Based upon the quoted provisions, it appears that a county officer or other such officer as designated by the legislative body of a county, has custody and control of the records maintained by the County and its offices. Even though no "records access officer" may have been designated under the Freedom of Information Law, it appears that the custody and control of records remains with the legislative body.

Second, §87(1)(a) of the Freedom of Information Law provides that the governing body of each public corporation, such as a county, shall promulgate rules and regulations in conformity with the provisions of the Law. Thus, the governing body of Cayuga County is charged with the ultimate responsibility for complying with the Freedom of Information Law. Enclosed are copies of the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law and which have the force and effect of law. Section 1401.2 of the regulations requires that the legislative body designate one or more "records access officers". A records access officer is the person to whom a request may be directed and who is responsible for coordinating an agency's response to requests made under the Freedom Information Law.

Third, it is suggested that you request the records in question from Ms. Howe again, informing her that your request is made pursuant to the Freedom of Information Law. You might ask her to respond within the statutory five day period and to provide you with the name of the person responsible for answering requests, if Ms. Howe does not have the authority to grant or deny access to the records.

Fourth, it is noted as a general matter 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.

Lastly, it would appear that much, if not all of the documentation sought is accessible under the Freedom of Information Law. Most of the material consists of a record or review of expenditures incurred by the Community College. As such, it would appear that the records sought are reflective of statistical or factual information accessible under the Freedom of Information Law [see e.g., §87(2)(g)(i)].

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Enc.

cc: Helena Howe, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3477

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

September 17, 1984

Mr. William Reemtsen
Assistant to City Administrator
City of Batavia
Batavia, NY 14020

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. Reemtsen:

I have received your letter of September 5 in which you requested an advisory opinion concerning property assessment data contained on computer tapes.

According to your letter, the City of Batavia has received a request from an individual who apparently would like a copy of the property assessment data, which is kept on computer tapes. You stated that although your office has "no problems in giving this [gentleman] access to the hard copy or the printed property assessment roll", you are "reluctant to give him access to the computer tapes". You asked, "If I deny this [gentleman] access to the computer tapes but give him free access to the printouts, am I in violation of the Freedom of Information Law?"

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

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

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

In view of the definition quoted above, it is clear that computer tapes and discs constitute "records" subject to rights of access granted by the Law.

Second, §89(3) of the Law states that an agency need not create a record in response to a request. However, if the information does exist in a format that is sought, it would be subject to the Freedom of Information Law.

Third, while your office appears willing to provide access to the printouts, which would contain the same information as the computer tapes, the printouts and tapes are, nonetheless, separate "records" as defined by the Freedom of Information Law. Moreover, it has been held that the computer tape format of certain information does not change the public character of the information or alter an individual's right to inspect and copy such tapes [see Szikszay v. Buelow, 436 NYS 2d 558].

Since the Law grants public access to "any information" maintained in "any physical form", an individual, in my view, has a right of access to information in any of the physical forms maintained by the agency. In other words, if an agency maintains the same information in more than one physical form, it is my belief that, pursuant to the Freedom of Information Law, a person may obtain access to either the printouts or the computer tapes, despite an agency's preference to disclose one form rather than another.

Lastly, it appears that the computer tape would enable a person to gain access to vast amounts of information in a convenient and relatively inexpensive form. Notwithstanding the volume of information that might be readily accessible, it is my opinion that the Freedom of Information Law makes the tapes in question available to any person upon payment of the actual cost of reproduction in conjunction 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3478

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

September 17, 1984

Mr. Cameron Harris
#79-B-1254
Auburn Correctional Facility
Box 618
Auburn, NY 13021

Dear Mr. Harris:

I have received your letter of August 30, which reached this office on September 14.

In your letter and the materials attached to it, you requested various documents pertaining to yourself. In this regard, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. Consequently, 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.

Nevertheless, I would like to offer the following comments and suggestions.

First, as a general matter, a request should be directed to the "records access officer" of the agency that maintains the records sought. Assuming that the records in question are maintained at the facility, the regulations promulgated by the Department of Correctional Services indicate that a request may be directed to the superintendent of the facility or his designee.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you include as much detail as possible, such as names, dates, descriptions of events, file designations, and other information that might enable agency officials to locate the records.

Lastly, in your affidavit, you referred to the provisions of the New York Freedom of Information Law, as well as the federal Freedom of Information and Privacy Acts. Please note that the federal Acts to which you referred are applicable only to records in possession of federal agencies. Rights of access to records of units of state and local government in New York are governed by the New York Freedom of Information Law, a copy of which is attached.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3479

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

September 18, 1984

Mr. Alexander De Francis
[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. De Francis:

I have received your letter of September 8 as well as the materials attached to it.

According to the materials, you requested various records from the Town Clerk and the Chairman of the Planning Board of the Town of Livingston. In response to your request, the Secretary to the Planning Board wrote that the Board "does not have a copying machine available". It was suggested that you "could make copies yourself or could bring a copying machine with you". Nevertheless, a news article dated August 10 indicates that the Town Board purchased photocopying machine.

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

First, as a general matter, §87(2) of the Freedom of Information Law permits a member of the public to inspect and copy records that are accessible under the Freedom of Information Law.

Second, §89(3) of the Freedom of Information Law provides that an agency must, upon payment or offer to pay the appropriate fees, make a copy of a record when a copy is requested.

Under the circumstances, although the Planning Board might not have a copying machine in its offices, I believe that the copying machine to which reference is made in the news article should be used for the purpose of preparing

copies of accessible records. It is noted, too, that while the records in question might be in the physical custody of the Planning Board, §30 of the Town Law indicates that the Town Clerk has legal custody of such records. Consequently, it is suggested that you contact the Town Clerk once again and offer to pay the fees for photocopies of the records in which you are interested. I would also like to point out that §87(1)(b)(iii) of the Freedom of Information Law provides that an agency may charge up to twenty-five cents per photocopy for records up to 9 by 14 inches.

Lastly, since your request was made some time ago, 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 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In order to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the Town Clerk and the Secretary to 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:ew

cc: Town Clerk
Secretary, Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1080
FOIL-AO- 3480

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

September 18, 1984

Ms. Florence Gioia
Genesee County Legislature
9 Cherry Street
Batavia, New York 14020

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. Gioia:

I have received your letter of September 7 in which you raised questions regarding minutes.

In your capacity as a member of the Genesee County Legislature, you raised the following question:

> "When a government body makes a motion to go into Executive Session, which has been seconded and approved, are the minutes that are taken in that session allowed to be deleted and/or destroyed."

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

First, although you did not identify the topics that might have been considered by the County Legislature during its executive sessions, it is emphasized that the Open Meetings Law specifies and limits the topics that may appropriately be considered during an executive session. Enclosed is a copy of the Open Meetings Law, which in paragraphs (a) through (h) of §105(1) specifies the grounds for enty into an executive session.

Second, as a general matter, a public body may vote or take action during a properly convened executive session, unless the vote involves the appropriation of public monies. When action is taken during an executive session, minutes must be prepared. Section 106(2) of the Law pertains to minutes of executive sessions and states that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or 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."

As such, when action is taken during an executive session, minutes reflective of the nature of the action taken, the date and the vote must be prepared. Section 106(3) requires that such minutes be made available pursuant to the provisions of the Freedom of Information Law within one week of an executive session.

It is noted that the provision concerning minutes of executive sessions does not require that expansive minutes be taken indicating those who may have spoken during an executive session or the views that may have been expressed during an executive session. Consequently, although deliberations during executive session may have been lengthy, the minutes may be brief.

Third, if, as you suggested, expansive minutes are taken, you asked whether they could be "deleted and/or destroyed". Once minutes have been prepared, whether they are brief or lengthy, I believe that they are subject to rights granted by the Freedom of Information Law. Here I would like to point out that the Freedom of Information Law is expansive in its scope, for in §86(4), the term "record" is defined to mean:

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

Based upon the language quoted above, as soon as minutes exist, they would in my view constitute a "record" subject to rights of access granted by the Freedom of Information Law.

Further, the Freedom of Information Law is based upon a presumption of access. 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 (i) of the Law.

As a consequence, there may be situations in which some aspects of minutes of an executive session might justifiably be deleted, if those deletions represent information that falls within one or more of the grounds for denial.

Lastly, with respect to the destruction of records, §65-b of the Public Officers Law provides that a unit of local government, such as a county, cannot destroy or dispose of records without the consent of the Commissioner of Education. In turn, the Education Department has devised detailed schedules that indicate minimum retention periods for particular types of records. In short, records cannot be destroyed until the minimum period of retention has been reached.

To obtain specific information regarding retention schedules, it is suggested that you contact the Local Records Section of the State Archives at the Education Department. I believe that an inquiry could be answered by Mr. Bruce Dearstyne. His address is NYS Department of Education, Office of Cultural Education, Cultural Education Center, Empire State Plaza, Albany, New York 12230.

I hope that I 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-3481

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

September 18, 1984

Supervisor E. Lee Denman
Town of Olive
West Shokan, NY 12494

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 Supervisor Denman:

I have received your letter of September 10, as well as the correspondence attached to it.

You have requested advice with respect to your unsuccessful attempts to obtain records from the Office of Real Estate & Disbursement Analysis at the New York City Department of Water Supply. Specifically, in a series of correspondence, you requested copies of cancelled checks paid to the Town of Olive during particular time periods. Although four requests were made beginning in November of 1983, it appears that no response has yet been given.

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 (i) of the Law.

Second, I believe that the cancelled checks are accessible, particularly since the Town of Olive, which you serve as Supervisor, is one of the parties involved in the transactions [see Minerva v. Village of Valley Stream, Sup. Cty., Nassau Cty., May 20, 1981]. In short, I do not believe that any of the grounds for denial listed in the Freedom of Information Law could appropriately be cited to withhold the records.

While one of the grounds for denial might be applicable, due to its structure, I believe that the Department would be required to disclose. Section 87(2)(g) 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 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, a communication between the Town and the City of New York might be characterized as "inter-agency material". Nevertheless, I believe that the checks consist solely of factual information that must be made available under §87(2)(g)(i).

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, contain prescribed time limits regarding respones 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance with the Law, a copy of this opinion will be sent to Deputy Commissioner Moan.

I hope that I 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: Deputy Commissioner Moan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3482

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

September 19, 1984

Ms. Muriel M. Fallon
District Clerk/Records
Access Officer
South Orangetown Central
School District
Board Offices
Wan Wyck Road
Blauvelt, NY 10913

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. Fallon:

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

As Records Access Officer for the South Orangetown Central School District, you wrote that you received a request for a resume or curriculum vitae submitted by the Superintendent to the Board when he was hired in 1980. You have asked whether the record in question may be withheld pursuant to §§87(2)(b) and 89(2) of the Public Officers Law.

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

First, as you are likely aware, the Freedom of Information Law (Public Officers Law, §§84-90) grants access to all records of an agency, except "records or portions thereof" that fall within one or more among the grounds for denial listed in the Law. Therefore, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part.

Second, as a consequence, it is possible that a resume or curriculum vitae might contain information that in some respects would justifiably be withheld under the provisions that you cited. In brief, §87(2)(b) permits an agency to withhold records or portions thereof the disclosure of which would result in "an unwarranted invasion of personal privacy". Section 89(2)(b) lists five examples of unwarranted invasions of personal privacy, the first of which pertains to:

> "i. disc re of employment, medical or credit stories or personal references of applicants for employment..."

From my perspective, rights of access as well as the capacity to deny must be based upon the contents of the record. Some aspects of a resume might involve personal information that is largely irrelevant to the performance of one's official duties. For example, I believe that items involving one's marital status, military experience, home address, and similar details could justifiably be withheld under the privacy provisions cited earlier.

Nevertheless, other aspects of the record might in my view be accessible. For instance, while an "employment history", might ordinarily be withheld, if the resume indicates previous public employment, I believe that such a reference to public employment would be accessible, for the same information would have been available to the public during the period of the individual's employment. Similarly, if a resume refers to an individual's certification to teach or to be a school district administrator, those facets of a resume would in my view be accessible, for they would be relevant to the performance of the official duties of the employee and the employing board of education. Further, the same information would in my view be available from other sources.

In sum, it would appear that some aspects of a resume or curriculum vitae might justifiably be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy, while other aspects of the same record would, if disclosed, result in a permissible rather than an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3483

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

September 19, 1984

Mr. Henry R. Purcell, Jr.
84-A-357
Box 307
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. Purcell:

I have received your letter of September 9 concerning your unsuccessful efforts in obtaining records.

Specifically, it appears that you are interested in obtaining a copy of your "rap sheet" as well as the contents of various files pertaining to you in possession of the Department of Correctional Services. In this regard, I would like to offer the following comments and suggestions.

First, I believe that your "rap sheet" would be available to you by writing to the Division of Criminal Justice Services at the following address:

NYS Division of Criminal Justice Services
Stuyvesant Plaza
Executive Park Tower
Albany, New York 12203

It is suggested that you discuss the request to be made to the Division of Criminal Justice Services with your counselor. Perhaps that person could inform you of the information that you must supply in order to seek and obtain your rap sheet.

Second, with respect to the records that you are seeking from the Department of Correctional Services, it is emphasized that the Freedom of Information Law in §89 (3) requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, it is recommended that you provide as much detail as possible, such as names, dates, file designations, descriptions of events and similar details that might enable agency officials to locate the records sought.

Third, in conjunction with the rules promulgated by the Department of Correctional Services, a request for records kept at a facility should be directed to the facility superintendent or his designee. In the event that the records are maintained in the Department's central office in Albany, a request should be sent to the Deputy Commissioner for Administration in Albany.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3484

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

September 20, 1984

Mr. Clyde Collins, Jr.
Tompkins County Jail
125 East Court Street
Ithaca, NY 14850

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. Collins:

I have received your letter of September 13, in which you requested assistance.

According to your letter, you submitted a written request to the Records Access Officer of the Division of Parole on August 31, 1984. However, you have not yet received a response from that agency.

It is noted at the outset that the Committee on Open Government is authorized to provide advice with respect to the Freedom of Information Law. This office, however, does not generally maintain possession of records such as those in which you are interested. Nevertheless, I would like to offer the following comments.

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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3485

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

September 20, 1984

Mr. Michael Sweeney
The Herald Statesman
Larkin Plaza
Yonkers, NY 10701

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. Sweeney:

I have received your letter of September 11 in which you requested an opinion concerning the Dobbs Ferry Police Chief's failure to grant access to the Village police blotter.

According to your letter, the Police Chief "refuses to let [you] see the blotter because [you] wrote a story using the names of victims taken off that blotter". It is your belief that the police blotter is a matter of public record. In this regard, I would like to offer the following comments.

First, police blotters or their equivalent have been found to be available under the Freedom of Information Law [see Sheehan v. City of Binghamton, 59 AD 2d 808]. Although the phrase "police blotter" is not specifically defined by any provision of law, the court in Sheehan, 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 is specified in the decision that the blotter is available, for it contains no investigative information, but rather a summary of events of occurrences. Therefore, it is my belief that as a general matter, police blotters should be made available.

Second, I direct your attention to §87(2)(b) of the Freedom of Information Law, which provides that an agency may deny access to records, or portions of such records, when disclosure would constitute an "unwarranted invasion of personal privacy". Section 89(2)(c) of the Law provides, in part, that disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted. Based upon those provisions, the police chief may, under certain circumstances, be authorized to delete the names of victims that appear on the police blotter. It is emphasized, however, that, in my view, although situations may exist where disclosure of a victim's name would constitute an unwarranted invasion of personal privacy, withholding that information would not be appropriate in every instance. In short, victim's identities might be accessible or deniable, depending upon the specific circumstances presented.

Finally, I have enclosed a copy of the Sheehan case, supra, at 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3486

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

September 21, 1984

Ms. Josephine Mlinar
Paralegal
Hall & Sloan
401 Broadway, Suite 310
New York, NY 10013

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. Mlinar:

I have received your letter of August 30 in which you requested an advisory opinion regarding your appeal of a denial of access to records of the New York State Division of Human Rights.

According to your letter of appeal to the Commissioner of the Division, "nearly all of [your] requests" for certain records of the Division were denied. You explained that "the records contain fundamental statistical information concerning the activities of the Division, including its performance of duties under contracts entered into with the Equal Employment Opportunity Commission".

Specifically, you had requested access to "any and all computer generated reports which show statistical data; to any and all reports submitted to an correspondence with the Equal Employment Opportunity Commission, including specific reports required under contracts with the EEOC; and actual compliance, bases for determinations, and determinations." You explained further that "access was refused for any of the reports or correspondence with the EEOC, on the grounds that these documents are 'interagency materials' and 'internal working documents'." It is your belief, however, that much of the material should be available. You also wrote that access was

denied to all of the requested computer generated reports of the Division, except for "FOIA-1 and FOIA-2", and expressed the belief that the Division maintains reports which show statistical data on a monthly basis and that these reports were denied because the information contained therein "might violate the privacy of complainants and/or respondents".

You also explained that access was apparently denied to records consisting of the Division's bases for its determinations of complaints and that "no reason was given for this denial/omission".

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

First, it is noted as a general matter 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 (i) of the Law.

Second, with respect to the Division's denial of access to reports submitted to the Equal Employment Opportunity Commission, I direct your attention to §86(3) of the Freedom of Information Law. That provision defines "agency" to include:

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

Based upon the definition quoted above, it is my view that the Equal Employment Opportunity Commission is not an agency to which the exception regarding "inter-agency or intra-agency materials" [§87(2)(g)] would apply. The Equal Employment Opportunity Commission, a federal agency, is not an agency for the purposes of the Freedom of Information Law, since the Law refers only to state or municipal governmental entities. Moreover, the federal Freedom of Information Act defines "agency" to include only federal governmental entities. Thus, in my opinion, communications between the Equal Employment Opportunity Commission and the Division would not be inter-agency materials.

Even if the communications between the Equal Employment Opportunity Commission and the Division could be characterized as "inter-agency materials", §87(2)(g) provides that, while such materials may be withheld, those portions consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Moreover, please note that although the Division's stated reason for denying the Equal Employment Opportunity Commission records was based upon the inter-agency exception of §87(2)(g) of the Law, other grounds for denial may exist. Since I am not familiar with the law or regulations of the Equal Employment Opportunity Commission, I cannot comment on the requirements of provisions of federal law that might require confidentiality.

Third, with regard to the records containing the computer generated reports of the Division which were denied, I direct your attention to §87(2) of the Freedom of Information Law. That provision requires each agency to make all records available for public inspection, "except that such agency may deny access to records or portions thereof..." that fall within one or more of the ensuing grounds for denial. Thus, it appears that the Legislature envisioned situations in which a single record or report might be both available and denial in part.

Furthermore, I believe that the language of §87(2) requires that an agency review requested records, in their entirety, to determine which portions, if any, fall within one or more of the grounds for denial. Therefore, if, as you believe, the records include information which would not violate the privacy of complainants, those portions of the records should be made available.

Additionally, I direct your attention to §89(2)(b) of the Freedom of Information Law which provides examples of situations in which an agency may deny access to records on the ground that disclosure would result in an unwarranted invasion of personal privacy. Relevant to your circumstances may be §89(2)(b)(e) involving disclosure of employment histories and §89(2)(b)(iii) pertaining to the release of lists of names and addresses, if such lists would be used for commercial purposes. In this regard, it is noted that the courts have upheld the Division's denial of lists of the first names and addresses of complainants where such information might be used for commercial purposes [see Goodstein v. Shaw, 463 NYS 2d 162].

Finally, with respect to the Division's silence regarding the availability of its bases for determinations of complaints, §1401.7(b) of the Committee on Open Government's regulations states that a "denial of access shall be in writing stating the reasons therefor and advising the person denied access of his or her right to appeal..." Thus, in my view, the Division should have explained its reason for denying access records indicating the bases for determinations of complaints.

I regret that I cannot be more specific with respect to the records in question; it is difficult to provide advice or direction without a more detailed knowledge of their contents. However, I hope 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 Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3487

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

September 24, 1984

Mr. Bruce Markens
[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. Markens:

I have received your letter of September 15 in which you requested an advisory opinion with respect to the timeliness of the New York City Board of Education's response to your requests for records.

According to your letter, the Board has not responded to any of your twelve requests for information. Your appeals to Mr. John Nolan, the Board's Secretary, have been answered by assurances that the Board would respond to your requests at a date far beyond the statutory period. Despite Mr. Nolan's assurances, you have received no response from the Board. In this regard, I would like to offer the following comments.

As you may be aware, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government require that an agency respond to a request within certain 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew
cc: Mr. John Nolan, Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3489

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

September 25, 1984

Mr. Martin Lansky
[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. Lansky:

I have received your letter of September 14 in which you requested advice regarding your requests for copies of SAT, GRE and GMAT examinations from the State Education Department.

According to your letter, you "made a Freedom of Information request to the State Education Department regarding the files of tests they have under the FOI Law". Specifically, you requested photocopies of the SAT, GRE and GMAT examinations, but the Deaprtment refused your request and advised you to call the publishers for such materials.

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

First, it is noted that the Freedom of Information Law does not govern rights of access to standardized tests in the possession of the State Education Department. Section 340 of the Education Law, commonly known as the Truth in Testing Law, generally requires that testing agencies file copies of tests with the Commissioner of Education following the release of the test results [Education Law, §342]. Tests submitted to the Commissioner are deemed public records, and the State Education Department, in collecting this material, is to be considered an archive under Title 17 §108 USC [Education Law, §342]. Thus, it would appear that any test in the possession of the State Education Department is subject to the rights of access granted under the Freedom of Information Law.

Second, since I am not an expert regarding the Truth in Testing Law, I contacted a representative of the Education Department on your behalf. He indicated that, due to pending litigation, the Department has adopted a policy under which it permits members of the public to review tests which are submitted by the test agencies. However, the Department will not provide photocopies of such tests. Apparently, the pending litigation involves possible violations of the copyright law.

Third, while copies of the tests which you seek are not available from the Department, I have been informed that the tests might be obtained through the testing agencies. You may request copies of the SAT, GRE and GMAT examinations from the following, respectively:

The College Board
888 7th Avenue
New York, NY 10019

The Graduate Record Examinations Board
Princeton, NJ 08541

Graduate Management Admissions Council
Box 966
Princeton, NJ 08541

In short, due to the pendency of litigation, the availability of the tests in question under the Freedom of Information Law or the Truth in Testing Law is unclear. I hope, however, that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3490

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

September 25, 1984

Ms. Janice L. Duffy
Town Clerk
Town of Southeast
Town Office
Main Street
Brewster, NY 10509

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 correspondence received by this office.

Dear Ms. Duffy:

I obtained a copy of Local Law No. 1 of 1979 adopted by the Town Board of the Town of Southeast after that law was submitted to the Department of State.

In brief, Local Law No. 1 establishes fees for searches for certain records maintained by the Office of the Building Inspector.

From my perspective, the fee established by Local Law No. 1 is 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 Town of Southeast, to promulgate rules and regulations rursuant 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, 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 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 ocnstructive 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 or a search fee was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a search fee or 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1085
FOIL-AO-3491

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

September 26, 1984

Ms. Katherine Kerrizaer
[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. Kerrizaer:

As you are aware, your letter of September 11 addressed to the Assistant Attorney General in Binghamton has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

According to your letter and the materials attached to it, various issues have arisen regarding the expansion of a sewage treatment plant in the Village of Waverly. It appears that state agencies, the Village, and a commercial enterprise have been involved in relation to the matter. Nevertheless, you inferred that actions have been taken by the Village and state agencies without the knowledge of or disclosure to the public. In this regard, since I am unaware of the specific types of information that you are seeking, I would like to offer the following general comments.

First, as a general matter, the Freedom of Information Law is applicable to records of any agency of state or local government in New York. As such, rights of access granted by the Law would be applicable to records in possession of the Village, as well as records maintained by state agencies involved with the project.

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 (i) of the Law.

Third, to the extent that any contracts or agreements exist, I believe that they would be available, for no ground for denial could appropriately be asserted. Further, records reflective of financial transactions or the receipt, disbursement or expenditure of public monies would in my view similarly be available.

Fourth, in terms of procedure, each agency is required to have designated a "records access officer" who is charged with the duty of coordinating an agency's responses to requests made under the Freedom of Information Law. Consequently, if you are interested in seeking records from the Village of Waverly, a request should be directed to the designated records access officer. It is likely that the access officer for the Village is the clerk, for the clerk is the legal custodian of all Village records. To seek records from the Department of Environmental Conservation, the records access officer is Mr. Graham Greeley, whose office is at the Department's headquarters in Albany.

It is noted that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Consequently, when making a request, sufficient detail should be included to enable agency officials to locate the records sought.

Fifth, since you alluded to minutes of meetings of the Village Board of Trustees, I direct your attention to the Open Meetings Law. In brief, that statute is applicable to meetings of public bodies, such as the Village Board of Trustees. Further, the courts have construed the term "meeting" broadly to include 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 [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 Ad 2d 409 aff'd 45 NY 2d 947 (1978)]. Therefore, so-called "work sessions" or informal meetings fall within the requirements of the Open Meetings Law, even if there is no intent to take action, but rather only an intent to discuss public business.

Further, as in the case of the Freedom of Information Law, the Open Meetings Law is based upon a presumption of openness. The Law requires that meetings of public bodies be conducted open to the public except to the extent that a topic falls within one or more among eight grounds for entry into an executive session. The topics that may appropriately be considered during an executive session are limited and specified in paragraphs (a) through (h) of §105(1) of the Open Meetings Law.

The Open Meetings Law also contains what might be characterized as minimum requirements concerning the contents of minutes. With respect to minutes of open meetings, §106(1) states that:

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

In addition, as a general matter, a public body may vote during a properly convened executive session, unless the vote involves the appropriation of public monies. When action is taken during an executive session, minutes must be created which indicate the nature of the determination, the date and the vote. Subdivision (3) of §106 requires that minutes of open meetings be prepared and made available within two weeks of those meetings. With respect to minutes of action taken during an executive session, the Law requires that those minutes be prepared and made available within one week.

Lastly, with regard to the enforcement of the Freedom of Information and Open Meetings Laws, challenges may be initiated under the provisions of Article 78 of the Civil Practice Law and Rules.

As indicated earlier, a request made under the Freedom of Information Law should be directed to the records access officer. If that person denies access, the applicant may, according to §89(4)(a) of the Law, appeal to the head or governing body of the agency or whomever is designated to determine appeals. If the appeals person or body upholds the denial, a judicial proceeding may be commenced under Article 78. It is noted that when such a proceeding is brought under the Freedom of Information Law, the agency bears the burden of proving that the records withheld fall within one or more of the grounds for denial listed in §87(2) of the Law.

With respect to enforcement of the Open Meetings Law, §107(1) states in part that:

> "Any 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."

Further, since there may be issues involving minutes, I would like to point out that §107(3) states that:

> "The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public."

Enclosed for your consideration are copies of the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1086
FOIL-AO- 3492

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

September 27, 1984

Mr. Alvin W. White, President
Mr. J.C. Johnson, Vice President
Gateway Gardens Tenants and
Civic Association
P.O. Box 1637
Huntington Station, NY 11746

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. White and Johnson:

I have received your letter dated July 28 in which you requested an advisory opinion concerning the Town of Huntington Housing Authority. I regret the delay in response; however, your letter was not received by this office until September 19.

According to your letter, you are interested in obtaining from the Huntington Housing Authority and its Board of Commissioners various public records, including minutes, operating guidelines, proposed budget and "changes in policy". However, you have been informed by the Chairman of the Board of Commissioners and the Executive Director that the Housing Authority is a "satellite Federal Agency" and that they claim "executive body privileges at all times". Moreover, you explained that on July 16, the Board held a session which you expressed an interest in attending. However, since the Chairman did not respond to your request, you were "effectively denied access".

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

First, with respect to the availability of the records maintained by the Huntington Housing Authority, I direct your attention to §87(2) of the Freedom of Information Law. That provision requires each agency to make all records available for public inspection and copying, except those records or portions thereof that fall within one or more of the nine grounds for denial appearing in §87(2)(a) through (i) of the Law. Generally, the language of many of the exceptions is based upon potentially harmful effects of disclosure.

Second, "agency" 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 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 Huntington Housing Authority was created by the State Legislature for the Town of Huntington and its operations and activities are governed by law (see Public Housing Law, §472), it is my opinion that the Authority is an agency as defined by the Freedom of Information Law, and that its records are presumed to be available in accordance with the Law.

Moreover, assuming the Board of Commissioners is the governing body of the Authority or was created by the Authority, the Board, in my view is also an agency as contemplated by the Law.

Thus, it is my belief that the records of the Authority and its Board should be made available pursuant to the Freedom of Information Law. It is noted, too, that the courts have required a housing authority to disclose its records as required by the Freedom of Information Law [see Westchester Rockland Newspapers, Inc. v. Fisher, Sup. Ct., Westchester Cty., May, 1983, affirmed __AD 2d__, App Div, Second Dept., NYLJ, May 21, 1984].

Similarly, it appears that the Board of the Authority is a public body subject to the Open Meetings Law. That Law generally requires that every meeting of a public body be open to the public, except to the extent that executive sessions may be conducted pursuant to §105 of the Law.

Section 102(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."

In my opinion, the Board falls within this definition.

First, it is assumed that the Board consists of more than two members.

Second, although no quorum may be required of the Board in its by-laws, for example, §41 of the General Construction Law requires that it must conduct their business by means of a quorum. That section indicates that whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only be means of a quorum, a majority of the total membership. Consequently, even if no quorum requirement is specified, I believe that §41 of the General Construction Law imposes such a requirement.

Third, since the Board conducts public business and performs a governmental function for a public corporation, the Town of Huntington, it appears that the conditions precedent to a finding that the Board of Commissioners is a public body are met.

Fourth, §102(2) of the Open Meetings Law also includes within the definition of "public body" committees, subcommittees or other similar bodies of a public body. Thus, committees formed by a public body, even if such committees are advisory and without authority to take formal action, are subject to the Open Meetings Law. It is noted, too, that case law indicates that an advisory body desingated by a government official, rather than a public body, falls within the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 964, app dis 55 NY 2d 995].

For the reasons stated above, I believe that the Huntington Housing Authority and its Board of Commissioners are public entities subject to the Freedom of Information and Open Meetings Laws.

Lastly, I have enclosed a copy of Westchester Rockland Newspapers case, supra, at 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

cc: Huntington Housing Authority
A. Sutton, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3493

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

October 1, 1984

Mr. Jose Colon
84-A-2353
354 Hunter Street
Ossining, NY 10562

Dear Mr. Colon:

I have received your appeal regarding a denial of a request that you had directed to the Division of Criminal Justice Services on September 12.

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.

Further, §89(4)(a) of the Freedom of Information Law pertaining to appeals 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 ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In view of the language quoted above, it is suggested that you direct your appeal to the Commissioner of the Division of Criminal Justice Services in conjunction with §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

OML-AO- 1091
FOIL-AO-3494

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

October 3, 1984

Mr. Murray Steyer
Law Offices
Steyer & Sirota
123 Main Street
Suite 700
White Plains, NY 10601

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. Steyer:

I have received your letter of September 18 in which you requested an advisory opinion from this office.

Your questions are:

> "1. Is a teacher's personnel file maintained by a School District open for examination, in whole or in part, by a parent or anyone else?
>
> "2. Does a parent who is present at a closed meeting of the Committee on the Handicapped with respect to her child have the right to tape record the meeting?"

With regard to these questions, I would like to offer the following comments.

First, as you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

Third, it appears that a possible ground for denial under the circumstances would be §87(2)(b), which states in general that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy".

Fourth, there have been several judicial interpretations of the privacy provisions to which reference was made earlier with respect to public employees. It is noted initially that the courts have found that public employees enjoy a lesser right to privacy than any other identifiable group, for public employees have a responsibility to be more accountable to the public than any group. In addition, the courts have found in essence that records that are relevant to the performance of the official duties of a public employee are available on the ground that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been held that records concerning public employees that are not relevant to the performance of their official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981]

Based upon the standards described above, it is my opinion that documents such as a certification may be available under the Freedom of Information Law. A certification, for example, is the equivalent of a license and is based upon findings by the State Education Department that a particular individual is qualified to engage in a particular area of teaching. As such, a certificate appears to be a good source of determining a teacher's qualifications and would, in my view, be available.

In addition, other information contained within personnel records may be available. For example, if certain requirements must be met as a condition of employment (i.e., a master's degree in a particular area), a record indicating the receipt of such a degree would, in my view, be available, as it is relevant to the performance of the official duties of both the employee and employing board of education.

On the other hand, the source of a degree, teaching experience, grades, class ranking and similar personal details might justifiably be withheld. Disclosure of this type of information may, in my opinion, constitute an unwarranted invasion of personal privacy.

Another possible basis for denial is set forth at §87(2)(g), which permits an agency to withhold records that:

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

In essence, the provision contains a double negative. An agency may deny access to inter-agency or intra-agency materials, except to the extent that they consist of any of the items listed in subparagraphs (i.), (ii.), and (iii.). As such, statistical or factual data, including time sheets, payroll information and the like are accessible. Similarly, if, for example, an employee has been involved in disciplinary proceedings which have resulted in a determination, the determination would be accessible. Nevertheless, records or portions thereof in the nature of advice or impression appear to be deniable.

With respect to your second question, I point out that the Open Meetings Law is silent with regard to the issue of tape recording meetings. As you may know, however, it is the opinion of the Committee and several courts [see People v. Ystueta, 418 NYS 2d 508; Mitchell v. Board of Education, Garden City Union Free School District, Sup. Ct., Nassau Cty., April 6, 1984], that a portable, battery operated cassette tape recorder may be used to record an open meeting conducted by a public body.

Nevertheless, it is my opinion that the rationale which supports the right to tape record an open meeting does not support the right to tape record a closed meeting. By statute, the Legislature has, in some cases, granted public bodies discretionary authority and, in other cases, has required public bodies to close certain meetings or portions of meetings to the public. In my view, if a public body may or must hold a closed meeting, it may also prohibit the use of tape recorders during such meeting.

My opinion differs, however with respect to parents who attend a closed meeting of a Committee on the Handicapped. State and Federal regulations governing committees on the handicapped generally require that a parent be permitted to attend meetings whenever possible.

Section 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."

Moreover, 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 give the parent, on request, a copy of the individualized education programs."

Thus, it appears that 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 meetings pertaining to their children, [see e.g., Education Law, §4402(3)(c); regulations of the U.S. Department of Education, §121a.345]. In my opinion, tape recording a committee meeting is an extension of such "awareness" and a parent should not be prohibited from using a tape recorder at such a meeting. It is emphasized that I am unaware of any statute or case law that deals with the use of a tape recorder by a parent at a meeting of a committee on the handicapped. However, since the thrust of state and federal regulations involves an intent to enhance and encourage parental participation, a prohibition regarding the use of a tape recorder by a parent might be considered as contrary to the intent of these provisions.

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

Sincerely,

ROBERT J. FREEMAN

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3495

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

October 4, 1984

Mr. George Veytruba
75-A-2072
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. Veytruba:

I have received your letter of September 24 in which you raised questions regarding the means by which you might obtain psychiatric records pertaining to you.

According to your letter, you are an inmate, and pyschiatric records are maintained by both the Department of Mental Hygiene and the Department of Correctional Services. In this regard, I would like to offer the following comments and suggestions.

First, as a general matter, a request should be directed to the records access officer of the agency that maintains the records sought. Therefore, if the records that you are seeking are maintained by the Office of Mental Health, a request should be sent to that agency at its Albany address. With respect to records maintained by the Department of Correctional Services, if they are kept at the facility, a request may be directed to the facility superintendent. If the records are maintained at the central office of the Department, a request may be directed to the Deputy Commissioner for Administration.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, when requesting records, it is suggested that you provide as much detail as possible, including names, dates, identification numbers, descriptions of events, and similar information that might enable agency officials to locate the records sought.

Third, in terms of rights of access, it is noted that §33.13 of the Mental Hygiene Law generally requires that patient records be kept confidential. The only instances in which patient records may be disclosed are listed in §33.13, a copy of which has been enclosed for your review. To the extent that patient records pertaining to you have been transferred from the Office of Mental Health or a state mental hygiene facility to the Department of Correctional Services, I believe that the confidentiality requirements imposed by §33.13 would carry over to the Department as a recipient of such records. As indicated in §33.13(5)(d), "Information so exchanged shall be kept confidential and any limitations on the release of such information imposed on the party giving the information shall apply to the party receiving the information."

Lastly, assuming that some of the psychiatric records have been prepared by the Department of Correctional Services and its staff, rights of access would likely be determined in part by the Freedom of Information Law. It is noted, however, that intra-agency materials consisting of advice, opinion, suggestion and the like may be withheld under §87(2)(g) of the Freedom of Information Law. Therefore, it is possible that a psychiatric opinion may be deniable under the Freedom of Information Law.

The remaining mechanism by which an individual might seek medical records involves the provisions of §17 of the Public Health Law. In brief, the cited provision does not grant direct rights of access to medical records to a patient. Nevertheless, under §17, a competent patient may designate the physician of his choice to seek and obtain medical records on his 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

FPPL-AL-4
FOIL-AO-3496

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 5, 1984

Mr. Jens G. Lobb
First Assistant Counsel
New York State Police
State Campus
Albany, New York 12226

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. Lobb:

I have received your letter of September 26 in which you requested an advisory opinion.

According to your letter, the Division of State Police received a request made under the Freedom of Information Law from the Watertown Daily Times on September 21. The request involved the following:

> "...the records in your possession, whether called accountability records, simplified traffic informations, or speeding tickets which identify or contain the identity of those persons to whom traffic summonses or tickets were issued yesterday for violations of the Vehicle and Traffic Law by Troopers stationed at: Watertown, Lowville, Pulaski, Alexandria Bay, Adams, West Carthage, Star Lake, Tupper Lake, Canton, Gouverneur, Messina, Norfolk, Winthrop and Ogdensburg."

In conjunction with that request, Mr. Ralph Ambrosio of you office contacted me for the purpose of asking whether, in my view, disclosure would result in an unwarranted invasion of personal privacy under the Freedom of Information Law as well as the Personal Privacy Protection Law.

To provide further information regarding the materials sought, you added in your letter that the traffic tickets include:

> "...information as to the identity of the operator, including date of birth, home address, drivers license identification number, vehicle identification and the particular traffic violation."

In this regard, I would like to offer the following comments.

First, the recent request by the Watertown Daily Times is, from my perspective, similar to that made in 1981 by Paul Browne, formerly the Albany correspondent for the same newspaper. As you may be aware, following a denial of the request by the Division of State Police, the newspaper initiated a lawsuit. That proceeding was finally determined by the Court of Appeals, which essentially affirmed an Appellate Division decision holding that the records sought were available [Johnson Newspaper Corp. v. Stainkamp, 94 AD 2d 825 (1983)]. The Court of Appeals confirmed rights of access, but modified to the extent that §160.50 of the Criminal Procedure Law might require the sealing of records involving arrests that were later dismissed in favor of an accused. The Court, however, stressed that the applicability of the sealing provisions were not at issue in the case and that no determination was being made relative to the application of §160.50 of the Criminal Procedure Law to the records in question [61 NY 2d 958 (1984)].

Second, rather than reiterating the points made in an advisory opinion prepared at the request of Mr. Browne, I have enclosed a copy of my letter to him, with which the Appellate Division concurred [94 AD 2d 825, 827].

With respect to privacy, it was my contention in the opinion written at the request of Mr. Browne that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy due, in part, to other judicial determinations as well as various provisions of law, such as §2019-a of the Uniform Justice Court Act and §255 of the Judiciary Law, both of which grant significant rights of access to court records. It

is assumed that the information sought most recently is analogous to that requested by Mr. Browne and that much if not all of the personal information contained in the records in your possession would also be accessible, by statute, from other sources, such as the courts or the Department of Motor Vehicles, for example. If that is so, I believe that the same conclusions reached in the opinion addressed to Mr. Browne as well as Johnson Newspaper, supra, would be applicable in the instant situation.

Lastly, as you may be aware, the Personal Privacy Protection Law became effective on September 1 of this year. While that statute imposes certain restrictions upon the disclosure of personal information found in records maintained by state agencies, it preserves rights of access granted by the Freedom of Information Law and other access statutes. Specifically, §96(1)(c) of the Personal Privacy Protection Law indicates that an agency may disclose information if it is "subject to disclosure under article six of this chapter". Article 6 of the Public Officers Law is the Freedom of Information Law. Section 96(1)(f) also permits the disclosure of personal information when disclosure is "specifically authorized by statute".

Based upon the foregoing, when records are accessible under the Freedom of Information Law, or pursuant to some other statute, such as the provisions involving court records cited earlier, or perhaps §202 of the Vehicle and Traffic Law, those records remain accessible, notwithstanding the provisions of the Personal Privacy Protection Law. Further, even if some aspects of the records sought would, if disclosed, result in an unwarrated invasion of personal privacy (i.e., a date of birth), that portion of the record might be deleted; the remainder, however, would in my view be accessible.

In sum, it appears that the records sought are analogous to those determined to be available in Johnson Newspaper, supra. Therefore, I believe that they are available under the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: John Johnson, Jr.
Janice M. Kucek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3497

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 5, 1984

Mr. Howard Jacobson
#80-A-3899
Attica Correctional Facility
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. Jacobson:

I have received your letter of September 23 in which you requested assistance in acquiring information from certain interviews relating to the criminal proceeding in which you were involved.

According to your letter, you would like to obtain the name of a potential witness who, during an interview, may have provided exculpatory evidence for your trial. In addition, you seek a tape recording of an interview between the prosecutor, his detective and a particular juror.

In this regard, I would like to offer the following comments.

First, I point out that records which are maintained by courts are not subject to the provisions of the Freedom of Information Law. In other words, if either of the records which you seek are in the possession of a court, your right of access to those records is governed by a statute other than the Freedom of Information Law.

Second, with respect to the name of the potential witness, even if this information is in the possession of an agency subject to the Freedom of Information Law, §87 (2)(e) of the Law may permit such agency to deny the information sought. That section provides that an agency may deny records that:

> "(e) are compiled for law enforcement purposes and which, if disclosed, would:
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

As such, if the witness is considered a confidential source, his or her name might properly be withheld. In addition, disclosure of the witness's name might result in an unwarranted invasion of personal privacy. If so, §87(2)(b) permits an agency to deny access to such information.

Third, it is noted that the Freedom of Information Law is not the only statute which governs rights of access to records involving criminal proceedings. In this regard, Article 240 of the Criminal Procedure Law may be relevant, as it pertains to discovery of evidence. Moreover, you may be able to obtain the information that you seek under the authority of §255 of the Judiciary Law. That section requires the clerk of a court, upon request and payment of a fee, to provide copies of that courts' records. You should direct your request to the clerk of the court in which you were tried.

Finally, I suggest that you request the information from the office of the district attorney who prosecuted you. That office may be in possession of such information. Additionally, it is urged that you speak with an attorney regarding these matters, particularly if they involve evidence that might be exculpatory.

I regret that I cannot be of greater assistance. However, should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3498

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 9, 1984

Mr. Christopher M. Murphy
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The enusing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Murphy:

I have received your letter of September 25 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, according to the correspondence attached to your letter, you submitted a request on September 6 to the Division of State Police involving manuals relative to radar devices used by the State Police within Troop C. Following an initial denial, you appealed to Colonel Strojnowski, who wrote that:

> "[I]t is our unanimous determination that your appeal be denied, your objection not withstanding, for the same reasons set forth below. For the record, your appeal has been denied on the grounds that your request is for records and documents which we contend were prepared for law enforcement purposes which if disclosed, would interfere with normal law enforcement investigations, or reveal investigative techniques and procedures."

You have questioned the propriety of the determination.

In this regard, I would like to offer the following comments.

From my perspective, as I understand the situation, no ground for denial could appropriately be asserted to withhold the manuals which you requested. 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 (i) of the Law.

Further, in my opinion, the basis for denial to which Colonel Strojnowski alluded, §87(2)(e), is not applicable. The cited provision states that an agency may withhold records that:

> "(e) 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."

Assuming that the manuals requested were prepared by the manufacturers of radar devices, I do not believe that they could be characterized as records compiled for "law enforcement purposes". If that is so, §87(2)(e) could not in my view be cited as a basis for denial.

Moreover, even if the manuals could be characterized as records compiled for "law enforcement purposes", the specific language of §87(2)(e)(iv) indicates that such records may be withheld when disclosure would reveal criminal investigative techniques and procedures, other than those considered to be "routine". I believe that radar is commonly used by law enforcement agencies, including the State Police. Consequently, while it might be contended that the records fall within the scope of records compiled for law enforcement purposes, the contents of the manual in my opinion would nonetheless be reflective of "routine techniques and procedures".

In sum, if my assumptions are accurate, there does not appear to be any basis for withholding 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:ew

cc: Colonel Strojnowski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3499

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 9, 1984

Mr. Charles McAllister
Box 51
DIN # 84-A-905
Comstock, NY 12821

Dear Mr. McAllister:

I have received your letter of October 4, in which you requested "a copy of any and all information" that concerns the extent to which you may acquire information relative to "the mechanics" of "arrest and civil discoveries".

In all honesty, I am not sure of the type of information that you are seeking. Nevertheless, enclosed are copies of the Freedom of Information Law and an article prepared for the New York Law Journal that may be useful to you.

It appears that you have a copy of the Committee's most recent annual report. It is noted that the report contains summaries and citations regarding judicial determinations rendered under the Freedom of Information Law. Perhaps those summaries can be used to review decisions of interest.

Lastly, it is emphasized that the Freedom of Information Law is a statute that generally grants access to records, or enables an agency to withhold records, when records are requested by the public. Stated differently, if a record is accessible under the Freedom of Information Law, it is available to any person, notwithstanding one's status or interest. There are other statutes, however, such as those pertaining to discovery by a litigant, that may grant different rights of access due to one's status as a litigant. Consequently, rights of access provided by the Freedom of Information Law might differ from those granted under discovery provisions. Therefore, it is suggested that your specific concerns be discussed with an 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 Directoe

RJF:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-
FOIL-AO-3509

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 10, 1984

Mr. Dennis Kociencki
Parliamentarian/Executive Assistant
Student Government Association
Erie Community College - North
Main & Youngs Road
Williamsville, New York 14221

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. Kociencki:

I have received your letter of September 26 in which you requested an advisory opinion.

According to your letter, the "Student Government of Erie Community College North funds several clubs on campus with money collected from Student Activity Fees". In addition, "club budgets were approved in an Executive Session of the Student Government Association". Your questions are:

> "1. Do the clubs funded by Student Government Association have a right to know the budgets of all other clubs on campus?
>
> 2. Is the practice of deliberating and approving club budgets in Executive Session a violation of the Open Meetings Law?"

With regard to these questions, I would like to offer the following comments.

With respect to club budgets, it is noted that the Freedom of Information Law generally requires that all records maintained by an agency be made available for public inspection and copying. 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."

Thus, the Freedom of Information Law governs a broad range of governmental offices.

Moreover, the Court of Appeals has found that some not-for-profit entities are subject to the Freedom of Information Law [Westchster-Rockland Newspapers v. Kimball, 50 NY 2d 575]. For example, a volunteer fire company is a not-for-profit corporation that performs its duties for a municipality by means of a contractual relationship. Although a volunteer fire company is not itself government or a governmental entity, the Court found that it performs what traditionally might be considered a governmental function and therefore falls within the scope of the Freedom of Information Law.

Based upon the language of the Freedom of Information Law and its judicial interpretation, it is likely that the Student Government Association of Erie Community College North is an agency subject to the Freedom of Information Law. While it is assumed that the Association's Board is elected by the students of the college, you stated that the Association is responsible for allocating funds, obtained from mandatory student activity fees, to various campus clubs. The Association, in my view, performs a governmental function for the SUNY system; that is, it funds student organizations on campus with money that the college requires students to pay in the form of an activities fee. But for the Association, it appears that the Erie Community College North would be responsible for funding the campus clubs with the student activities fees. Therefore, it appears that the Association conducts public business and performs a governmental function and, as such, may be found to be subject to the Freedom of Information Law.

If the Association is subject to the Freedom of Information Law, all records maintained by it, including the budget of the campus clubs which it funds, would be available to the public. To that extent, the campus clubs funded by the Student Government Association would have a right to know or review the budgets of all other clubs.

With respect to the Association's practice of approving club budgets in Executive Session, I point out that the Open Meetings Law generally requires that meetings of public bodies be open to the public. "Public body" is defined in §102(2) of the Law to include:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By analyzing the elements of the definition, I believe that it may be concluded that the Association's board is a public body subject to the Open Meetings Law.

First, it is my view that the Student Government Association is an entity that must act by means of a quorum. If it is a public body, §41 of the General Construction Law may require it to perform its duties only by means of a quorum. If it is a not-for-profit corporation, it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law.

Second, to fall within the definition of "public body", an entity must conduct public business and perform a governmental function for the state. As discussed above with regard to the Freedom of Information Law, I believe that the Association conducts public business and performs a governmental function for the State University syste, or perhaps for Erie County, at Erie Community College North.

Therefore, it is my view that the Association is a public body subject to the Open Meetings Law. As such, its meetings must be open to the public, except when executive sessions may be held pursuant to §105 of the Law. That section sets forth procedural guidelines for entering into executive session and limits the subjects of discussion for which an executive session may properly be conducted. In short, only those topics specifically enumerated in §105 may be discussed in executive session. In my opinion, deliberation and approval of club budgets would not fall within any of the statutory purposes for holding executive sessions.

In addition, I point out that §106 of the Open Meetings Law requires that minutes be taken at all open meetings of a public body which shall include a record of all motions, proposals, resolutions and any matters formally voted upon. Moreover, minutes of executive sessions must include a summary of the final determination of any action taken by formal vote. Thus, the minutes of either an open meeting or executive session should reflect the final, approved budgets of the campus clubs. Pursuant to §106 (3) of the Law, the minutes must be made available to the public within specified time limts.

In sum, the application of the Freedom of Information Law and Open Meetings Law is unclear with respect to a student government association. However, to the extent that I am familiar with the function of the Association, it appears that it is an "agency" required to comply with the Freedom of Information Law. Further, it is clear in my view that its board is a "public body" subject to the Open Meetings Law. I have included copies of these laws 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

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3501

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 12, 1984

Mr. Jimmy Guadalupe
80-A-1649
C-32-42
Attica Correctional Facility
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. Guadalupe:

I have received your letter of September, which reached this office on October 11.

You requested from this office institutional and disciplinary records pertaining to you. In this regard, I would like to offer the following comments and suggestions.

First, it is noted that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. Consequently, the Committee 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, under the rules and regulations promulgated by the Department of Correctional Services under the Freedom of Information Law, a request for records kept at a correctional facility should be directed to the facility superintendent.

Third, §89(3) of the Freedom of Information 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, such as names, dates, descriptions of events and similar information that might enable agency officials to locate the records sought.

Lastly, enclosed is a copy of the regulations of the Department of Correctional Services concerning access to records. It is suggested that you review the regulations carefully, for they 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3502

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 12, 1984

Mr. Clarence E. Winans
[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. Winans:

I have received your letter of September 18 in which you requested further advice in regard to your problem with the Village of Chatham.

According to your letter, you have been unable to obtain certain information concerning violations of a Village ordinance. You wrote that, while you were permitted to read a written opinion of the Village Attorney which was discussed at a Village Board meeting, the Board has refused to give you a copy of the opinion. You also explained that the report indicated that if "you have not received information or reports to which [you are] entitled, [you] may bring said charge to the New York State Supreme Court". In addition, you stated that you have received no reply to several of your requests for records. Moreover, you wrote that, with respect to your request for a "pre-notification data list on violations", you were told by the police sergeant that such information was not available because it constituted "police investigation matters".

In this regard, I would like to offer the following comments.

First, with respect to the opinion written by the Village Attorney, it is possible that the Board considers the opinion confidential and subject to an attorney-client privilege. However, since you were permitted to read the opinion, in my view, the privilege was waived, and the opinion should be made available for copying as well. Under the Freedom of Information Law, records which are

available for review are also available for copying [Public Officers Law, §89(3)]. Moreover, long before the enactment of the Freedom of Information Law, the courts held that the right to copy is concomitant with the right to inspect [see In Re Becker, 200 AD 178].

Second, you wrote that several of your requests for records have gone unanswered. In this regard, I point out that §89(3) of the Freedom of Information Law provides that, as a general rule, an agency is not required to prepare any record not possessed or maintained by such agency in response to a request. Thus, if the Village does not maintain a record of the information which you seek, it is not required to create a new record, even if such information can be compiled from other sources. Furthermore, if the requested records do not exist, they cannot be denied, nor would there be a denial to appeal.

Third, if the records do exist, an agency is required to respond to a request within certain time limits. Generally, the agency must respond by granting or denying access to the records within five business days of the receipt of a request [Public Officers Law, §89(3)]. In my view, a failure to respond within the designated time limits results in a constructive 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 ten 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 on Open Government. Thus, you may appeal to the Village "appeals officer" even though you have not been told that your request has been denied.

In addition, it has been held that when an appeal is made but a determination is not rendered within ten 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, 87 AD 2d 388, app dis 57 NY 2d 774]. Therefore, in my view, you may proceed pursuant to Article 78 if you receive no response to your appeal.

Finally, with regard to the police sergeant's characterization of the "pre-notification data list on violations" as "police investigation matters", I direct your attention to §87(2)(e) of the Freedom of Information Law. That provision states that an agency may deny records which:

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Since it is unclear what the pre-notification data list includes, I cannot advise whether §87(2)(e) of the Law would be applicable. If, however, the list merely includes the names and mailing addresses of individuals to whom notices of violations were sent, I believe that such list would not fall within the above-cited section and should be made available.

It is noted, too, that the "law enforcement purposes" exception has been found to be inapplicable relative to records of a building inspector regarding building code violations [see Young v. Town of Huntington, 388 NYS 2d 978 (1976)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Village Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-
FOIL-AO-3503

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 15, 1984

Mr. Sam Roberts
The New York Times
229 West 43rd Street
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. Roberts:

I have received your letter of September 29 in which you requested an advisory opinion.

According to your letter, the New York Times "intends to submit a Freedom of Information request for any and all records reflective of the discussion and action taken by the Administrative Board of the New York State Courts at its regular September meeting."

The question involves the application of the Freedom of Information Law with respect to the records in question. In this regard, I would like to offer the following comments.

First, the Freedom of Information Law (Article 6, Public Officers Law) includes within its scope records of an "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 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."

From my perspective, which is based upon judicial interpretations of the Freedom of Information Law, as well as other statutes and the New York State Constitution, the Administrative Board is "an agency" subject to the requirements of the Freedom of Information Law.

Section 210 of the Judiciary Law in subdivision (2) states that:

> "[T]he administrative board of the courts shall consist of the chief judge, who shall serve as chairman, and the presiding justices of the appellate divisions of the supreme court. The members of the administrative board shall serve without compensation but shall be entitled to reimbursement for expenses actually and necessarily incurred by them in the performance of their duties."

Article VI, §28 of the Constitution contains similar language regarding the Administrative Board of the Courts and in subdivision (c) states that:

> "[T]he chief judge, after consultation with the administrative board, shall establish standards and administrative policies for general application throughout the state, which shall be submitted by the chief judge to the court of appeals, together with the recommendations, if any, of the administrative board. Such standards and administrative policies shall be promulgated after approval by the court of appeals."

In view of the language quoted above, it would appear that the Administrative Board performs an administrative function and does not exercise a judicial function whereby determinations are made relative to justiciable issues.

Further, in a determination that was later affirmed unanimously by the Appellate Division, it was found that the Office of Court Administration is not a court exempted from the requirements of the Freedom of Information Law, but rather that it is an "agency"that falls within the scope of the Freedom of Information Law [see Quirk v. Evans, 116 Misc. 2d 554, 455 NYS 2d 918, aff'd 97 AD 2d 992 (1983); see also, Babigian v. Evans, 104 Misc. 2d 140, 427 NYS 2d 668, aff'd 97 AD 2d 992 (1983)]. In its discussion of the issue, the

Supreme Court in Quirk, supra, cited prior authority which alluded to the Administrative Board of the Judicial Conference, stating that:

> "[T]here is some judicial authority for the proposition that the Administrative Board of the Judicial Conference, most of whose powers devolved on the OCA and the Chief Administrator, was merely an administrative agency. Justice Silverman, formerly of this court, commented:
>
> 'Pursuant to section 28 of article VI of the State Constitution, and section 212 of the Judiciary Law, the Administrative Board has the authority and responsibility for the administrative supervision of the unified court system, including the adoption of standards and policies of general application throughout the State relating to the appointment and promotion of employees. As such, it performs the functions formerly performed by the State Civil Service Commission and the Department of Personnel in relation to the non-judicial positions in the unified court system.
>
> '...the Administrative Board, like any administrative agency, is bound by its own rules.' [Matter of English v. McCoy, 51 Misc. 2d 311 [273 N.Y.S. 2d 171], mod. other grounds, 27 A.D. 2d 280 [278 N.Y.S. 2d 449], mod. other grounds 22 N.Y. 2d 356 [292 N.Y.S. 2d 857, 239 N.E. 2d 614], application for reargument denied 22 N.Y. 2d 973 [295 N.Y.S. 2d 1033, 242 N.E. 2d 499]" (455 NYS 2d at 921).

In view of the foregoing, it appears that the Administrative Board is subject to the Freedom of Information Law.

Second, assuming that the Administraitve Board is an "agency", its records would in my view be accessible in accordance with the provisions of the Freedom of Information Law. 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Third, at this juncture, I direct your attention to the Open Meetings Law (Public Officers Law, Article 7). That statute is applicable to meetings of public bodies. Section 102(2) of the Open Meetings Law defines "public body" to include:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By viewing the definition quoted above by means of its components, it appears that the Administrative Board is a "public body". The Administrative Board is an entity consisting of more than two members. I believe that it conducts public business and performs a governmental function for the state. Further, it would appear that the Administrative Board must conduct public business by means of a quorum pursuant to §41 of the General Construction Law. The cited provision states that:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum, and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

While neither the Judiciary Law nor the Constitution might refer specifically to any quorum requirement, it would appear that the Board may carry out its duties only by means of a quorum as described in §41 of the General Construction Law.

If the Administrative Board is a "public body", of potential relevance to your question is §106 of the Open Meetings Law concerning minutes. The cited provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

If the Administrative Board is a public body, it would appear that minutes reflective of action taken would be accessible in accordance 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:ew

cc: Honorable Lawrence H. Cooke, Chairman, Administrative Board of the Courts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3504

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 16, 1984

Mr. Jerry Hiller
Village Administrator
Village of East Aurora
Village Hall
571 Main Street
East Aurora, NY 14052

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. Hiller:

I have received your letter of October 4 in which you requested advice with respect to updating the rules of the Village of East Aurora concerning public access to records.

According to your letter and attachment, the Village's present rules were adopted in 1974 and were intended to be temporary until the State promulgated more comprehensive regulations. When the Freedom of Information Law was significantly amended in 1978, the Village did not amend its regulations accordingly. I would like to offer the following comments with respect to the present version of the Law.

First, when the Freedom of Information Law was originally enacted it listed categories of accessible records. Effective in 1978, the amended Law, which is based on a presumption of access, provides that all records of an agency are available except to the extent that records or portions thereof fall within one or more of the grounds for denial. The nine grounds for denial are listed in §87(2) of the Law and concern records which, if disclosed, may harm someone or impair the function of a governmental entity.

Second, the present Freedom of Information Law and the regulations promulgated by the Committee on Open Government provide time limits within which an agency must respond to a request for records. Specifically, §89(3) of the Law and §1401.5 of the Committee's regulations provide

that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or in the alternative, 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 request is acknowledged within five business days, the agency has ten additional business days within which to grant or deny access. If no response is given within five business days of the receipt of a request, the request may be deemed a "denial" of access [see regulations, §1401.7(c)].

In addition, a denial or "constructive denial" may be appealed to the head of an agency or whomever is designated to determine appeals. That person or body has ten 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 Freedom of Information Law provides that, except when a different fee is otherwise prescribed by statute, the fees for copies of records shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches or the actual cost of reproducing any other record [Freedom of Information Law, §87(b)(iii)].

Finally, I note that I have tried to address the most significant changes in the Freedom of Information Law since the Village's enactment of its rules in 1974. For your information, and more detail, I have enclosed a copy of the present Law, the Committee's regulations and model regulations that may serve as the basis for implementing new rules by completing the appropriate blanks.

I hope that I have been of some assistance to you in your effort to update the Village's public access law. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3505

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 16, 1984

Mr. Nicholas Botta
#84-A-4815
Collins Correctional Facility
Helmuth, NY 14079

Dear Mr. Botta:

I have received your letter of October 11 in which you requested records from this office.

Specifically, you have asked for a copy of your "rap sheet". In this regard, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. Consequently, the Committee does not maintain possession of records generally, such as those in which you are interested. In short, the Committee cannot provide a copy of your rap sheet, because this office does not maintain copies of rap sheets.

It is suggested that you request the records from the custodian of criminal history information, the Division of Criminal Justice Services. The address for the Division is:

Division of Criminal Justice Services
Stuyvesant Plaza
Executive Park Tower
Albany, NY 12203

I would like to point out that the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, when making a request, it is suggested that you include as much detail as possible in order that the agency can locate the records sought. It is also recommended that you discuss such a request with your counselor, who may be able to provide you with additional information regarding the manner in which a request should be made to the Division of Criminal Justice Services.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3506

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 16, 1984

Mr. Richard Johnson
#82-A-0272
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. Johnson:

I have received your letter of October 2 in which you requested assistance from this office in obtaining your medical records from St. Mary's Hospital in Brooklyn, New York.

According to your letter, you have been unsuccessful in obtaining records concerning an operation performed in 1972 or 1973. Neither the head clerk at St. Mary's Hospital nor the physician at Green Haven Correctional Facility have responded to your requests.

The Committee on Open Government is authorized to advise the public with respect to the Freedom of Information Law. The Committee does not, however, maintain the type of records that you seek nor does it have the authority to require that records be made available. Nonetheless, I would like to offer the following comments and suggestions.

First, the Freedom of Information Law applies only to records maintained by state or local agencies in New York. Section 86(3) of the Law defines "agency" as:

> "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, would, in my view, fall outside of the requirements of the Freedom of Information Law. Assuming that St. Mary's Hospital is a private institution, it is my belief that the Freedom of Information Law does not govern the availability of the Hospital's records.

Second, with respect to medical records in general, there is no law of which I am aware that grants direct rights of access to hospital records to the individual to whom the records relate. However, §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 conservator of a conservatee, an examining consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physician or hospital..."

Based upon the provision cited above, it appears that a hospital or physician must release the medical records of a patient to another physician or hospital who seeks medical records on behalf of a competent patient.

Therefore, I suggest that you continue your efforts to have the doctor at Green Haven, or another doctor with whom you are familiar, request the records from St. Mary's Hospital on your behalf.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3507

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 18, 1984

Mr. Michael Albergo
[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. Albergo:

I have received your letter of October 6 as well as the materials attached to it.

According to your letter, you have unsuccessfully requested from Putnam County the front sides of paychecks relative to employees of the office of the District Attorney, as well as various other County employees. You wrote that you have been asked to provide a reason for your request, even though it is your belief that you need not state the reason. In addition, in one of the responses to requests, you were told that the request was "so open ended" that it did not "reasonably describe" the records sought. In the same response, which was prepared by David D. Bruen, the County Executive, it was suggested that disclosure of the paychecks "would be tantamount to disclosing the home addresses of employees of the County". Mr. Bruen offered to furnish you with "a list of the positions in the District Attorney's office and their gross salaries...".

In this regard, I would like to offer the following comments.

First, as intimated by the County Executive, the Freedom of Information Law requires that an applicant request records "reasonably described" [Freedom of Information Law, §89(3)]. Under the circumstances, it does not appear that your request to look at paychecks is restricted in terms of time. If, for example, you sought to inspect or copy paychecks issued during a specific period, such a request would in my view reasonably describe the records sought. However, a request to review paychecks of all employees of the office of the District Attorney, without any restrictions, would not indicate any period to which the records might relate.

Second, as you may be aware, §87(3)(b) of the Freedom of Information Law states that each agency shall maintain:

> "a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

Based upon the language quoted above, it is clear in my view that each agency, including Putnam County, is required to prepare and make available a list that identifies every agency employee by name, as well as title and salary. From my perspective, although it is true that §89(7) of the Freedom of Information Law indicates that an agency need not provide access to the home address of a public employee, neither the records sought, nor the payroll record required to be prepared pursuant to §87(3)(b) would include the home address of a public employee. Consequently, I disagree with the County Executive's contention. Further, I believe that the payroll information described in §87(3)(b) must be made available.

Third, assuming that a request for paychecks is narrowed to a particular time period, it is my view, as a general matter, that the checks would be accessible. It is noted that I am unfamiliar with the contents of the front side of a paycheck. Consequently, other than the name of an employee and the net pay, I do not know what other details might be included. If other details appear, it is possible that they could be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Further, as you may be aware, it has been held judicially that the reverse side of a paycheck may be denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Lastly, you indicated that you were asked the reason for which a request was made. In this regard, I do not believe that rights of access granted by the Freedom of Information Law are contingent upon the status or interest of an applicant [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; see also M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Honorable David D. Bruen, County Executive
Mr. Joseph L. Peloso, Jr., Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-
FOIL-AO-3508

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 18, 1984

Honorable Warner H. Strong
Mayor
Village of Palmyra
Palmyra, NY 14522

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 Mayor Strong:

I have received your letter of October 4 in which you requested advice regarding memoranda written by departmental employees to other departmental employees.

In your letter you asked the following questions:

> "[A]re these memos subject to the 'Open Meetings Law' - or any other law of which you are aware? May these memos be considered private, departmental business - and what, if any, would be the legal implications of them being made public by a third party; what would occur should public access to them be denied?"

In response to your questions, I would like to offer the following comments.

First, I point out that the Freedom of Information Law is based upon a presumption of access. In other words, an agency must make all records available for inspection and copying except to the extent that an agency may withhold records or portions thereof enumerated in §87(2) of the Law. Relevant to your question is paragraph (g) of §87(2) which permits an agency to deny records which:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Conversely, to the extent that inter or intra-agency materials contain advice or opinion, I believe that they would be deniable.

Second, it should be noted that while §87(2) permits an agency to deny records based upon one or more of the deniable grounds, the section does not require an agency to withhold such records. Thus, in response to your question concerning the legal implications of disclosure by a third party, the Freedom of Information Law does not prohibit or make it unlawful to disclose records. There may be other statutes concerning particular records that require confidentiality.

Third, the Open Meetings Law generally requires that all meetings of a public body be open to the public except when an executive, or closed, session may be held pursuant to §105 of the Law. That section lists eight subjects which may properly be discussed in a closed session. None of the enumerated subjects cover discussions of inter or intra-agency memoranda in general.

It is emphasized that even though a record might justifiably be withheld under the Freedom of Information Law, a discussion related to that record might nonetheless be required to be conducted open to the public. For example, if the Village Highway Superintendent writes to you and recommends that a road be repaired, the memorandum would be advisory and, therefore, deniable under the Freedom of Information Law. However, when, at a meeting, the Board of Trustees seeks to discuss the recommendation, the discussion must be open, for none of the grounds for executive session would be applicable.

Finally, you asked what would occur should public access to the memoranda be denied. I point out that both the Freedom of Information and Open Meetings Laws include provisions for reviewing an agency's denial of records or closure of a meeting. In brief, an aggrieved person may initiate an Article 78 proceeding to review such decisions by a public body.

I have enclosed a copy of the Freedom of Information Law and the Open Meetings Law for your information. I hope that I have been of some assistance to you. Should any further questions arise, please feel free to call this office.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Encl.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3509

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 18, 1984

Mr. John E. Curtis
[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. Curtis:

I have received your letter of October 9 in which you requested assistance in gaining access to records.

According to your letter, on September 9, you sent a letter to Mr. Dallas Zahm, Highway Superintendent of the Town of Villenova, in which you requested various records. As of the date of your letter to this office, your request to Mr. Zahm remained unanswered.

In this regard, I would like to offer the following comments and suggestions.

First, although the Highway Superintendent might have physical custody of the records in which you are interested, it is possible that he is not the person designated to respond to requests made under the Freedom of Information Law. Under §89(1)(b)(iii) of the Freedom of Information Law, the Committee on Open Government is required to promulgate general regulations concerning the procedural aspects of the Law. In turn, §87(1) requires that the governing body of a public corporation, such as a town, adopt regulations consistent with the Freedom of Information Law and the regulations of the Committee.

One of the aspects of the regulations involves the designation of a "records access officer" who is responsible for dealing with requests made under the Freedom of Information Law. In most towns, the town clerk is the records access officer, for the clerk is the legal custodian of all town records [see Town Law, §30]. Consequently, it is suggested initially that you contact the Town Clerk for the purpose of determining the identity of the Town's designated records access officer. At that point, it is suggested that you submit a request to the records access officer.

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Having reviewed your request, which is attached to your letter, it is likely that much of the information that you are seeking does exist in the form of a record or records. However, it is possible that some of the information might not appear in records, in which case the Town would not be obliged to create a new record in order to respond to your request.

Lastly, it is noted that 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 business 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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, 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: Town Supervisor
Dallas Zahm, Highway Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3510

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 18, 1984

Mr. Samuel A. Weissmandl
Administrative Assistant
Office of the Mayor
Village of New Square
New Square, NY 10977

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, unless otherwise indicated.

Dear Mr. Weissmandl:

I have received your letter of October 9, as well as the materials attached to it.

In terms of background, you serve as Administrative Assistant to the Mayor of the Village of New Square, which apparently is a newly incorporated public corporation situated within the Town of Ramapo. Due to the legal duties of the Village, there is a necessity to obtain or review many of the records in possession of the Town of Ramapo, which, until the creation of the Village, had performed many of the responsibilities now imposed upon the Village. Concurrently, it appears that the Town of Ramapo may have a need to obtain or review records maintained by the Village of New Square.

According to your letter, the Town Clerk of the Town of Ramapo has been directed by means of a resolution adopted by the Town Board to transfer Town records to the Village of New Square "on an as needed basis", subject to the proviso that "at any time the Town of Ramapo needs any copies of the above records, they may have free access to these records".

You have asked whether the Town of Ramapo may "stipulate that the Village of New Square provide copies of the above records for free, or is the Village allowed to charge the 25 [cents] per paper, the same as the Town of Ramapo charges the Village?"

In this regard, it is emphasized that Joy Gorman, the Town Clerk of the Town of Ramapo, has contacted me by phone with respect to your letter. In our conversation, Ms. Gorman indicated that the Town of Ramapo does not assess any fee with respect to copies of records sought by the Village of New Square. Consequently, it would appear that your question involving the capacity of the Village to assess fees for copies is based upon an inaccurate assumption, specifically, that the Town charges a fee for copies of records sought by the Village.

Further, under the circumstances, it is assumed that copies of records are transferred between the Town and the Village in an effort to enable each municipality to carry out its official duties. Therefore, it does not appear that your question involves rights of access accorded to members of the public generally under the Freedom of Information Law.

It is suggested that the Town and the Village attempt to clarify their relationship with respect to the exchange of records. From my perspective, a free exchange of records needed to carry out Town and Village duties respectively, stipulated in writing by the governing bodies of each municipality, would represent an appropriate solution to the problem.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Ms. Joy Gorman, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3511

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 18, 1984

Ms. Elna L. Manges, Trustee
Village of Elmira Heights
215 Elmwood Avenue
Elmira Heights, NY 14903

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. Manges:

I have received your letter of October 10 in which you requested a written confirmation of a conversation that we had earlier in the month.

According to your letter, a request has been made by a woman who was unsuccessful in obtaining an urban renewal grant. That person recently requested to review files pertaining to other persons requesting grants. You indicated that the award of a grant is based upon income and, consequently, it is your view that disclosure would be a "violation of confidentiality". You also suggested that "the only way these records could be seen would be after all identifying information has been deleted."

In this regard, I would like to offer the following comments.

First, 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 (i) 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 embarrased 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 Services 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 msut of necessity be made. Therefore, although I might believe that disclosure of particular information would be offensive and result in an unwarranted invasion of personal privacy, another person might feel that disclosure would be innocuous, thereby resulting in a permissible invasion of personal privacy. In short, I do not feel that there are 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.

Second, in view of the contentions expressed above, it would appear that records pertaining to the award of grants would be available, but, as you suggested, after the deletion of identifying 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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3512

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 19, 1984

Mr. George Veytruba
#75-A-2072
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. Veytruba:

I have received your letter of October 10 concerning the availability of psychiatric records.

As a follow-up to Mr. Freeman's letter of October 4, you asked whether psychiatric records are accessible or "at least harder to deny" when they are used to deny parole to an inmate. In this regard, I would like to offer the following comments.

First, the Freedom of Information Law does not requrie an agency to consider the purpose for which requests for records are made. In other words, if an agency may deny access to certain records, such as psychiatric records which are reflective of advice, opinion or suggestions, the agency need not consider the purpose for which the individual has requested such records. The agency may, in its discretion, grant or deny access to records which may be withheld under the Law.

Second, when a psychiatric record is subject to the Freedom of Information Law, to the extent that the record includes advice, opinion or suggestions, the record may generally be withheld. Stated differently, an individual does not have a right under the Freedom of Information Law to review or copy a doctor's, or other examiner's records which consist of, for example, his or her opinion of an individual's mental state or his or her advice or suggestions as to the care or treatment of the individual.

Finally, the regulations of the Division of Parole provide for access to records prior to specified stages of parole proceedings. I point out that the Division will not grant access to portions of the case record to the extent that they contain "diagnostic opinions which, if known to the inmate/releasee, could lead to a serious desruption of his institutional program or supervision" (9 NYCRR 8000.5 (c)(2)(i)(a)(1). That language may pertain to the availability of psychiatric records.

Additionally, it is suggested that you speak with an attorney regarding the right of an inmate to review the record upon which a denial of parole is based.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1105
FOIL-AO-3513

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 19, 1984

Mrs. Dorothy E. Petrucelli
Board of Education
Eastchester Union Free
School District
580 While Plains Road
Eastchester, NY 10707

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. Petrucelli:

I have received your letter of October 9, in which you requested an advisory opinion.

As a member of the Board of Education of the Eastchester Union Free School District, you have questioned various practices of the Board. Specifically, you wrote that "as of July of this year we no longer have minutes of action taken in Executive Session". It is your belief that some of the actions that were voted upon during executive sessions should have been "ratified" during open meetings. Apparently several of your questions involve the initiation of an investigation relative to a staff member that has resulted in a proceeding commenced under §3020-a of the Education Law. You indicated further that "Our attorney has advised us that any discussion of Probable Cause relating to §3020-a must be held in Executive Session, and that a vote for Probable Cause must also be taken in Executive Session with no minutes being taken." You also expressed the belief, however, that minutes should be taken, even though action might appropriately be taken during an executive session.

In this regard, I would like to offer the following comments.

First, it is emphasized that your questions involve a variety of provisions of law, including the Education Law, Open Meetings Law, and the Freedom of Information Law.

Second, as a general matter, a public body subject to the Open Meetings Law may vote during a properly convened executive session, so long as the vote does not involve the appropriation of public monies. Nevertheless, various judicial interpretations of the Education Law, §1708(3), indicate that a school board can vote only during an open meeting, except in situations where a statute requires that action can be taken during an executive session [see e.g., United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et at 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 58 NY 2d 626 (1982)].

Based upon the review of §3020-a of the Education Law, it would appear that the actions taken by a board pursuant to that provision must occur during an executive session. As such, §3020-a is in my view a statute that requires voting by a school board to be taken behind closed doors. For instance, subdivision (2) of the cited provision concerning the disposition of charges states in part that:

> "Upon 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."

Based upon the language quoted above, I believe that a school board would be required to vote during an executive session in relation to a determination relative to charges made against a tenured individual.

Third, of significance is §106 of the Open Meetings Law, which provides guidance regarding the contents and disclosure of minutes. Subdivisions (1)and (2) of the cited provision state that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> "2. Minutes shall be taken at executive session of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; 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, if a school board votes during an executive session, I believe that minutes reflective of the determination and the vote by the members must be prepared. Therefore, I agree with your contention that, even though the Board might in some instances vote behind closed doors, it must nonetheless prepare minutes reflective of its actions.

Nevertheless, as stated in §106(2), minutes of an executive session would be available to the extent provided by the Freedom of Information Law, which is Article 6 of the Public Officers Law. I would like to point out in this regard that a judicial determination regarding records prepared, including charges, in conjunction with a proceeding initiated under §3020-a of the Education Law, may be withheld under the Freedom of Information Law [see Harold Company v. School District of the City of Syracuse, 430 NYS 2d 460 (1980)]. In brief, since charges are not proven and are not indicative of a final determination relative to a tenured person, it was found that disclosure would at that juncture constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)].

As such, while I believe that minutes relative to action taken during an executive session must be prepared, in the context of the situation involving charges made under §3020-a of the Education Law, I do not believe that the minutes would have to be made available under the Freedom of Information Law.

I hope that I have been of some assistance by clarifying the situation. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3514

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 19, 1984

Peter L. Danziger, Esq.
O'Connell and Aronowitz, P.C.
100 State Street
Albany, New York 12207

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. Danziger:

I have received your letter of October 10, as well as the correspondence attached to it.

On behalf of the Capital Newspapers Division of the Hearst Corporation, you have requested an advisory opinion relative to rights of access to the "Corning Papers".

In a response dated October 9 to a request for the records in question, Vincent J. McArdle, Jr., Corporation Counsel for the City of Albany, indicated that some of the Corning Papers would be subject to rights granted by the Freedom of Information Law. However, Mr. McArdle suggested that others would fall outside the scope of the Law. Specifically, Mr. McArdle wrote that:

> "Parallel files are being created carrying the same designation as the original, except that an 'a' has been added to distinguish the new file. The papers placed in the 'a' file have been segregated for two general reasons. Some were clearly written or received by Mayor Corning in other than his capacity as Mayor, being either personal letters or correspondence to and from him in his capacity as Chairman of the Albany County

> Democratic Committee. Most of the latter would, even if they were determined to constitute public records pursuant to Section 86 of the Public Officers Law, be subject to the exceptions contained in Sections 87.2(b) and 89(2)(b) of that law, in that they are requests for employment, including past employment historys.
>
> "The above records have been marked in pencil in the upper right corners as 'ch' for Chairman, 'b' for those within the Section 87(2)(b) exception, or both. Purely personal correspondence is designated 'p'."

As such, it appears that Mr. McArdle has sought to distinguish, for the purpose of determining rights of access granted by the Freedom of Information Law, those records that were written or received by Mayor Corning in his capacity as Mayor, as opposed to those that might be characterized as "personal" or that might relate to the Mayor while acting in his capacity as Chairman of the Albany County Democratic Committee.

Based upon an appeal of October 10 submitted to Harold H. Greenstein, the "F.O.I. Appeals Officer" for the City of Albany, you contended that all of the "Corning Papers" should be subject to the Freedom of Information Law. In addition, it is your view that records designated as personal would not necessarily be deniable under the Freedom of Information Law.

I concur with your contentions and, in this regard, I would like to offer the following comments.

First, and perhaps most important, the scope of the Freedom of Information Law is determined in part by the definition of "record". Section 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 language quoted above, I believe that all of the Corning Papers "kept", or "held" constitute "records" subject to the Freedom of Information Law.

Moreover, two determinations rendered by the Court of Appeals in my opinion bolster such a contention. In Westchester Newspapers v. Kimball [50 NY 2d 575 (1980)], the Court of Appeals found that records involving a lottery sponsored by a volunteer fire company fell within the framework of the Freedom of Information Law, even though it was argued that the records had no relation to the performance of the official duties of the agency that maintained them. Although the agency suggested that records pertaining to a "non-governmental function" would not be subject to the Freedom of Information Law, the Court found 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. For not only are the expanding boundaries of governmental activity increasingly diffult 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 from 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 and extracurricular event, ran afoul of our penal law?" [id. at 581].

From my perspective, the illustration provided by the Court of Appeals is relevant to the instant situation, for a variety of activities, some of which might not have been "governmental", were apparently carried out by one person, the former Mayor.

In a recent decision involving minutes of meetings of corporate boards furnished voluntarily to a state agency by a third party outside of government, the Court of Appeals stated that:

> "The requested minutes are 'records' under the plain language of FOIL because they are 'information kept, held, filed, produced***by, with or for an agency.' When the plain language of the statute is precise and unambiguous, it is determinative..." [Washington Post Co. v. NYS Insurance Department, 61 NY 2d 557, 565 (1984)].

Based upon the language of the definition of "record" as well as its judicial interpretation by the Court of Appeals, it is reiterated that the "Corning Papers" are in my view subject to the Freedom of Information Law, even if they are characterized as "personal', and even if the records might pertain to the Mayor while acting in his capacity as Chairman of a political party committee. In short, I believe that the mere fact that the papers are kept by the City brings them within the scope of rights granted by the Freedom of Information Law.

Second, with regard to materials that are considered "personal", Mr. McArdle wrote that those materials might be withheld under §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute an "unwarranted invasion of personal privacy".

In my view, the introductory language of §87(2), which requires that records be made available, except "records or portions thereof" that fall within a ground for denial, leads to two conclusions. Initially, I believe that the quoted language indicates that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, in my opinion, §87(2) requires that an agency review records in their entirety to determine which portions, if any, might justifiably be withheld.

Under the circumstances, even though records might be "personal", it is possible that their contents are available, except to the extent that certain identifying details might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Without having the opportunity to be familiar with "personal" records, it is impossible to conjecture as to rights of access to the contents. Nevertheless, I do not believe that such records would, of necessity, as a group, fall outside the scope of rights granted by the Freedom of Information Law. Stated differently, as in the case of all records, I believe that they would be available, except those portions for which a ground for denial could be appropriately asserted.

The remaining ground for denial to which Mr. McArdle alluded is §87(2)(g). The cited provision permits an agency to withhold records that are:

> "are inter-agency or intra-agency materials which 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.

Once again, records characterized as inter-agency or intra-agency materials should in my opinion be reviewed to determine which portions could be witheld. It is also noted that §87(2)(g)(i), which requires the disclosure of "statistical or factual tabulations or data", has been interpreted to grant access to factual information, irrespective of the format in which it might appear [see e.g., 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., 90 AD 2d 568 (1982)]. In Ingram, the Court found that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subjective analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable...Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v. Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [id. at 569].

In sum, I believe that the "Corning Papers" are, in their entirety, subject to rights of access granted by the Freedom of Information Law. Further, in my opinion, although some of the records might be characterized as "personal" or "inter-agency or intra-agency materials", those records might not be exempted from disclosure in toto; on the contrary, I believe that the records must be reviewed individually to determine rights of access.

Lastly, it is emphasized that the Freedom of Information Law is permissive. Section 87(2) of the Law indicates that an agency may withhold records or portions thereof that fall within the ensuing grounds for denial. Nevertheless, the Law does not require that information be withheld, even though a basis for withholding might be applicable. In view of the volume of material constituting the "Corning Papers", it is noted that the City is not required to withhold records, but rather that it has discretionary authority to do so in accordance with the grounds for denial listed in the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Vincent J. McArdle, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3515

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 19, 1984

James P. Otis, Ph.D.
Director
Standards and Procedures
Review Unit
State of New York
Office of Mental Retardation and
Developmental Disabilities
44 Holland Avenue
Albany, NY 12229

Dear Dr. Otis:

I have received the draft of Part 602 of OMRDD's proposed regulations regarding the Freedom of Information Law, and I appreciate your interest in complying with the Law. Having reviewed the draft, I would like to offer the following comments.

First, with respect to §602.6, I point out that the Freedom of Information Law does not require that requests for access to records be "identified as requests under the Freedom of Information Law." Requiring as much, in my view, serves only to unnecessarily complicate the process of requesting records, which I believe would be contrary to the intent of the Law.

Second, §602.7(c) concerning fees provides that the agency shall charge an additional fee, beyond the cost of copying records, of "ten dollars per hour for each staff hour required to delete information from a record...". Please note that the Freedom of Information Law states that the fees for copies of records shall not exceed twenty-five cents per nine by fourteen inch photocopy or the actual cost of reproducing any other record (§87(1)(b)(iii) of the Freedom of Information Law).

Moreover, the Committee's regulations promulgated under the Law specifically state that no fee shall be charged for inspection of records, search for records or any certification of records [21 NYCRR 1401.8(a)]. In addition, §1401.8(c)(3) provides that the fee for copies of records, other than those covered by the twenty-five

cents limit or by the provision concerning agencies which do not have photocopying equipment, "shall not exceed the actual reproduction cost, which is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries." Based upon the language cited above, it is my belief that an agency cannot charge any additional fee for staff time required to locate or review records or to delete portions of records for any reason unless otherwise prescribed by statute. Since I am not aware of any such statute regarding the records of OMRDD, I do not believe your agency is authorized to charge ten dollars per staff hour needed to delete information from records which, if disclosed, might constitute an unwarranted invasion of personal privacy.

I hope that my suggestions are helpful to you. If you have any further questions, please do not hesitate to call me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3516

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 22, 1984

Mr. Nicholas C. Yanni
[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. Yanni:

I have received your letter of October 13 in which you requested advice from this office.

According to your letter, you sent a certified letter to the Yorktown Court Clerk requesting certain records. However, you have received no reply nor an acknowledgement of receipt of your letter to date. In this regard, I would like to offer the following comments.

First, the Freedom of Information Law is applicable to records of an "agency", which is defined in §86(3) of the Law, and which exempts the judiciary from the scope of the Law. Judiciary is defined in §86(1) to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

I believe that the Yorktown Court is a part of the judiciary as defined above and, thus, is not subject to the provisions of the Freedom of Information Law.

Second, although rights of access to court records is not governed by the Freedom of Information Law, §2019-a of theUniform Justice Court Act requires as a general matter that the records and dockets of the court be open to the public for inspection at reasonable times. Therefore, I suggest that you contact the Town Court to ascertain when the records are available for inspection.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-357

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 24, 1984

Mrs. Mary O. Furey
The Concerned Taxpayers of the
Ballston Spa School District
P. O. Box 91
Ballston Spa, New York 12020

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 October 17, as well as the correspondence attached to it.

In terms of background, on August 31, you directed a request to the records access officer of the Ballston Spa Central School District, in which you sought a variety of records. The receipt of the request was acknowledged on September 7, and two weeks later, all but one of the areas of the records sought were made available. Superintendent Giacobbe, the Records Access Officer, indicated that certain records were being updated but that they would be made available to you shortly. The information requested that has not yet been made available involves:

> "Certification status of all teaching personnel (N.Y.S. Provisional or N.Y.S. Permanent); the area of certification; when they received Permanent Certification and the effective date of tenure."

On October 15, Mr. Giacobbe wrote that:

> "The information regarding tenure and certification is found in the personnel records of each individual professional employee. To develop a list containing this information would entail many hours of compilation. We do not have sufficient staff to comply with that request."

Notwithstanding his response, you indicated in a letter of appeal to Mr. Dennis Furey, President of the Board of Education, that you were informed by Mrs. Schallen, who works in the Superintendent's office, "that the information was on her desk but that Mr. Giacobbe wanted to review it before he released it". As such, there appears to be a conflict between Mr. Giacobbe's response and the information given by Mrs. Schallen.

In this regard, I would like to offer the following comments.

First, as you 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 (i) of the Law.

Second, 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 a request is made for information that does not exist in the form of a record or records, an agency would not be obliged to prepare a new record in order to respond to a request.

Third, according to your initial request, you sought records indicating certification status and other details regarding teaching personnel. Mr. Giacobbe indicated that the information sought was found within individual personnel files and that no list containing the information sought exists. From my perspective, based upon your letter of request, you did not seek a list, but rather records containing particular types of information. If those records exist, I believe that they would be available for inspection and copying in accordance with rights granted by the Freedom of Information Law, even if the records are found in individual personnel files.

In terms of rights of access, I believe that the information sought would be accessible under the Freedom of Information Law. A record indicating certification status would in my view be the equivalent of a license. Further, I believe that a license generally is intended to enable the public to know that an individual is qualified to engage in a particular profession or aspect of a profession. Consequently, it is my view that records indicating certification status as well as the area of certification and the date of certification, would be accessible. Similarly, records indicating the date of tenure would be based upon a determination by the Board of Education and would in my view be available.

In sum, assuming that the information that you seek exists in the form of a record or records, I believe that it must 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: Dennis Furey, President, Board of Education
Paul J. Giacobbe, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3518

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 25, 1984

Ms. Cykerd
[redacted]

Dear Ms. Cykerd:

In conjunction with our telephone conversation, enclosed are various materials that might be useful to you.

Among the enclosures are Part 357 of the regulations of the Department of Social Services, which concerns access to records pertaining to recipients of public assistance, §17 of the Public Health Law concerning the disclosure of medical records, and a booklet describing your rights under the Freedom of Information Law.

If you want to direct a request to an agency of government in New York, it is suggested that you use the sample letter of request appearing in the booklet. As indicated in the booklet, each agency should have designated a "records access officer" who is responsible for dealing with requests. In addition, I would like to point out that the Law requires that an applicant request records "reasonably described". Since you referred to a contract entered into by a New York City agency, you should provide as much detail as possible concerning the contract when you submit a request, so that agency officials can locate the records.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3519

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 25, 1984

Ms. Lori M. Manzer
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, NY 10022

The staff of the Committee on Open Government is auhtorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Manzer:

I have received your letter of October 12 in which you requested an advisory opinion with respect to the availability of records related to a disciplinary hearing.

The facts, as you outlined them, involve a civil service employee who was afforded a due process hearing pursuant to §75 of the Civil Service Law. A deputy, appointed to conduct the hearing issued a report in which he found in favor of the school district with respect to one specification and against the district with respect to the second specification. The Board of Education passed a resolution adopting, in full, the hearing officer's recommendation that the charged employee be terminated.

Based upon the facts described above, you wish to know which of the following documents are subject to disclosure under the Freedom of Information Law:

"(a) the Hearing Officer's Report,
(b) the transcript and record of the hearing (including exhibits),
(c) notes taken by the Hearing Officer for his own use in issuing his report,
(d) the charge, including both specifications,
(e) statements of witnesses,
(f) notes and internal correspondence relevant to the hearing, and
(g) notes of Board of Education members made in executive session to consider adoption of the Hearing Officer's Report."

In this regard, I would like to offer the following comments.

First, as you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, with respect to records involving disciplinary action taken against a public employee, I believe that two paragraphs of §87(2) are relevant. Section 87(2)(b) permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In addition, §87(2)(g) allows an agency to withhold certain inter or intra-agency materials.

Third, the courts have made it 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. Moreover, 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 Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, it has been held that records concerning public employees that are not relevant to the performance of their official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984].

Based upon the judicial determinations cited above, I believe that, to the extent that the records listed above are reflective of final disciplinary action taken against a public employee, they are available, for, as stated in Geneva Printing, and Donald C. Hadley v. Village of Lyons, (Sup. Ct., Wayne Cty., March 25, 1981), "[t]hey deal with a matter of public concern, that being a public employee's accountability for misconduct." On the other hand, if allegations of misconduct were not proven or accepted, the records relating to such allegations may, in my view, be withheld for disclosure would result in an unwarranted invasion of personal privacy.

In addition, with respect to the statements of witnesses, it is possible that the names of such witnesses may be withheld on the ground that disclosure would result in an unwarranted invasion of their personal privacy. It is noted, however, that privacy considerations should, in my view, be handled based upon the surrounding factual circumstances, i.e., whether witnesses' identities have previously been publicly disclosed.

Fourth, §87(2)(g) provides that an agency may withhold inter-agency or intra-agency materials which 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 is, in effect, a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials, consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Although you did not provide great detail, it appears that the records in which you are interested may contain "factual data" or "final determinations" which would be available under the Law. However, some of the records may contain opinion or advice and could, therefore, be withheld.

Thus, in my view, the Hearing Officer's Report should be available since it was adopted in its entirety by the Board of Education and, therefore, is the final determination of the Board. Moreover, the specification of the charge upheld in favor of the school district, but not the specification found against the district, may be available under the Freedom of Information Law. Additionally, unless disclosure would result in an unwarranted invasion of personal privacy, to the extent that the transcript and record of the hearing, including the statement by witnesses, are factual and form the basis of the Board's final determination, I believe those portions would be available. Conversely, those portions not found to be factual by the Board may be withheld.

Finally, with regard to the hearing officer's notes, the notes and internal correspondence relevant to the hearing, and the notes of the Board members, it is my belief that these are predecisional materials "prepared in order to assist the decision-making process and, hence, exempt from disclosure" [McAulay v. Board of Education of the City of New York, 61 AD 2d 1048, aff'd 48 NY 2d 659].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3520

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 25, 1984

Mr. Kenneth B. Wolfe
County Attorney
Office of the County Attorney
Lewis County
Lowville, NY 13367

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. Wolfe:

I have received your letter of October 17, in which you requested assistance relative to rights of access to court records.

According to your letter, while acting in your capacity as County Attorney, you have sought to obtain minutes of criminal proceedings "on file in the office of the Lewis County Clerk". Although you were permitted to look at the records, you were not permitted to make copies.

In this regard, I would like to offer the following comments.

First, as you are aware, the Committee is responsible for advising with respect to the Freedom of Information Law. Under the circumstances, it does not appear that the records in question would fall within the scope of that statute. The Freedom of Information Law is applicable 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."

Based upon the language quoted above, it would appear that the records in question could be considered court reocrds outside the scope of the Freedom of Information Law.

Second, however, various other statutes grant broad rights of access to court records. A statute generally applicable to records maintained by clerks of courts is §255 of the Judiciary Law. The cited provision states that:

> "[A] clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify that a document or paper, of which the custody legally belongs to him, can not be found."

It would appear that the language of §255 requires that a clerk search for and make copies of records in his possession, upon payment of the appropriate fees. Further, §8020 of the Civil Practice Law and Rules entitled "County clerks as clerks of courts" contains provisions regarding duties of county clerks in relation to the production of copies of court records in their possession [see e.g., §8020(f)]. Moreover, case law indicates that statutes granting access to court records have been construed broadly [see e.g., Werfel v. Fitzgerald, 23 AD 2d 306 (1965)]. Assuming that records are accessible for inspection and copying under the cited provision of the Judiciary Law or other statutes, it would appear that they would be available to any person.

Lastly, please consider the preceding comments to be general in nature. Depending upon the nature of records and the circumstances present, there may be exceptions to the presumption of access. For instance, in the case of a criminal proceeding, if charges made against an accused are dismissed in that person's favor, §160.50 of the Criminal Procedure Law generally provides that records pertaining to the charges become 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:ew

cc: County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3521

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 26, 1984

Ms. Hamideh Ramjerdi-Shirazi
[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. Ramjerdi-Shirazi:

I have received your letter of October 16 in which you requested assistance.

According to your letter and the correspondence attached to it, on September 25, you directed a letter to the President of Brooklyn College, where you are employed by the Economics Department, in which you requested copies of records pertaining to you under the Freedom of Information and Privacy Acts. Although the contents of your "personnel file" were made available to you, you were denied access to an "administrative file". Further, even though the administrative file was withheld, you saw a memorandum from the Chairman of the Department to Anna Marie Mascolo, Special Assistant to the President for Legal Affairs. However, Ms. Mascolo threw "the paper in the waste basket".

In this regard, I would like to offer the following comments.

First, the provisions that you cited in your request are the federal Freedom of Information and Privacy Acts. These provisions apply only to records maintained by federal agencies. Relevant, however, are the provisions of the New York Freedom of Information Law (see attached), which is applicable to records maintained by units of state and local government in New York, inlcuding the City University of New York and Brooklyn College.

Second, the Freedom of Information Law includes within its scope all records of an agency. It is noted that the term "record" is defined expansively in §86(4) of the Law to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, boods, manuals, 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 rights of access granted by the Freedom of Information Law would include not only records found within a personnel file, but also records found within an "administrative file", as well as other information maintained by Brooklyn College. In short, rights of access granted by the Freedom of Information Law in my view extend to any records pertaining to you maintained by Brooklyn College, and not only those found within a personnel file.

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Fourth, without knowledge of the contents of the administrative file, it is difficult to conjecture as to rights of access to its contents. Of possible significance is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available. Section 87(2)(g), however, permits an agency to withhold those portions of inter-agency or intra-agency materials reflective of advice, opinion, suggestion and the like.

Based upon the language of §87(2)(g), and other potentially relevant grounds for denial appearing in the Freedom of Information Law, rights of access would be dependant upon the contents of records. However, it is reiterated that the placement of records in an administrative file or other separate files would not remove them from the scope of rights of access granted by the Law.

Fifth, often collective bargaining agreements deal with rights of access by employees to records pertaining to them. Consequently, it is suggested that you review the provisions of any collective bargaining agreement under which you may be affected to determine the extent to which records might be accessible pursuant to such an agreement. It is possible that rights granted under a collective bargaining agreement might exceed those granted by the Freedom of Information Law.

Sixth, §89(4)(a) of the Freedom of Information Law states that an applicant who is denied access to records may appeal the denial. Specifically, the cited provision 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 ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Lastly, although the Freedom of Information Law does not deal with the disposal of records, I would like to point out that an agency cannot discard or destroy records at will. On the contrary, various provisions of law deal with the disposal of records, such as §65-b of the Education Law, which prohibits an entity of local government from destroying or disposing of records without the consent of the Commissioner of Education. It is suggested that you attempt to determine from officials of the City University or Brooklyn College whether the record to which you referred could have justifiably been destroyed in accordance with the Law.

In an effort to apprise officials of Brooklyn College of the requirements of the Freedom of Information Law, copies of the Law and this opinion will be sent to President Hess and Ms. Mascolo.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: President Hess
Ms. Mascolo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-
FOIL-AO-3522

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 26, 1984

Mrs. Vivian Giambo
[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. Giambo:

I have received your letter and a variety of correspondence attached to it.

The materials describe a series of problems concerning issues involving the use of real property in the Town of Phillipstown. Related to those issues are questions involving the responsiblities of the Town under the Freedom of Information and Open Meetings Laws. Your inquiry focuses upon a series of requests for records maintained by the Planning Board. You wrote that, although some materials pertaining to a specific situation fully described in your correspondence were made available, various documents were absent from the file.

In this regard, I would like to offer the following comments.

First, it is noted at the outset that the Freedom of Information Law is expansive in its scope. The coverage of the Law is determined in part by the term "record" which 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."

Based upon the breadth of the language quoted above, it is clear in my view that all records maintained by the Town are subject to rights of access granted by the Law.

Second, if a request for records is submitted, but all of the records are not made available, some would have been withheld. Here I point out that, when records are withheld, a reason for a denial must be stated in writing. Further, when records are denied, an applicant must be informed of his or her right to appeal.

Third, in terms of 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Fourth, it is emphasized that the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of 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 business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Other issues involve the implementation of the Open Meetings Law relative to notice of meetings. Section 104 of the Open Meetings Law requires that notice of the time and place be given prior to every meeting of a public body, including a planning board. Section 104(1) pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings.

Section 104(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public in the same manner as prescribed in §104(1) "to the extent practicable" at a reasonable time prior to such meetings.

It is important to note, in the context of the materials, that there may be a distinction between notice requirements relative to a meeting of a public body as opposed to a public hearing conducted by a public body. In the case of a meeting, although a public body must provide notice as described in the preceding paragraphs, §104(3) indicates that the notice of a meeting to be held pursuant to the Open Meetings Law need not consist of a paid legal notice. However, often a public hearing must be preceded by a paid legal notice.

The correspondence indicates that issues have arisen in relation to whether or not action might have been taken by the Planning Board relative to particular issues. From my perspective, action may be taken by a public body only at a duly convened meeting and only by means of a majority vote of its total membership.

Enclosed for your consideration are copies of the Freedom of Information and Open Meetings Laws.

As suggested to you during our telephone conversation, it is suggested that you confer 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
Exeuctive Director

RJF:ew

Enc.

cc: Mr. Anthony A. Constantino, Clerk of Phillipstown Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3523

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 29, 1984

Mr. Howard Toftegaard
Howie's Jewelers Inc.
607 Second Avenue
Troy, NY 12182

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. Toftegaard:

I have received your letter of October 23, as well as the correspondence attached to it.

According to the materials, on August 4, you requested a copy of a contract "between Troy High School and the L.G. Balfour Co.". On August 29, the Superintendent of Schools responded by acknowledging the receipt of your request and indicating that your request was forwarded to the School District's records access officer. The Superintendent indicated that he asked that a response be given to you "immediately". Nevertheless, as of the date of your letter to this office, you have not yet received the record sought. Moreover, your telephone calls to the records access officer have not been returned.

In this regard, I would like to offer the following comments.

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural implementation of the Law. In turn, §87(1) requires the governing body of each public corporation, which in this instance is the Board of Education, to adopt regulations in conformity with those promulgated by the Committee and consistent with the Law.

One aspect of the regulations pertains to the degisnation and duties of a records access officer. According to the Committee's regulations, 21 NYCRR §1401.2(a), the records access officer "shall have the duty of coordinating agency responses to public requests for access to records". Consequently, it would appear that your request should have been

forwarded to the records access officer when it was received by the School District. In addition, I believe that the records access officer had the responsibility of making a determination relative to your request in accordance with the Law and the regulations.

Second, the Freedom of Information Law and the regulations contain prescribed time limits for responses to requests.

Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten busienss 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, a contract, such as that which you have requested, is clearly available, for none of the grounds for denial could justifiably be asserted.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mario Scalzi, Superintendent
Pat Minton, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3524

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 30, 1984

Ms. Lark J. Shlimbaum
Shlimbaum & Shlimbaum
265 Main Street
P.O. Box 8
Islip, New York 11751

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. Shlimbaum:

I have received your letter of October 17, 1984 in which you requested an advisory opinion concerning access to records relating to a town employee.

According to your letter, you seek access to Town records concerning the education, training and qualifications of a Town employee to the extent that those records relate to the employee's position and job responsibilities. However, your request has been denied on the ground that the release of the records would result in an unwarranted invasion of personal privacy.

In this regard, I would like to offer the following comments.

First, as you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

It is emphasized that the introductory language in §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. Based upon that language, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Moreover, the cited language, in my view, 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.

Second, with respect to personnel records, I believe that two paragraphs of §87(2) are relevant. Section 87(2)(b) permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In addition, §87(2)(g) allows an agency to withhold certain inter-agency or intra-agency materials.

Third, the courts have made it 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. Moreover, 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 Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980]. Conversely, it has been held that records concerning public employees that are not relevant to the performance of their official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984].

Further, §89(2)(b) lists five situations in which disclosure of records would constitute an unwarranted invasion of personal privacy. For instance, §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...maintaining it" (emphasis added).

Based upon the language of §87(2)(b)(iv) and the judicial determinations cited above, your request for the town employee's records, to the extent that they relate to the employee's position and job responsibilities, in my view, should not be denied on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Fourth, §87(2)(g) of the Freedom of Information Law provides that an agency may withhold inter-agency or intra-agency records which are not:

> "i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. In other words, to the extent that the employee's records contain opinion or advice, those portions in my view may be withheld.

In sum, it is my belief that the records, to the extent that they relate to the employee's position and job responsibilities, are not deniable on the ground that their release would constitute an unwarranted invasion of personal privacy. Moreover, in my view, the records could be denied upon the limited grounds outlined above as inter-agency or intra-agency materials.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3525

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 31, 1984

Ms. Josephine Mlinar
Paralegal
Hall & Sloan
Attorneys at Law
401 Broadway
Suite 310
New York, NY 10013

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. Mlinar:

As you are aware, I have received your letter of October 18, concerning an appeal addressed to the Division of Human Rights under the Freedom of Information Law.

Your question involves the provision of the Freedom of Information Law cited by the Division concerning the time within which a denial of access may be appealed. The Division suggested that the appeal was untimely, "citing Public Officers Law §89.5(3)(c)(1)".

From my perspective, the provision cited by the Division is inapplicable, for it deals with situations in which records containing trade secrets are at issue. In brief, when a commercial enterprise submits records pursuant to law or regulation that it considers to be trade secrets, the corporation may seek to insure that the records be withheld unless and until notice is given following a request for records characterized as trade secrets. As I understand your correspondence, the records in which you are interested do not in any way pertain to trade secrets or to the provision cited by the Division. Consequently, I believe that §89(4)(a) concerning the right to appeal would be applicable. 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 ten 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."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. Douglas H. White, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3526

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 31, 1984

Mr. LeRoy Johnston III
Mahlon R. Perkins, P.C.
Attorneys and Counsellors at Law
20 West Main Street
P.O. Box 27
Dryden, NY 13053

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. Johnston:

I have received your letter of October 22 in which you requested an advisory opinion.

According to your letter, you represent the estate of a person who was part owner of the Strand Theater in Ithaca. The Strand had been improved with federal grant money. Further, various federal and state agencies, as well as the City of Ithaca, were involved in the improvement project. Recently, the City initiated a lawsuit against the estate and other owners of the Strand, alleging breach of contract in connection with the improvement project.

Subsequently, you requested "copies of all 'records' ... in possession or control of the City of Ithaca or any 'agency' ... thereof in which there is any mention, reference or allusion to the Strand Theater". Moreover, you requested "[a] copy of each item of correspondence or memorandum in which there is any mention, reference or allusion to the Strand Theater" which were transmitted, since 1975, to, from or among specifically named individuals and entities. In response, the City Attorney wrote that the request was "too broad". Additionally, he indicated that much of the information sought would be deniable as inter or intra-agency materials or would not be discoverable under §3101(d) of the Civil Practice Law and Rules which pertains to material prepared for litigation.

In this regard, I would like to offer the following comments.

First, as you are aware, §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought from an agency. In addition, the Committee's regulations suggest that whenever possible, a person requesting records should supply information regarding dates, file designations or other information that may help to describe the records sought [21 NYCRR 1401.5(c)]. In my opinion, the extent to which the records exist and the means by which they are filed and maintained should be considered. Where, as here, the request involves a building located within a city, which may maintain numerous records concerning the property, and relate to various matters, a request for "all" records would not, in my view, reasonable describe the records sought.

Second, §87(3)(c) and §1401.6 of the Committee's regulations require an agency to maintain a "reasonably detailed current list by subject matter of all records" in its possession. The regulations also require that the list be sufficiently detailed to permit identification of the category of the record or records sought [see §1401.6(b)]. A review of the City's subject matter list may enable you to more reasonably descirbe the records which you seek regarding the Strand Theater.

Moreover, each agency is required to designate a records access officer, who, among other responsibilities, is required to assist the requester in identifying requested records, if necessary [21 NYCRR 1401.2(b)(2)]. In this regard, you may find it helpful to work with the records access officer, whose knowledge of the city's record keeping system may assist you in locating the desired records.

Finally, Farbman v. New York City Health and Hospitals, (62 NY 2d 75), in my view, stands for the general proposition that records otherwise available under the Freedom of Information Law are not limited by the rules of discovery set forth in Article 31 of the Civil Practice Law and Rules, and that a litigant enjoys the same rights of access under the Freedom of Information Law as the public generally. However, I point out that, with respect to material prepared for litigation, the Court noted that:

> "we have no occasion to consider whether these categories would be 'specifically exempted' from disclosure by virtue of section 87 (subd 2, par[a]) of the Public Officers Law" (id. at 82).

In my view, material prepared for litigation is "specifically exempted" by statute and may be withheld 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Mr. Paul D. Bennett, Assistant City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO
FOIL-AO-3527

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 1, 1984

Ms. Alice Neff Lucan
Assistant General Counsel
Cannett Co., Inc.
Lincoln Tower
Rochester, NY 14604

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. Lucan:

I have received your letter of October 22 in which you expressed concern regarding the impact of the Personal Privacy Protection Law (see attached) in relation to reporters' rights of access to records.

For the following reasons, I do not believe that the Personal Privacy Protection Law will serve to diminish or restrict rights of access granted by the Freedom of Information Law, or any other statute.

First, it is emphasized that the new law pertains only to records of state agencies. Section 92(1) of the Personal Privacy Protection Law defines "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

As such, excluded from the scope of the Personal Privacy Protection Law are all entities of local government, including counties, cities, towns, villages, school districts and similar units of municipal government.

Second, with respect to records of state agencies, §96(1) permits the disclosure of records or persoanl information under specified circumstances. One of those circumstances, §96(1)(c), authorizes "disclosure under Article six of this chapter", which is the Freedom of Information Law. Consequently, any record accessible under the Freedom of Information Law remains available, notwithstanding the provisions of the Personal Privacy Protection Law.

Also relevant is §96(1)(f), which pertains to disclosures that are "specifically authorized by statute or federal rule or regulation". Therefore, if disclosure is permitted or required pursuant to a statute other than the Freedom of Information Law, rights of access are preserved.

In sum, the Personal Privacy Protection Law does not in my view in any way impede or infringe upon rights of access to records conferred prior to its enactment by any other statute. Further, and perhaps equally important to Gannett reporters across the state, the Personal Privacy Protection Law does not apply to records of local government.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3528

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 2, 1984

Mr. Frank T. Strafaci
Attorney at Law
569 Bay Ridge Parkway
Brooklyn, NY 11209

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. Strafaci:

I have received your letter of October 23 in which you requested an advisory opinion.

According to your letter, the Towns of Oyster Bay and Babylon require that a fee of twenty dollars be charged for copies of each certificate of occupancy, which constitutes the "total certificate of occupancy" of a particular property. Moreover, each Town requires a recent survey before a certificate is released. Since an all encompassing certificate of occupancy typically includes several certificates, you wrote that the total cost of copying could exceed one hundred dollars. In addition, you noted that the Town of Babylon prohibits access to the files for inspection and copying.

In this regard, I would like to offer the following comments.

First, as you are likely 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 Towns of Oyster Bay and Babylon, 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 reproduction 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. Until October 15, 1982, the Law provided that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "Law". Chapter73 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, 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 search fee or a fee higher than twenty-five cents per photocopy.

Third, I am unaware of any statute which authorizes fees in excess of twenty-five cents per photocopy relative to the records in question. Although §261 of the Town Law authorizes a town board to set fees for the charges and expenses incurred for zoning and planning, I do not believe that this section could be read to permit fees in excess of

twenty-five cents per photocopy of town zoning and planning records. In my view, §261 permits towns to set reasonable fees for the issuance of certain building certificates and permits; but it does not authorize a town to set fees for copies of such documents. Thus, it is my opinion that the Towns of Oyster Bay and Babylon are not authorized to charge fees in excess of twenty-five cents per photocopy for records up to nine by fourteen inches or in excess of the actual cost of reproducing any other record.

Fourth, with respect to the Town of Babylon's prohibition on inspecting and copying files, I direct your attention to §87(2) of the Freedom of Information Law which requires an agency to "make available for public inspection and copying all records" 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 (i) of the Law. In my view, the Town of Babylon may not prohibit inspection and copying of all building files and may only deny particular records or portions thereof which fall within 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

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Town of Babylon
Town of Oyster Bay

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3529

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 7, 1984

[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 20, in which you questioned the dissemination of information about you.

Specifically, according to your letter, you were involved in a proceeding in 1975 in which you were adjudicated a youthful offender. At that time, you were informed by your attorney that the adjudication would not have the effect of a conviction and that records pertaining to the proceeding could not be disclosed to the public or to any government agency. Nevertheless, you apparently learned recently that the Federal Bureau of Investigation (FBI) has records of the proceeding. Your question is whether it is legal for the FBI to have possession of such records.

In this regard, I would like to offer the following comments.

First, as a general matter, I believe that the information provided by your attorney was accurate. Section 720.35 of the New York State Criminal Procedure Law states that:

> "1. A youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudge to hold public office or public employment or to receive any license granted by public authority.

2. Except where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers, whether on file with the court, a police agency or the division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or private agency, other than an institution to which such youth has been committed, or a probation department of this state that requires such official records and papers for the purpose of carrying out duties specifically authorized by law."

Therefore, it would appear that records concerning a proceeding in which you were adjudicated a youthful offender are confidential.

Second, I have contacted the FBI on your behalf in order to attempt to learn of its practices and statutory authority. I was informed that, since 1973, the FBI does not collect information regarding "juveniles" unless such persons are treated by state courts as adults, which was not the case in your situation. I would conjecture, therefore, that a report of an arrest was given to the FBI at the time of the arrest, but that the law enforcement agency in New York did not report the youthful adjudication to the FBI. If the FBI had been informed of the adjudication as a youthful offender, the records would likely have been returned or expunged.

Third, Mr. William Garvey of FBI will be sending to you information regarding the means by which you can obtain, review and perhaps seek to expunge criminal history information that it maintains about you. With that information, perhaps you will be able to correct the problem.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3530

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 7, 1984

Mr. Fred Koster
Project Director
State of New York
Executive Department
Division of Alcoholic Beverage
Control
250 Broadway
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. Koster:

As you are aware, I have received your letter of October 17 in which you requested advice relative to the Freedom of Information Law.

Attached to your letter is a request which, if satisfied in toto, would require "a tremendous effort" on the part of employees. One aspect of the request, characterized as "Schedule B" refers to some forty-five persons, corporations or licensed premises. Among the forty-five, some are identified by name only, some by name and address, and some by name, address and/or identification number. "Schedule A" involves a request for various documents regarding the forty-five persons, corporations or licensed premises. The documents sought include applications for a license or transfer license, internal investigation reports, show cause orders that relate to license applications, testimony given in administrative proceedings, administrative decisions and supporting materials, internal memoranda relating to legal proceedings arising out of administrative decisions, documents and exhibits submitted in conjunction with such administrative proceedings, and judgments relating to such proceedings.

In this regard, I would like to offer the following comments.

First, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Based upon a recent Court of Appeals decision,

Farbman v. New York City [62 NY 2d 75 (1984)], the standard of reasonably describing is met when the agency can locate the records in question. From my perspective, whether the records sought are reasonably described may be dependent in part upon the manner in which an agency files or indexes its records. In some instances the records sought may be precisely identified; nevertheless, they might be all but impossible to locate due to the neture of an agency's filing system.

Another factor may involve the breadth of a request in terms of time. The request enclosed with your letter is open-ended relative to the time of the creation or initial maintenance of the records sought. Again, if records pertaining to a particular licensee are old, they may be stored differently from more current files. Therefore, the capacity to locate records might be dependent upon the nature of the system under which they are filed.

It is noted that two Supreme Court decisions have dealt in part with situations in which voluminous requests were made.

The first involved a request for some 1,500 grievances and the ensuing determinations. Although the agency contended that its shortage of manpower precluded compliance, it was determined that a denial on that basis would "thwart the very purpose of the Freedom of Information Law" [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYJ 2d 823 (1980)].

The second involved a request by an inmate for files pertaining to him containing in excess of 2,300 pages. Further, various aspects of the materials could likely have been withheld. In its discussion of the issue, the court found that:

> "[T]he respondents state that a large portion of the material contained in the petitioner's file is exempt by reason of Public Officers Law Section 87 subd. 2(f) and (g), and considering the nature of the material it may be presumed that this is true. As already noted, the material is voluminous and its subject matter diverse. To require the respondents to sort through all of the material, selecting that material claimed exempt and separating it from the others would, in this court's view, be so burdensome as to be unreasonable. The statute does not require this result and, it is felt, it is precisely

> to avoid such result that the particular records desired are to be 'reasonably described'" [Konigsberg v. Coughlin, 475, NYS 2d 714, 716 (1984)].

In view of the two decisions cited above, there appears to be no clear advice that can be offered relative to a request for a voluminous amount of material, some which may be available, and some of which might justifiably be denied.

It might be worthwhile to confer with the applicant to explain that the information sought is voluminous and that it would take a great deal of time to locate and review the information prior to granting or denying access, particularly in view of the fact that the request is open-ended in terms of the age of the records. Perhaps, after providing an indication of the scope of the request and the effort needed to respond, the applicant might choose to narrow or limit the request.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-3530

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 8, 1984

Mr. Alan Lyons
#71-A-0408
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. Lyons:

I have received your letter of October 29 in which you requested assistance concerning the Freedom of Information Law.

According to your letter, you submitted various requests to officials of the Ossining Correctional Facility for a copy of a bill of indictment pertaining to you. You wrote that you have received no response. Nevertheless, attached to your letter is a memorandum sent to you by Ms. Peggy Henry, Inmate Records Coordinator, who indicated that the record sought is not maintained by the facility. Further, Ms. Henry suggested that you "contact the District Attorney of the County in which the indictment was rendered...".

From my perspective, the suggestion offered by Ms. Henry was appropriate. In this regard, I would like to offer the following comments.

First, as a general matter, an agency is responsible for granting or denying access to records in its possession in accordance with the Freedom of Information Law. Under the circumstances, if the facility does not maintain the record sought, it could neither grant nor deny your request.

Second, a request for records should be directed to the agency that maintains them. In this instance, it appears that the Office of the District Attorney of the county where the indictment was made would have the record in question. Consequently, as indicated by Ms. Henry, a request should be directed to the "records access officers" of the appropriate Office of District Attorney. The records access officer is responsible for dealing with requests made under the Freedom of Information Law.

Third, it is noted that §89(3) of the Freedom of Information 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, such as dates, descriptions of events, indictment or docket numbers and similar information that would enable agency officials to locate the records sought.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatroy pamphlet that may be useful to you. Further, as you requested, a copy of this letter will be sent to First Deputy Superintendent Carl D. Berry.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Carl D. Berry, First Deputy Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1110
FOIL-AO-3532

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 9, 1984

Mr. Ron Patafio
Editor
The Reporter Dispatch
Westchester Rockland Newspapers
1 Gannett Drive
White Plains, NY 10604

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. Patafio:

I have received your letter of November 1 in which you requested advisory opinions in relation to two separate issues.

The first pertains to a meeting held on October 30 by the Putnam County Solid Waste agency, which is chaired by David P. Bruen, Putnam County Executive. According to your letter and the news article attached to it, the meeting was held "to discuss where to bring the county's garbage and where to look for sites of transfer stations as part of the countywide garbage program". Mr. Bruen ordered that the meeting be closed without either a motion or a vote taken to enter into an executive session. When the proposed executive session was challenged, a reporter offered a copy of the Open Meetings Law to Mr. Bruen, who refused to review the Law and closed the meeting. The article indicates that Mr. Bruen stated that he believed that he knew "the intent of the Law", which in his view, "is to keep people in public life from hiding anything from the people or the press... When we get to negotiations, it will all come out anyway." Following the meeting, Mr. Bruen indicated that an executive session was proper, for the issue discussed behind closed doors involved "contract negotiations".

From my perspective, there was no basis for closing the meeting. Further, Mr. Bruen's comments in my view indicate that he is not completely familiar with either the intent or the letter of the Open Meetings Law.

In this regard, I would like to offer the following comments.

First, a public body cannot exclude the public simply by declaring that an executive session will be held. Section 105(1) of the Open Meetings Law requires that a public body complete a procedure, during an open meeting, before it may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Based upon the language quoted above, prior to entry into an executive session, a motion to do so must be introduced during an open meeting. The motion must identify, in general terms, the subject to be considered during an executive session. Further, the motion must be carried by a majority vote of the total membership. None of those steps was apparently taken prior to entry into the executive session.

Second, as indicated above, §105(1) does not permit a public body to enter into an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of the cited provision specify and limit the topics that may appropriately be considered behind closed doors. Unless one or more of those topics arises, a public body must in my view conduct its business during an open meeting.

Third, under the curcumstances, I do not believe that any ground for entry into an executive session could properly have been asserted. Although "negotiations" might have been the topic of discussion, that topic in this instance would not in my opinion have qualified for entry into an executive session. It is noted that the term "negotiations" appears in one of the grounds for executive session, §105(1)(e). That provision, however, enables a public body to enter into an executive session to discuss collective bargaining negotiations under the Taylor Law. Stated differently, §105(1)(e) may be asserted to consider collective bargaining negotiations between a public employer and a public employee union. Based upon your letter and the news article, the negotiations considered at the meeting in question were unrelated to collective bargaining. In short, it is my view that none of the eight grounds for executive session could have been cited to close the meeting.

Fourth, with respect to the intent of the Law, the legislative declaration appearing in §100 of the Open Meetings Law states in its first sentence that:

> "It 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."

Based upon the declaration of legislative intent, it is clear in my view that the entire decision making process is intended to be open. Further, the courts have confirmed that the discussions leading to determinations are at the heart of the Law. For instance, in a decision rendered by the Appellate Division, Second Department, that was later unanimously affirmed by the Court of Appeals, it was stated that:

> "[W]e believe that the legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" [Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, 415, aff'd 45 NY 2d 947 (1978)].

Consequently, while it may be true that the result of negotiations will be made known, I believe that the Open Meetings Law nonetheless requires that the deliberations leading to the result of the negotiations must, under the circumstances, be open to the public.

The second situation, which is also described in your letter and another news article, pertains to a refusal on the part of officials of the Town of Greenburgh to make available the Town's tentative budget. Although the tentative budget was filed with the Clerk by the state deadline, she refused to make it available until it was presented to the Town Board. In addition, the Town Attorney contended that the tentative budget is an "interdepartmental document", which until given to the Town Board, may be withheld. Further, the Town Attorney apparently stated that the "law governing towns says nothing about making the budget available to the public before it was presented to the Town Board".

While the Town Law might not direct that the tentative budget be made available, it does not provide either that the tentative budget must be kept confidential. Relevant portions of the Town Law regarding the tentative budget do not specifically direct that it be made available or withheld. That is the case with respect to numerous records maintained by government. Stated differently, often there is no statute specifically pertaining to particular records that requires that they be made available or denied. In those instances, I believe that the provisions of the Freedom of Information Law, as well as other laws that deal generally with access to records, govern.

With respect to the Freedom of Information Law, that statute is based upon a presumption of access. In other words, all records of an agency, such as a town, are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

I concur with the Town Attorney's characterization of the tentative budget as an "interdepartmental document". Further, §87(2)(g) of the Freedom of Information Law permits an agency to withhold inter-agency or intra-agency materials, except certain types of information described in the Law. For instance, within inter-agency or intra-agency materials, an agency must grant access to those portions consisting of "statistical or factual tabulations or data" [see §87(2)(g)(i)]. Therefore, the Freedom of Information Law in my opinion requires that those portions of the tentative budget reflective of statistical or factual information must be made available.

Moreover, the fact that the tentative budget might not have been served upon the Town Board is in my opinion of no relevance with respect to rights of access. Once such a record exists, I believe that it is subject to rights of access.

Lastly, it is possible that the entire tentative budget may be accessible when the Freedom of Information Law is read in conjunction with another statute. Section 89(6) of the Freedom of Information Law states that:

> "Nothing 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 granted by some other provision of law exist, those rights could not be limited or abridged by the Freedom of Information Law. Of possible significance is §51 of the General Municipal Law, which has for decades granted access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

In sum, since there is nothing in the Town Law that specifically enables a town to withhold a tentative budget, I believe that the tentative budget should be made available in conjunction with the provisions of the Freedom of Information Law, as well as §51 of teh General Municipal 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:ew

cc: David Bruen, Putnam County Executive
Anthony Veteran, Town Supervisor, Town of Greenburgh
Susan Tolchin, Town Clerk, Town of Greenburgh
Alan Moller, Town Attorney, Town of Greenburgh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3533

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 14, 1984

Mr. Robert S. Asher
Counselor at Law
Suite 1705
110 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. Asher:

I have received your letter of October 29 in which you requested an advisory opinion.

According to your letter, you are defending a physician in a proceeding under §230 of the Public Health Law. When the hearing is concluded, the various investigative reports, transcripts, exhibits and possibly a presentence report from the Division of Parole will be forwarded by the Health Department to the Board of Regents for review and a final determination. Specifically, you requested an "opinion as to whether the testimony received and the exhibits entered into evidence are [exempted] from disclosure to the press and public under the Freedom of Information Law or any other section of the Law or regulations " after the Board of Regents makes its final determination.

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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, §87(2)(a) permits an agency to withhold records or portions thereof which are "specifically exempted from disclosure by state or federal statute". As you may be aware, §230(9) of the Public Health Law provides that:

> "Notwithstanding any other provisions of law, neither the proceedings nor the records of any such committee shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided..."

The Court of Appeals has held that the above-cited section "is a statute exempting information from disclosure within the meaning of Section 87 (subd 2, par [a]) of the Public Officers Law" [Matter of John P. v. Whalen, 54 NY 2d 89, 97].

At the same time, however, §6510(8) of the Education Law provides for the strict confidentiality of:

> "[t]he files of the department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents...[except that] [t]he provisions of this subdivision shall not apply to documents introduced into evidence at a hearing held pursuant to this chapter and shall not prevent the department from sharing information concerning investigations with other duly authorized public agencies responsible for professional regulation or criminal prosecution."

According to a representative of the Department of Education, it is the Department's policy to make records of the hearing available, including those portions of the investigative record which may have been introduced at the hearing.

Third, it is not within the scope of the authority granted to the Committee on Open Government to advise as to whether the Education Department's interpretation of the Education Law is accurate. In fact, the Court of Appeals has stated that an advisory opinion of the Committee "is neither binding upon the agency nor entitled to greater deference in an article 78 proceeding than is the construction of the agency" [id. at 96].

In sum, the interpretation of §230(9) of the Public Health Law and §6510(8) of the Education Law is beyond the jurisdiction of the Committee. I regret that I cannot be of greater assistance. If you have any further questions, please do not hesitate to call.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3534

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 14, 1984

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, unless otherwise indicated.

Dear Mr. King:

I have received your letter of October 31, as well as the materials attached to it.

The first issue concerns a request to review minutes of meetings of the Board of Trustees of the Village of Hewlett Bay Park. In response to a request sent to the Village, you were informed that "the District Attorney's Office has all minute books from 1980 to date." In response to ensuing requests directed to various representatives of the District Attorney, you were apparently informed that the minutes are "confidential". Moreover, you wrote that the Office of the District Attorney "has no Freedom of Information Officer", and that you were "told that they do not have to comply [with] the Freedom of Information Law."

In this regard, I would like to offer the following comments.

First, as you may be aware, the Freedom of Information Law is applicable 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."

Since an office of a district attorney is a "governmental entity" that performs a "governmental function" for the state and a public corporation, in this instance, Nassau County, I believe that it is an agency required to comply with the Freedom of Information Law. It is noted that one of the first decisions rendered under the Freedom of Information Law indicated that certain records of a district attorney are available [see Dillon v. Cahn, 79 Misc. 2d 300, 259 NYS 2d 981 (1974)], and that several later decisions confirm that records of district attorneys are subject to rights granted by the Freedom of Information Law in the same manner as records of agencies generally [see e.g., New York Public Interest Research Group, Inc. v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979; Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., June 24, 1982; Hawkins v. Kurlander, 98 AD 2d 14 (1983)].

Second, since an office of a district attorney is an "agency", I believe that a "records access officer" must be designated. In terms of background, §89(1)(b)(iii) of the Freedom of Information Law requires that the Committee on Open Government promulgate regulations concerning the procedural implementation of the Law. In turn, §87(1) requires each agency to adopt regulations in conformity with the Law and consistent with those promulgated by the Committee.

Among the requirements included in the Committee's regulations is the designation of one or more "records access officers" by the head of an agency (see 21 NYCRR §1401.2). The designated records access officer has the duty of coordinating an agency's response to requests for records sought under the Freedom of Information Law.

Third 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, even though the minutes may be in possession of a law enforcement agency, they are accessible, for none of the grounds for withholding could in my view be appropriately asserted. In many cases, the provision of greatest significance to a law enforcement agency 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 is in my opinion based upon potentially harmful effects of disclosure. Under the circumstances, it does not appear that disclosure would result in harm, for the minutes had been available from the Village Clerk to any person since their creation. Since they have been publicly disclosed in the past, it is difficult to envision how any ground for denial could be justified, notwithstanding the transfer of the records to the District Attorney.

The second issue concerns requests for mailing lists of residents of the Villages of Hewlett Bay Park and Woodburgh. You indicated by phone and in your letter that such lists have been made available as a matter of policy in the past. Further, according to the copies of requests attached to your letter, you specified that the list would not be used for "commercial enterprise".

If indeed it has been determined by officials of the two villages that the mailing lists are accessible, I believe that they must be made equally available to you. Nevertheless, I would like to note several considerations.

First, there is no law of which I am aware that requires a municipality to prepare a mailing list with the names and/or addresses of residents. If no such list exists, a village would not be obligated to create such a record in response to a request [see Freedom of Information Law, §89(3)]. Conversely, if a mailing list has been prepared, I believe that it would constitute a "record" [see §86(4)] subject to rights granted by the Freedom of Information Law.

Second, one of the grounds for denial pertains to disclosures that would result in an "unwarranted invasion of personal privacy". Further §89(2)(b) lists several examples of unwarranted invasions of personal privacy, one of which would be:

> "the sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

If the lists in question would not be used for commercial or fund-raising purposes, it would appear that they are accessible [see 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)], particularly if they are made routinely available to the public 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:ew

cc: Ed Grilli, Public Information Officer
Dennis Dillon, District Attorney
Clerk, Village of Hewlett Bay Park
Clerk, Village of Woodsburgh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3535

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 19, 1984

Mr. Stephen E. Fraley
#82-A-3166
Box 149 47/5
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. Fraley:

I have received your letter of October 31 in which you requested advice concerning the Freedom of Information Law.

Attached to your letter is a request dated October 11 that was directed to the records access officer at the Westchester County Jail. As of the date of your correspondence sent to this office, you had not received a response. Further, you indicated that you are unaware of the person or body to whom an appeal could be sent.

In this regard, I would like to offer the following comments.

First, pursuant to the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, the governing body of a public corporation, such as Westchester County, is required to designate one or more records access officers (21 NYCRR §1401.2). Further, the records access officer has the duty of coordinating an agency's response to requests made under the Freedom of Information Law. Therefore, even if there is no records access officer at the County jail, I believe that your request should have been forwarded to the designated records access officer.

Second, 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 reocrds and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has ten 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 ten business days of the receipt of the appeal as required by §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, I believe that the appeals officer is the County Attorney, whose office is located at County Office Building#1, White Plains, NY 10601.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-3536

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 20, 1984

Mr. John Stone
82A1575-C-18-16
135 State Street
Box 618
Auburn, New York 13024-9000

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 October 31 in which you requested assistance.

Specifically, you have inquired with respect to rules applicable to inmates concerning religious mail, overseas correspondence, mailing privileges and the receipt of religious newspapers from foreign countries.

In this regard, it is emphasized that the Committee on Open Government 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. Further, I have no knowledge of either the existence or contents of any rules, directives or policies relating to the topics that you described.

Nevertheless, if the Department of Correctional Services has issued directives, established rules or adopted policies concerning the subject of your inquiry, I believe that such records would be accessible pursuant to § 87(2)(g)(iii) of the Freedom of Information Law, which requires that

final agency policy be made available.

Further, if such records exist and are maintained at a correctional facility, a request may be addressed to the facility superintendent. In the alternative, if the records are maintained at the Department's Albany office, a request could be directed to the Deputy Commissioner for 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/wly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3537

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

Novmeber 26, 1984

Mr. Peter G. Roswell
Assistant Superintnedent
Onteora Central School District
Boiceville, NY 12412

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. Roswell:

I have received your letter of November 8, in which you requested an advisory opinion.

Specifically, according to your letter, a request was recently sent to the Onteora Central School District involving a "mailing list of the names and addresses of all parents Grades 7 through 12". You indicated that the list, which has been sought by a parent, "includes code numbers indicating a handicapping condition for each student".

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 Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as the "Buckley Amendment", govern 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 Buckley Amendment by the United States Department of Education provide additional guidance which, in my view, lead 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/td

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-
FOIL-AO- 3538

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 26, 1984

Mr. Ross J. Palmieri
[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. Palmieri:

I have received your note requesting an advisory opinion concerning the partial denial of your request to review certain records, specifically, license file "SCHENECTADY RL 1273" of the State Liquor Authority.

According to the letter attached to your note, your appeal was also denied. The determination on appeal stated that certain records within the above-mentioned file were exempt from disclosure under the Freedom of Information Law and the Personal Privacy Protection Law. You were told that:

> "(1) such documents contained information relative to another person who has not consented to disclosure of such documents or information [Public Officers Law, section 96.1(a)]; and/or (2) such documents constitute attorneys' 'work product' or material prepared for litigation before a judicial, quasi-judicial or administrative tribunal [Public Officers Law, section 95.6(d)]; and/or (3) such documents are inter- and intra-agency materials and are not statistical or factual tables or data, or instructions to the agency staff which affect the public or agency policy or determinations [Public Officers Law, section 87.2(g); and/or (4) such documentation contain information which was completed for law enforcement purposes and which is exempt from disclosure [Public Officers Law, sections 87.2(e) and 95.5(a)]."

I have spoken with Mr. Leslie Trebby of the Liquor Authority in order to learn more about the records contained in your file. In turn, he provided me with additional correspondence between yourself and his office. In this regard, I would like to offer the following comments.

First, with respect to records which relate to another person [cited by the Authority as Personal Privacy Protection Law, §96(1)(a)], it is my opinion that any records contained in your file relate to you, the "data subject", and, as such, should not be withheld unless disclosure would result in an unwarranted invasion of personal privacy with respect to another person. If, for example, the records identify undisclosed witnesses, complainants or informers, those names could, in my view, be deleted by the Authority. However, I believe that the remainder of such records could then be made available to you.

Second, to the extent that a record consists of an attorneys' work product or is material prepared for litigation, I believe that the records may be withheld under the Personal Privacy Protection Law, §95(6)(d) and the Freedom of Information Law, §87(2)(a). The latter section provides that an agency may deny access to records or portions thereof which "are specifically exempted from disclosure by statute". Under the Civil Practice Law and Rules, §3101(c) and (d) provide that an attorney's work product and material prepared for litigation are generally not obtainable in the prosecution or defense of an action. In my view, those categories of records are not available under the Freedom of Information Law because they are specifically exempted from disclosure by statute.

Third, it is my view that records may not properly be withheld from you on the grounds that they are or contain, inter or intra-agency materials under §87(2)(g) of the Freedom of Information Law. If those materials identify you, you may review them under the authority of the Personal Privacy Protection Law, even though they might be deniable under the provisions of the Freedom of Information Law. The Freedom of Information Law permits an agency to deny access to inter or intra-agency records which are not statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations. However, the Personal Privacy Protection Law does not permit a state agency to withhold any inter or intra-agency records from an individual if those records are maintained and are retrievable by use of the name or other method which identifies that person.

Finally, with respect to the undisclosed records containing information compiled for law enforcement purposes, it appears that they should be made available to you if the investigations, proceedings or litigation have been completed. Both §87(2)(e) of the Freedom of Information Law and §95(5)(a) of the Personal Privacy Protection Law provide that an agency may deny certain law enforcement records which, if disclosed, would thwart the function of such agencies. Thus, to the extent that the records identify a confidential source or reveal non-routine criminal investigative techniques or procedures, the records may properly be withheld under the above-cited provisions.

In sum, it is difficult to advise as to whether the records that were denied should be made available under either the Freedom of Information Law or the Personal Privacy Protection Law. I hope that the preceding discussion, however, is of some assistance to you. If you have any further questions, please do not hesitate to call this office.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Mr. Leslie Trebby
Ms. Gloria Dabiri

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3539

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 26, 1984

Mr. James S. Drummond
Regional Manager
Tepco Air Pollution
Control Systems
P.O. Box 36
38 Spring Street
Williamstown, MA 01267

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. Drummond:

I have received your letter of November 6 in which you requested an advisory opinion.

According to your letter, you sought a list of all authorized or licensed bingo halls in New York State. You indicated that the request involved the names of organizations rather than the names of individuals. In response to your request, Mr. Thomas L. Davide, Secretary of the New York State Racing and Licensing Board wrote, "It is our position that this material is privileged pursuant to Chapter 87 of the Public Officers 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, the only category of deniable records which is relevant to your situation is, in my opinion, §87(b) which permits an agency to withold records or portions thereof which, if disclosed, would constitute an unwarranted invasion of personal privacy. However, since you are seeking only the names of organizations rather than the names of

individuals, I do not believe that disclosure of a list of such organizations would constitute an invasion of personal privacy.

In sum, it is my opinion that the records you seek, if they exist and are maintained by the New York State Racing and Wagering Board, should be made available to you under the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3540

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 28, 1984

Mr. Charles McAllister
Box 51
DIN 84-A-905
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. McAllister:

I have received your letter of November 5 in which you requested assistance in obtaining a copy of a certain Emergency 911 call to the Suffolk County Police. Specifically, you would like to obtain a copy of the calls recorded on July 25,1983 between 11:30 a.m. and 12:45 p.m. in order to prove your allegations of mistaken identity.

In this regard, I would like to offer the following comments.

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 Suffolk County 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 (i) 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 re-

cordings, 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 complied for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures".

The language quoted above indicates that it is based largely upon potentially harmful effects of disclosure. From my perspective, it is questionable whether a 911 tape recording could be considered a record "compiled for law enforcement purposes", for it might be viewed as a record compiled in the ordinary course of business. Assuming, however, that §87(2)(e) would be applicable, it is possible that those aspects of the tape recording pertaining to your case would not, at this juncture, result in the harmful effects of disclosure by its language, for a trial has already been held and judicial proceedings have been completed.

Lastly, you may direct your request for a copy of the recording to the Records Access Officer of Suffolk County Police Department. The Officer should advise you of its availability.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1113
FOIL-AO-3541

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 3, 1984

Mr. Irving Silver
[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. Silver:

I have received your letter of November 6 in which you requested additional information in conjunction with our pamphlet, "Your Right to Know".

Specifically, you asked whether an agency, acting in response to a request made under the Freedom of Information Law, properly deleted tha name of an individual wherever it appeared in a report. Since you supplied the agency with the name of the individual, you do not believe that disclosure of the name would have constituted an unwarranted invasion of personal privacy.

In addition, you asked whether a public body must have a quorum to meet in executive session. Further, you inquired, "Does the MTA have the right to hold a closed discussion, where the public is barred, then call an open meeting, where the public may attend, then hold an executive session without revealing their deliberation and come back to an open session for a vote?" Finally, you asked whether the Open Meetings Law applies to a meeting of two MTA members.

In this regard, I would like to offer the following comments.

First, §89(2)(c) of the Freedom of Information Law provides that when identifying details are deleted, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy. Since you supplied the name of

the individual to the agency, it appears that there would be no personal privacy to protect. However, the agency may have deleted the name for a number of reasons. For example, a name other than the one supplied by you could possibly be included in the report. Alternatively, the agency may regard the individual as an informant or complainant and may have chosen not to confirm his or her identity. In short, without further details, it is difficult to advise whether disclosure of the individual's name would have been considered an unwarranted invasion of personal privacy.

Second, with respect to the scope of the Open Meetings Law, §105 of that statute requires that a majority of the members of a public body vote to enter into executive session. It is noted, too, that a quorum would be present since a majority of the membership of a public body generally constitutes a quorum.

Third, the procedure for entering into executive session is set forth in §105 of the Open Meetings Law. That section provides that a majority vote of a public body must occur at an open meeting in order to enter into an executive session. The vote must be taken pursuant to a motion which identifies the general area of the subject to be discussed. The subjects which may properly be considered in executive session are limited to those enumerated in §105(1)(a) through (h) of the Law. It is further provided that no formal vote can be taken in executive session to appropriate public monies.

Fourth, you asked what is covered by the Law. In short, all meetings of a public body are subject to the provisions of the Open Meetings Law. A public body includes any governmental entity constituting of two or more members for which a quorum is required in order to conduct public business. Further, the definition of "public body" [§102(2)] specifies that committees and subcommittees are also subject to the Law.

A "meeting" has been defined by the courts as any gathering of a quorum of a public body for the purpose of conducting public business. Thus, if only two members of a public body meet, but they do not constitute a quorum, the Open Meetings Law would not be applicable. However, if the two persons constitute a quorum of a committee or subcommittee designated by a governing body, their gathering to discuss public business is, in my view, a meeting subject to the Open Meetings Law.

Lastly, minutes are required to be prepared for all open meetings and are available to the public pursuant to §106 of the Law. Moreover, if a record is prepared concerning a pbulic body's meeting, such record is available in accordance with the Freedom of Information Law. In other words, if minutes of a meeting are not required to be taken, any record which is prepared may be available in accordance with rights of access granted by the Freedom of Information Law.

At your request, I have enclosed copies of the Freedom of Information and Open Meetings Laws. I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1112
FOIL-AO-3542

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 3, 1984

Mr. George G. Warner
Business Manager
Poland Central School
P.O. Box 8
Route 8
Poland, NY 13431

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. Warner:

I have received your letter of October 22 in which you requested an advisory opinion regarding agendas and minutes produced regarding meetings held by the Poland Central School District Board of Education.

According to your letter, the minutes of Board meetings often refer to attachments which are available for public inspection. You provided examples of those records and requested an advisory opinion in light of another opinion written at the request of Mr. Thomas Sullivan on October 1. In addition, you asked for comments regarding the agendas of Board meetings to the public and meetings provided to the Board members.

In this regard, I would like to offer the following comments.

First, I appreciate your effort to more fully explain the method in which the Board maintains the minutes of its meetings. When I wrote to Mr. Sullivan, I was not aware that the attachments referred to in the Board minutes were available to the public.

Second, if the minutes and the attachments are together made available to the public as the Board's minutes, it is my opinion that they meet the requirements of §106 of the Open Meetings Law concerning minutes. However, I do not believe that the requirements of §106 would be met if the minutes are provided without the attachments. In short, if the minutes are made available with the attachments physicially affixed to them, together, I believe that they would comply with the Law.

Third, it is unclear from your letter and enclosures whether the public is made aware of the content of, for example, personnel item #1, during the course of the Board meeting. It was my understanding of Mr. Sullivan's letter that those attending the meeting were not provided with copies of the "Personnel Report". If that is the case, I would suggest that such reports be made available to the public or, in the alternative, that those items which are acted upon be read aloud at the meeting. Such action would avoid the aura of a "closed meeting" that might otherwise exist.

Fourth, the Open Meetings Law is silent with respect to meeting agendas. I agree with your understanding that there is no requirement that an agenda be prepared and made available for a meeting. However, if agendas are prepared, they constitute agency records and, as such, are subject to the Freedom of Information Law.

Relevant to the two agendas prepared by the Board for each meeting is §87(2)(g) of the Law, which permits an agency to withhold certain inter or intra-agency materials. Having reviewed the public agenda and Board agenda which you provided, it appears that the Board agenda includes discussions of the issues, opinions, suggestions and recommendations. However, to the extent that the Board agenda includes statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations, such portions of the agenda would be available under §87(2)(g)(i)(ii) or (iii) of the Freedom of Information Law. On the other hand, those portions of the agenda which are opinions, advice or recommendations may be withheld 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

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Mr. Thomas Sullivan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3543

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 3, 1984

Mr Adrian Conwell
#81-A-4761
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. Conwell:

I have received your letter of November 6 in which you requested assistance from this office. Specifically, you would like to know whether you can, under the Freedom of Information Law, find out if certain individuals have prior criminal records.

In this regard, I would like to offer the following comments.

First, it is the Committee's opinion that an individual's record of convictions as opposed to a record of all arrests and charges, should be made available as a public record under the Freedom of Information Law by the Division of Criminal Justice Services. The Division is required to maintain various criminal records for the purpose of coordinating law enforcement efforts, including records of convictions within the State of New York.

Second, it has been the policy of the Division, however, to withhold such records from the public. The Division believes that its records are available only to authorized agencies and are otherwise confidential.

Third, as stated above, it is the Committee's position that records of conviction should be made available, in part, because they are available from the courts in which the convictions occurred. Thus, if you have an idea of where convictions might have occurred, you could direct your inquiries to the clerks of those courts.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3544

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 3, 1984

Mr Jose Lopez
#83-A-30 (A-4-15)
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. Lopez:

I have received your letter of November 5 in which you requested further assistance in obtaining copies of fingerprints.

You wrote that you received a letter from the Division of Criminal Justice Services which suggested that you seek the help of Prisoners' Legal Services. Since Prisoners' Legal Services indicated that it cannot held you, you would like to know what to do next.

In this regard, I would like to offer the following comments.

First, if you have not yet requested the same information from the "records access officer" of the police department which made the fingerprints, you might want to write to that department.

Second, you do not need the assistance of an attorney in order to make a request for records under the Freedom of Information Law. The Division is required to grant your request or to provide you with a written denial explaining the reasons for such denial. I suggest that you again request the fingerprints from the Division of Criminal Justice Services using the format on page nine and ten of the enclosed pamphlet.

For your information, I have enclosed a brochure which explains the scope of the Freedom of Information and Open Meetings Laws. Page seven explains that if your request is denied you may appeal the denial to the "Appeals Officer" of the agency. A sample appeal letter is provided on page ten.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3545

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 3, 1984

Mr. Bratescu Constantin
#84-A-0235
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. Constantin:

I have received your letter in which you requested assistance in obtaining medical records.

Specifically, you would like to obtain the records which cover the period of July 7 through July 26, 1983, when you were incarcerated at Riker's Island. You explained that the prison is served by the Montefiore Hospital at Riker's Island.

In this regard, I would like to offer the following comments.

First, the Freedom of Information Law applies only to records maintained by state or local agencies in New York. Section 86(3) of the Law defines "agency" as:

> "any state or municipal department, baord, 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, would, in my view, fall outside of the requirements of the Freedom of Information Law. Assuming that the Montefiore Hospital is a private institution, it is my belief that the Freedom of Information Law does not govern the availability of the Hospital's records.

Second, with respect to medical records in general, there is no law of which I am aware that grants direct rights of access to hospital records to the individual to whom the records relate. However, §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 conservator of a conservatee, an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physician or hospital..."

Based upon the provision cited above, it appears that a hospital or physician must release the medical records of a patient to another physician or hospital who seeks medical records on behalf of a competent patient.

Therefore, I suggest that you request, in writing, that the doctor at Attica, or another doctor with whom you are familiar, request the records from the Montefiore Hospital on your behalf.

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

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3547

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 6, 1984

Ms. Patricia Hobbes
[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. Hobbes:

I have received your letter in which you requested the name of the insurance carrier for the Minnesota Leasing Company.

The Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. The Committee does not, however, maintain the type of information which you seek. Furthermore, I do not believe that the Department of State or any other unit of government in New York maintains that information.

In addition, the Minnesota Leasing Company is not subject to the requirements of the Freedom of Information Law. The Freedom of Information Law pertains only to records of agencies, which can generally be characterized as governmental entities, except the state legislature and the judiciary.

I regret that I cannot be of greater assistance to you. If you have any further questions, please do not hesitate to call me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3548

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 12, 1984

Mr. Steven G. Dworsky
Legislator
District #1
City of Troy
85-23rd Street
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. Dworsky:

I have received your letter of November 5 in which you requested an advisory opinion concerning the time limitations of the appeal procedure set forth under the Freedom of Information Law.

According to your letter, responses to requests for records sent to the records access officer for Rensselaer County Executive have been persistently delayed. For example, since your initial request of October 10 was not answered within the statutory five day period, you considered the request to have been constructively denied and, therefore, you appealed on that basis. Eleven days after your appeal, you received a letter from County Executive Murphy stating that the requested record would be forwarded to you within ten business days. You would like to know whether the Public Officers Law permits the County Executive to require you to wait an additional ten days, following the expiration of the appeal period, for the requested records.

In this regard, I would like to offer the following comments.

First, as you are aware, an agency must respond to a request for records within five business days of the request. As you suggested, a failure to respond within five business days of the receipt of a request constitutes a constructive denial of access that may be appealed [see Freedom of Information Law, §89(3); also, 21 NYCRR §§1401.5(d) and 1401.7(b)].

Second, §89(4)(a) of the Freedom of Information Law provides that the appeal officer has ten business days from the receipt of an appeal to render a determination. Specifically, the cited provision requires that the appeals officer:

> "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

There is no provision for the appeals officer to acknowledge receipt of the appeal within the ten day period, setting a date for response beyond that period, although a similar procedure is proper at the time of the initial request.

In short, it is my opinion that the County Executive has not complied with the Freedom of Information Law, because he has not denied or granted access to the records which you requested within the statutory time limits. In addition, a copy of the appeals officer's determination must be forwarded to the Committee on Open Government [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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: William J. Murphy, County Executive

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3549

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 18, 1984

Mr. Kenneth A. Richieri
The New York Times Company
Legal Department
229 West 43rd Street
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. Richieri:

I have received your letter of November 12 in which you requested an advisory opinion.

According to your letter, a reporter of the New York Times, which you represent, requested "an investigation report prepared by the Department of Investigation in 1982..." In response to the request, Ms. Rachel Gordon, Deputy Commissioner of the Department, informed the reporter "that while the Department fully intended to release a copy of the requested report, it did not wish to do so until a supplemental report could be prepared on the same topic and the two reports could be released together. The Department thus declined to release the report within the statutory period." You indicated that Deputy Commissioner Gordon contended that the procedure was necessary, for the Department "was not convinced of the accuracy of some aspects of the report which has been prepared under a previous administration." Steven Rucker, Counsel to the Department, also argued "that reputations of third parties could be injured if the report was released as requested", even though he "conceded" that the report is "covered by the FOIL". It is your view that "it would be a severe undercutting of the intent and purpose of the FOIL if state and municipal agencies were allowed to refuse to release reports on the grounds that further investigation was necessary."

In this regard, I would like to offer the following comments.

First, it is emphasized that I am unaware of the contents of the requested report. Consequently, I could not conjecture as to the extent to which the report is accessible or deniable.

Second, nevertheless, the contentions upon which the denial was based are inconsistent with the Freedom of Information Law. In short, from my perspective, when a record is requested under the Freedom of Information Law, the only question that may be raised by an agency involves the extent, in any, to which the record might properly be withheld in accordance with the grounds for denial appearing in §87(2). If no basis for withholding exists, I believe that the record must be made available.

As indicated recently by the Court of Appeals:

> "[T]he statutorily stated policy behind FOIL is to promote '[t[he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations' (Public Officers Law, §84). Consistent with this policy, the Legislature restructured FOIL in 1977 (L 1977, ch 933, §1) to make the vast majority of requested documents presumptively discoverable as 'records' under the very broad definition contained therein: 'any information kept, held, filed, produced or reproduced by, with or for any 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' (Public Officers Law, §86, subd 4; see Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 580). FOIL is generally liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" [Washington Post v. Insurance Dept., 61 NY 2d 557, 564 (1984)].

In an earlier decision in which the Court of Appeals discussed the capacity to withhold, the opinion stated:

> "...To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be 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...Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In sum, based upon the language of the Freedom of Information Law and its judicial interpretation, I do not believe that an agency may delay disclosing records, unless such a constructive denial is based upon one or more of the grounds for denial appearing in 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:ew

cc: Rachel Gordon, Deputy Commissioner
Steven Rucker, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3550

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 18, 1984

Mr. Melvin A. Wesson
Drawer B
Stormville, NY 12582

Dear Mr. Wesson:

I have received your letter of December 10, in which you appealed an apparent denial of access to records requested from the Green Haven Correctional Facility.

In this regard, I would like to offer the following comments.

First, the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As a general matter, the Committee does not maintain records 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, throughout the materials that you sent, reference is made to federal acts. Please note that rights of access to records maintained by agencies of government in New York are governed by the provisions of the New York Freedom of Information Law. Enclosed is a copy of that statute for your review.

Third, with respect to the procedure for appealing an actual or constructive denial of access, §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 ten 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..."

I believe that the person designated to determine appeals for the Department of Correctional Services is the Counsel to the Department.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3551

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1984

[redacted]
#82-A-1551
C-3-13
Great Meadow Correctional Facility
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 [redacted]

I have received your letter of November 11 in which you requested assistance in obtaining medical records.

According to your letter, you have undergone an operation which you believe has left you with more damage than existed before the operation. For that reason, you have requested your medical records from the Director of Health Services. Apparently, you have received no response.

In this regard, I would like to offer the following comments.

First, it is unclear from your letter where the operation took place and whether the records are maintained by the correctional facility. If they are, it is my opinion that they should be made available to you, at least in part. For instance, medical records consisting of factual information, such as laboratory test results and similar materials are, in my view, available to you. However, I believe that those portions consisting of opinion, advice, or recommendations need not be made available under the Freedom of Information Law (see §87(2)(g), Freedom of Information Law). If the facility maintains the records, a request should be made to the Superintendent of the Great Meadow Correctional Facility.

Second, if your operation took place in a private institution or hospital and it maintains the records which you seek, the Freedom of Information Law would not be applicable. The Law applies only to records maintained by state or local agencies; it does not pertain to the availability of a private hospital's records.

Third, with respect to medical records in general, there is no law of which I am aware that grants direct rights of access to hospital records to the individual to whom the records relate. However, §17 of the Public Health Law, entitled "Release of Medical Records" states in relevant part that:

> "Upon the written request of any competent patient, parent or guardian of an infant, committee for an incompetent, or conservator of a conservatee, an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records including all laboratoty tests regarding that patient to any other designated physician or hospital..."

Based upon the provision cited above, it appears that a hospital or physician must release the medical records of a patient to another physician who seeks medical records on behalf of a competent patient.

Therefore, if your medical records are maintained by a private hospital, I suggest that you request, in writing, that the doctor at Great Meadow, or another doctor with whom you are familiar, request the records from the private hospital 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3552

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1984

Mr. Howard Jacobson
#80-A-3899
Attica Correctional Facility
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. Jacobson:

I have received your letter of November 15 in which you asked whether the Freedom of Information Law provides a procedure that requires agencies to correct their records. You stated that both the New York City Police Department and the Division of Criminal Justice Services "have significant mis-information [about you] in their computers".

In this regard, I would like to offer the following comments.

First, the Freedom of Information Law does not include a procedure which permits an individual to request that an agency correct inaccurate information about him or herself. Moreover, the new Personal Privacy Law which does set forth such a procedure, does not pertain to "public safety agency records," such as those of the Division of Criminal Justice Services. Further, since the Personal Privacy Protection Law is applicable only to state agencies, records of the New York City Police Department fall outside the scope of that statute.

Second, the regulations of the Division of Criminal Justice Services grant an individual the right to review his or her own records and to challenge the accuracy of that record (see 9 NYCRR 6050 et seq.). I have enclosed a copy of those regulations for your information.

Generally, the regulations provide that an individual has a right to review all of the criminal history data maintained by the Division which pertains to such person. In addition, the individual may challenge the completeness or accuracy of the data by filing a "Statement of Challenge". The regulations further provide that if corrections are made pursuant to a successful challenge, the Division shall notify every criminal justice agency known to it to which it has disclosed such information.

Finally, you have requested copies of cases which concern inaccurate or incorrect records. I am not aware of any such cases but for your information, I have enclosed a summary of cases which deal 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

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3553

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS

THOMAS H. COLLINS
ALFRED DELBELLO
JOHN C. EGAN
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WALTER W. GRUNFELD
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BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 18, 1984

Ms. Jo A. Fabrizio
[redacted]

The staff of the Commitee 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. Fabrizio:

I have received your letter of November 14 in which you requested an advisory opinion.

In your letter you asked the following questions:

> "1. Are there any statutory provisions or regulations of the Committee which restrict, regulate or otherwise inhibit an attorney from requesting information under FOIL?
>
> 2. To whom should a FOIL request be addressed when the public entity has no statutorily required public access officer?
>
> 3. Assuming a denial of information, who is the proper party to appeal to when requesting information about a community college from its' sponsoring county?"

In this regard, I would like to offer the following comments.

First, there is no language in the Freedom of Information Law or its regulations which restricts the right of access to agency records to any class of or to particular individuals. Relevant to your question is a recent decision rendered by the Court of Appeals which held that records, otherwise available under the Freedom of Information Law, are not deniable because they are requested by a litigant [Farbman v. New York City Health and Hospitals, 62 NY 2d 75; Burke v. Yudelson, 51 AD 2d 673]. Specifically, the Court

of Appeals stated that "Full disclosure by public agencies is, under FOIL, a public right and in the public interest irrespective of the status or need of the person making the request" (Farbman, supra.). Based upon those cases, it is my opinion that the Freedom of Information Law provides that records be made available to any person; thus, it does not restrict an attorney from making requests under the Freedom of Information Law.

Second, the Committee's regulations promulgated pursuant the the Freedom of Information Law provide that:

> "The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. 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" [21 NYCRR 1401.2(a)].

In the absence of a records access officer, I suggest that a request be directed to the governing body of a public entity, or perhaps its legal custodian of records. For example, §208 of the County Law concerns books and records maintained by a county. Section 208 provides, in part, that:

> "1. The board of supervisors of each county shall have the general charge of all records, books, maps and papers of the county, subject to such right of custody of a county officer as may be directed or authorized by law and shall make adequate provision for their safekeeping, repair and maintenance.
>
> 2. Each county officer shall have custody and control of all records, books, maps or other papers, required or authorized by law to be recorded, filed or deposited in his office; all other records, books, maps or papers

> shall be in the custody and control of such officer as the board of supervisors shall designate. It shall be the duty of each such officer to keep and preserve the same. No such record, book, map or other paper, shall be sold, destroyed or otherwise disposed of, except pursuant to law."

Based upon the quoted provisions, it appears that the custody and control of records remain with the legislative body. In the case of other municipalities or agencies, I suggest that the relevant enabling statutes be consulted.

Third, if your request is directed to the county legislature and is denied, you may wish to have the legislature review its decision. Initially, however, your request should, in my opinion, be directed to the governing body of the community college, for example, the board of trustees. An appeal would then be directed to the county legislature, which has oversight authority [see Freedom of Information Law, §89(4)(a)]. An Article 78 proceeding can be commenced to review a final determination, or lack thereof, of the individual or body to whom the appeal was 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

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3554

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 19, 1984

Mr. Leo Carl Halpern
Civil Rights Law Advocate
Democratic Party of Bronx County
2505 Olinsville Avenue
Bronx, NY 10467

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. Halpern:

As you are aware, I have received your letter of November 15, as well as the materials attached to it.

Your inquiry concerns a request sent to the Commissioner on the Quality of Care for the Mentally Disabled involving its "investigative records" prepared in response to a complaint that you made in 1983. Although the Commissioner's findings were made available to you, the "investigative records" were denied on the basis of §87(2)(g) of the Freedom of Information Law.

In this regard, I would like to offer the following comments.

Section 87(2)(g) of the Freedom of Information Law provides that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determination."

Although the language quoted above requires that some aspects of inter-agency or intra-agency materials must be made available, the Freedom of Information Law permits portions of

inter-agency or intra-agency materials to be withheld to the extent that they consist of opinion, advice, recommendation and the like. As such, it appears that the denial made under the Freedom of Information Law was likely appropriate.

It is noted that a new statute might be relevant to the situation. Enclosed is a copy of the Personal Privacy Protection Law which generally grants individuals rights of access to records pertaining to them (see enclosed, Personal Privacy Protection Law, §95). It is possible that the Personal Privacy Protection Law might provide rights to you in excess of rights granted by the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3555

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 19, 1984

Mr. Ronald Boccio
#81-A-1441
Great Meadow Correctional Facility
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. Boccio:

I have received your letter of November 19 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you sent a request for records on October 10 to the Senior Correctional Counselor at your facility. Since that person did not respond within five business days, you submitted an appeal to Counsel. The Office of Counsel responded by indicating that the Counselor never received the request.

In this regard, I would like to offer the following comments.

First, the Committee on Open Government is required by §89(1)(b)(iii) of the Freedom of Information Law to promulgate general regulations concerning the procedural implementation of the Freedom of Information Law. In turn, §87(1) of the Law requires that each agency adopt regulations consistent with the Law and the regulations promulgated by the Committee.

Second, enclosed are the regulations adopted by the Department of Correctional Services pursuant to the Freedom of Information Law. Please note that, with respect to records maintained at a correctional facility, a request should be sent to the facility superintendent or the person designated by the superintendent.

It is suggested that you carefully review the Department's regulations, for I beleive that they will 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3556

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 19, 1984

Mr. Collin Fearon, Jr.
#74-B-395
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. Fearon:

I have received your letter of November 16, which reached this office on November 20.

According to your letter and the materials attached to it, on two occasions you requested records identifying the contractors who built various correctional facilities or portions of correctional facilities. Although two such requests were sent to the Deputy Commissioner for Administrative Services, no response had been received as of the date of your letter.

In this regard, I would like to offer the following comments and suggestions.

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 business days to grant or deny access. Further, if no response is given within five

business days of receipt of a request or within ten business days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a 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 ten 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 ten 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 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

If you believe that your requests have been "bonstuctively denied" due to a failure to respond in a timely manner, it is suggested that you appeal. The regulations of the Department of Correctional Services indicate that an appeal may be directed to Counsel to the Department.

Second, while the Department of Correctional Services might maintain some of the records that you are seeking, others, particularly those concerning construction completed years ago, might not be kept by the Department, but rather by the Facilities Development Corporation. Therefore, to the extent that the Department does not maintain the records sought, it is suggested that you direct a request to the records access officer of the Facilities Development Corporation, which is located at 44 Holland Avenue, Albany, New York 12208.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3557

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 19, 1984

[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 November 16. Please accept my apologies for the delay in response.

According to your letter, your requests for records pertaining to your child have been denied by the Massapequa School District. Apparently, the file pertaining to your child has been marked "Do not release to father". As a concerned father, you believe that you have the right to view records concerning your child.

It is noted at the outset that, under the circumstances, rights of access would likely be determined under the provisions of the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g). Although the Committee on Open Government does not have specific authority to advise under that Act, as a service and in conjunction with advice given to this office by the United States Department of Education, I would like to offer the following comments.

In my view, even though a divorced parent might not have custody of his or her children, that factor is not determinative of rights of access.

My contention is based largely upon the provisions of the federal Family Educational Rights and Privacy Act and the regulations promulgated under the Act by what had been the U.S. Department of Health, Education and Welfare and is now the U.S. Department of Education. The Family Educational Rights and Privacy Act states essentially that

all "education records" pertaining to a particular student or students under the age of eighteen years are accessible to the parents of the students. The Act also states that, as a general rule, education records identifiable to a particular student or students are confidential with respect to third parties, unless confidentiality is waived by a parent.

Further, the term "parent" is defined in the regulations cited earlier to mean:

> "...a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as a divorce, separation, or custody, or a legally binding instrument which provides to the contrary" [see attached regulations, §99(3)].

It is emphasized that I have discussed the definition of "parent" with officials of the U.S. Department of Education on numerous occasions in order to obtain their expert advice. In this regard, I have been advised that a parent, custodial or otherwise, enjoys rights under the Act, unless a legally binding instrument, such as a divorce decree, specifically provides to the contrary. Stated differently, even a divorced parent without custody of the children has rights under the Act, unless a legal instrument specifically precludes or prohibits a parent from asserting his or her rights under the Act.

Lastly, I would like to point out that in a similar situation, it was found by Supreme Court, Albany County, that a non-custodial parent enjoys rights conferred by the Family Educational Rights and Privacy Act, even when the custodial parent signed a statement indicating that she did not authorize a school district to transmit records to the natural father [Page v. Rotterdam-Mohonasen Central School District, 441 NYS 2d 323 (1981)]. Further, the Court specified that the natural parent has rights granted under the Act, "unless such access is barred by state law, court order, or legally binding instrument", none of which were present (id. at 325).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Herbert Pluschau, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3558

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 20, 1984

Mr. William W. Zarr
Assistant Corporation Counsel
City of Niagara Falls
Department of Law
City Hall
Main Street
Niagara Falls, NY 14302

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. Zarr:

I have received your letter of November 21, as well as the materials attached to it.

Your inquiry concerns a request to inspect all "personnel action forms for non-competetive Civil Service employees" of the City of Niagara Falls from 1980 to the present. The forms contain personal information that may be withheld on the ground that disclosure would result in an "unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], such as employees' home addresses, home telephone numbers, social security numbers, dates of birth and the like. Consequently, the applicant agreed that certain aspects of the forms could be redacted to protect privacy.

The applicant has sought only to inspect the records in question; copies have not been requested. Further, he wrote that his client:

> "will not pay the cost of redacting any information. The New York State Freedom of Information Law does not provide for a requester of information to bear the financial burden of the City's wish to redact particular and/or certain identifying information and/or material from public records" (emphasis added by Lewis Steele).

Your question is:

> "Whether an agency, which has custody of records which in their present form contain material which is not subject to inspection, may properly charge for copies of the requested material at the statutory rate where this is the only reasonable method of making the records available for inspection."

In this regard, I would like to offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Section 87(2) in its introductory language states that "Each agency shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof" that fall within one or more of the grounds for denial that follow.

Relevant 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 addition, §89(7) states that nothing in the Freedom of Information Law requires the disclosure of the home address of a current or former public employee. It appears that there is no dispute with respect to the authority of the City to deny access to certain aspects of the form on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

With regard to the issue that has arisen, since the forms in question contain information that may justifiably be withheld from public view, I do not believe that an applicant may, as of right, inspect them without deletions. Under the circumstances, it appears that the only method of reviewing those aspects of the forms that are accessible, as of right, would involve the preparation of copies, followed by the deletion of those portions that may properly be withheld. Since a copy must be made prior to disclosure, it is my view that the agency may charge up to twenty-five cents per photocopy as permitted by §87(1)(b)(iii) of the Freedom of Information Law.

In sum, I believe that the agency has the option of withholding the forms, for disclosure of the forms in their entirety would constitute an unwarranted invasion of personal privacy, or, in the alternative, providing copies of the forms after having made the appropriate deletions, upon payment of, or offer to pay, the requisite fees for photocopying.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Lewis Steele

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3559

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 20, 1984

Mr. Clarence E. Winans
[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. Winans:

I have received your correspondence of November 19 concerning your appeal of the Village of Chatham's denial of your request to review certain records.

According to your letter of November 19, you appealed the Village Clerk's denial of your initial request to the Board of Trustees. If the Board does not respond to your appeal or if the request is denied, you wrote that you would be interested in initiating an Article 78 proceeding. Specifically, you would like to know how to commence such a proceeding.

In this regard, I would like to offer the following comments.

First, having reviewed your papers, it appears that your appeal to the Board of Trustees includes sufficient information for the Board to determine whether to grant or deny access to the records.

Second, the Committee is not authorized to advise the public with respect to the merits of initiating a judicial proceeding or the proper course to follow in such a proceeding. I suggest that you contact an attorney regarding the matter.

Third, I have enclosed a copy of the Committee's regulations promulgated pursuant to the Freedom of Information Law. The regulations, however, do not outline the steps to be taken in commencing an Article 78 proceeding. The procedure can be found in Article 78 of the Civil Practice Law and Rules.

Generally, an Article 78 proceeding is commenced by a notice of petition and a petition and is brought in Supreme Court. Since the proceeding may involve the preparation of a brief and/or oral argument, based upon both statutory and case law, again, I suggest that you consult an attorney.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3560

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1984

Mr. Hank Purcell, Jr.
#84-C-357
C.C.F.
Box 367
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. Purcell:

I have received your note of November 21, which reached this office on December 4.

As I understand the situation, you have submitted several unanswered requests under the Freedom of Information Law.

In this regard, the Freedom of Information Law and the regulations promulgated by the Committee, which have the force and effect of law, contain prescribed time limits for responses to requests and appeals.

Specifically, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business 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 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 ten 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 ten 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 Practive Law and Rules [Floyd v. McGuire, 108 Misc. 2d 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3561

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1984

Ms. Lorraine E. Dager
Town Clerk
Town of Fairfield
Box 61
Fairfield, NY 13336

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. Dager:

I have received your letter of December 1. Please accept my apologies for the delay in response.

Your first area of inquiry is whether tape recordings used by a town clerk for the purpose of preparing the minutes "should be public record or can they be erased or destroyed?"

In my opinion, as long as a tape recording of an open meeting exists, it is a "record" subject to the rights granted by the Freedom of Information Law. It is noted 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, letter, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the definition, I believe that a tape recording prepared by or in possession of a town clerk constitutes a "record" that falls within the scope of the Freedom of Information Law.

Further, since any person can be present at an open meeting, a tape recording 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 [see Zaleski v. Hicksville Union Free School District, Sup. Ct., Nassau Cty., NYLJ, December 7, 1978].

I do not believe that any motion or specific action must be taken to disclose tape recordings, for the Freedom of Information Law requires that they be made available on request.

The Freedom of Information Law does not pertain to the capacity to destroy records. It is noted, however, that §65-b of the Public Officers Law prohibits a unit of local government from destroying records without the consent of the Commissioner of Education. In turn, the Commissioner has prepared schedules that indicate minimum retention periods for particular records. I have contacted the Education Department on your behalf and was informed that, as a general rule, a tape recording may be erased or destroyed following any necessary transcriptions, such as the creation and later approval of minutes. It is suggested that, in order to obtain specific information on the subject, you may write to Warren Broderick, State Education Department, State Archives, Cultural Education Center, Empire State Plaza, Albany, New York 12230. Mr. Broderick can be reached by phone at (518) 474-6926.

Your remaining question is whether "everything in the Town Clerk's Office [is] supposed to be public", except in rare circumstances. In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

To provide additional information on the subject, enclosed are copies of the Freedom of Information Law, an explanatory brochure, and an article that seeks to provide a "common sense" view 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3562

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1984

Mr. Joseph Gaines
#82-B-2116
Box 149
Attica, NY 14011

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. Gaines:

I have received your letter of November 30 in which you requested information concerning rights of access to records generally and to medical records.

In this regard, I would like to offer the following comments.

First, the statute that generally grants rights of access to records in New York is the Freedom of Information Law, a copy of which is attached. The Freedom of Information Law is applicable to records of units of state and local government agencies. Further, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, with regard to medical records, the Freedom of Information Law does not apply to records of a private hospital or physician, for example. Moreover, there is no law that grants rights of access to you to medical records about you. However, under §17 of the Public Health Law, a physician designated by a competent patient may seek and obtain from another physician or hospital medical records on behalf of that patient.

If medical records are maintained at your facility, laboratory test results and similar factual materials would in my opinion be available to you. However, those aspects of medical records reflective of opinion or advice could likely be withheld under the Freedom of Information Law.

Lastly, when making a request under the Freedom of Information Law, an applicant must submit a written request that "reasonably describes" the records sought. Therefore, if you request records, it is suggested that you include as much detail as possible, such as names, dates, descriptions of events or medical conditions, and similar information in order to enable agency officials to locate the records.

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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3563

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1984

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 28, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, on July 13, the Bureau of Real Property Assessment in Queens charged a fee of twenty-five cents for certification of a photocopy of a tax map. You were also charged twenty-five cents for the photocopy. You have since requested a refund of the fee for certification, but no decision concerning your request has been rendered.

In this regard, I would like to offer the following comments.

First, as you may be aware, §89(3) of the Freedom of Information Law states in part that a person who obtains a copy of a record under the Freedom of Information Law, may, upon request, ask that the agency "certify to the correctness of such copy". In my view, a certification made under the Freedom of Information Law merely involves an assertion that a copy made is a true copy; it is not in my opinion the equivalent of a legal certification in which an assertion is made that the contents of a copy are correct and accurate.

Second, §1401.8 of the regulations promulgated by the Committee, which have the force and effect of law, preclude the assessment of a fee for a certification made under the Freedom of Information Law. However, I believe that a fee may be charged in conjunction with providing a service whereby a legal certification is prepared.

Third, assuming that you did not request that the copy be certified, presumably the only fee that could have been charged would have been the fee for photocopying, which is generally limited to twenty-five cents per photocopy [see Freedom of Information Law, §87(1)(b)(iii)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. Gerald S. Koszer, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3564

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1984

Mr. William Nelson
#83-A-7663
C.C.F.
Box 367
Dannemora, NY 12929-0367

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. Nelson:

I have received your letter of November 25 in which you requested a "clarification of the Freedom of Information Law".

Specifically, you wrote that in response to various requests for records sent to the Department of Correctional Services, the records are often denied because they are "evaluative in nature".

In this regard, I believe that the phrase "evaluative in nature" is based upon §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations."

Although some aspects of inter-agency or intra-agency materials must be made available, to the extent that such materials consist of advice, recommendation, opinion and the like, they may in my view be withheld. Therefore, if an

internal memorandum, for example, contains an opinion or advice regarding a situation involving an inmate, it might be characterized as "evaluative". Further, as indicated above, I believe that it could be denied pursuant to §87(2)(g) of the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3565

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1984

Mr. Martin Einemann
Marty's Service Station
Rt. 213
Rosendale, NY 12472

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. Einemann:

As you are aware, I have received various items of correspondence concerning your efforts in obtaining records from the Department of Transportation.

In terms of background, you are the owner of a parcel of real property needed by the Department for highway construction. Although the Department has made an offer to you for the property which is based upon an appraisal and related information, you are dissatisfied with the offer. Consequently, according to Commissioner LaRocca's determination on appeal, you requested:

> "statistics, facts, policies, and all information of comparable properties and determinations that this Department used for appraisal of your property and used to make the comparisons."

The Commissioner denied your appeal, stating that:

> "The Freedom of Information Law provides that agencies may deny access to records which are inter-agency or intra-agency material which is advisory in nature and integral to its deliberative process and which contains opinions, advice, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matters,

> as well as material, such as appraisals which qualify as material prepared for litigation."

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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, although two of the grounds for denial might justifiably be cited to withhold some of the materials that you have requested, it is possible that no basis for withholding could be offered with respect to other records. Further, one aspect of the Commissioner's denial is in my view contrary to a decision rendered under the Freedom of Information Law.

Specifically, one of the grounds for denial to which the Commissioner alluded is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations."

The language quoted above also permits the Department to withhold inter-agency or intra-agency materials that are reflective of advice, recommendation, opinion and the like. As such, the appraisal prepared by the Department in relation to your property, which is indicative of an opinion, could in my view be withheld at this juncture. Further, it has been held judicially that appraisal reports and data used in arriving at a particular dollar value could be withheld pursuant to §87(2)(g) of the Freedom of Information Law [see Matter of 124 Ferry Street Realty Corp. v. Hennessy, 82 AD 2d 981 (1981)].

It is possible, however, that other records, for example, those dealing prior agreements regarding the sale of real property, may be available. If, for example, an agreement on price was reached between the Department and the sellers of other parcels of real property, those transactions would have been consummated. Under those circumstances, it might be contended that records indicating a final agreement would be reflective of "final agency determinations" accessible under §87(2)(g) of the Freedom of Information Law. Further, it is possible that records indicating an agreed price would be available from other governmental sources, such as county clerks' offices or perhaps court records.

A second ground for denial of possible significance is §87(2)(c), which permits an agency to withhold records or portions thereof that:

> "if disclosed would impair present or imminent contract awards or collective bargaining negotiations."

In Murray v. Troy Urban Renewal Agency [56 NY 2d 888 (1984)], the Court of Appeals affirmed a denial of access on the basis of §87(2)(c) regarding reports of an appraiser regarding properties that the City planned to cffer for sale. To the extent that the appraisals involved transactions that had not been consummated, the reports could be withheld. Nevertheless, the Court also found that "A number of the buildings have since been sold, and it is obvious that the statutory exception to disclosure no longer applies to the appraiser's reports on those buildings" (id. at 890). Once again, based upon the language quoted above, it is possible that the records sought pertaining to completed transfers of real property should be accessible.

Lastly, the Commissioner expressed the opinion that the appraisal materials could be withheld on the ground that they constitute "material prepared for litigation". Material prepared for litigation is considered confidential under §3101(d) of the Civil Practice Law and Rules. Therefore, it 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". Nevertheless, it has been held that unless material is prepared solely for litigation, that exception would not be applicable; in other words, if records are prepared for multiple purposes, one of which might be use in eventual litigation, neither §3101(d) of the Civil Practice Law and Rules nor §87(2)(a) of the Freedom of Information Law could be cited to withhold records [Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)]. As I under-

stand the situation, an appraisal and records related to it would not generally constitute records prepared solely for 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:ew

cc: James L. LaRocca, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3566

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1984

Mr. Donald Loggins
[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. Loggins:

I have received a copy of your request sent to the New York City Department of Personnel, in which you asked whether particular items are accessible under the Freedom of Information Law.

The request indicates that you requested:

> "1) A copy of the revised notice of exam modifying the essay section of the exam.
>
> 2) A copy of the committee on manifest errors review and final determination of protests.
>
> 3) A copy of the final key answers to the multiple choice section based on the committee on manifest errors review.
>
> 4) A copy of the justification memo giving the reasons why questions 75 on were deleted.
>
> 5) A copy of your exam schedule for December 1984 and January 1985 giving the date(s) the essay exam will be given."

In this regard, I would like to offer the following comments.

First, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, it appears that items one and five, which concern a notice of an examination and an examination schedule respectively should be available, for no ground for denial could in my view be asserted. With respect to the three remaining aspects of your request, two of the grounds for denial may be relevant.

Section 87(2)(h) permits an agency to withhold records or portions thereof that:

> "are examination questions or answers which are requested prior to the final administration of such questions."

Based upon the language quoted above, if examination questions are to be used in the future, the questions and the answers may be withheld [see also, Social Services Employee Union v. Cunningham, 109 Misc. 2d 331, 90 AD 696 (1983)]. Therefore, depending on the use of questions in the future, §87(2)(h) might be asserted to withhold final key answers (item 3 of your request), or perhaps some aspects of the "determination of protests" made by the "committee on manifest errors" (item 2 of your request).

The other ground for denial of possible significance is §87(2)(g), which enables the Department to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

However, portions of such materials reflective of advice, opinion, recommendation and the like could in my opinion be withheld in accordance with §87(2)(g).

Without additional information concerning the role of the "committee on manifest errors", specific guidance cannot be given. You referred to a "final determination" by the committee, which might, depending upon the committee's function, be available under §87(2)(g)(iii), so long as no other ground for denial exists. Contrarily, if the committee merely recommends to an executive, for example, its determination might be deniable [see McAulay v. Board of Education, 61 AD 2d 1048, 48 NY 2d 659 (aff'd w/ no opinion) (1978)].

A similar rationale would likely apply with respect to item 4 of your request concerning a "justification memo" pertaining to the deletion of certain questions from an examination. The memorandum might be reflective of advice, and, therefore be deniable under §87(2)(g); on the other hand, it might represent a final agency determination accessible to the public.

In short, without additional information regarding the nature and content of the records sought, more specific advice cannot be offered.

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:ew

cc: Records Access Officer, Department of Personnel

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3567

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 28, 1984

Ms. Susan Ciraco
[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. Ciraco:

I have received your letter of November 23 in which you requested advice concerning the "Rules and Regulations in conformity with the Freedom of Information Law" promulgated by the North Salem School Board.

Specifically, you wrote that you will be submitting an "Application for Public Access to Records" to the Board and you would like to know if the Board's Rules and Regulations "are in order". In particular, you questioned the propriety of the clause that reads:

> "If access to records is neither granted nor denied within ten (10) business days after the date of acknowledgement of receipt of a request, the request may be construed as a denial of access that may be appealed."

In this regard, I would like to offer the following comments.

First, with respect to the quoted clause, I note that it is taken verbatim from the regulations promulgated under the Freedom of Information Law by the Committee on Open Government [see 21 NYCRR 1401.5(d)]. Although, as you pointed out, other regulations provide that a denial of a request be in writing and state the reasons for the denial, the idea of the "constructive denial" is also intended to assist an individual who requests records, but fails to receive a response within five business days of its receipt. Without such a provision, when an agency ignores requests for records or delays its response, no appeal could be made because there would be no denial to appeal.

Second, upon reviewing the rules and regulations of the Board, it appears that they are very similar to those of the Committee. As such, I believe that they comply with the Freedom of Information Law. I have enclosed a copy of the Committee's regulations for your information and review, as well as 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.