DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3568

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

January 2, 1985

Ms. Kathleen McNulty
League of Women Voters
554 East Fulton Street
Long Beach, NY 11561

The staff of the Committee on 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. McNulty:

I have received your letter of December 10 in which you indicated that numerous requests directed to officials of the City of Long Beach were not answered. The information sought involves "the name, publisher and date of a publication of a Geological Survey quoted in the proposed Long Beach Master Plan".

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, under the circumstances, if a record exists that contains the information, I believe that it would be accessible, for none of the grounds for denial could appropriately be cited to withhold such a record or records.

Third, 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 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 attempt to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the City Manager and the Corporation Counsel.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Honorable Edwin Eaton, City Manager
Corporation Counsel

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3568

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
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January 2, 1985

Ms. Kathleen McNulty
League of Women Voters
554 East Fulton Street
Long Beach, NY 11561

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Dear Ms. McNulty:

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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, under the circumstances, if a record exists that contains the information, I believe that it would be accessible, for none of the grounds for denial could appropriately be cited to withhold such a record or records.

Third, 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 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 attempt to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the City Manager and the Corporation Counsel.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Honorable Edwin Eaton, City Manager
Corporation Counsel

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3569

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

January 2, 1985

Mr. Bernard D. Ryan
Inst. No. P-6058
Drawer R
Huntingdon, PA 16652

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

Dear Mr. Ryan:

I have received your letter of November 23 in which you requested assistance in obtaining certain records relating to the filing of criminal assault charges by prison officials against you in October, 1971. In addition, you seek court records concerning the assault incident.

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, three grounds for denial are relevant to your situation. Section 87(2)(g) of the Law permits the denial of certain "inter-agency or intra-agency" materials. However, the cited provision also provides that "statistical or factual tabulations or data" and "final agency determinations" found within such agency materials must be made available [see §87(2)(g)(i) and (iii)]. Thus, to the extent that the prison records relating to the assault incident contain factual or statistical tabulations or include a final agency determination, only those portions of the records are required to be made available to you.

Section 87(2)(b) might also be relevant, for it permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". Therefore, disclosure of the identity of witnesses and other

parties who may be included in the records, may be denied as an unwarranted invasion of personal privacy.

Another ground for denial of potential significance is §87(2)(e), which permits an agency to withhold records that:

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

Third, although portions of the prison records might not be made available to you, the court records relating to the assault conviction may be available. While the Freedom of Information Law does not pertain to records of the courts, there are various other provisions of law that grant broad rights of access to court records.

Generally, §§255 and 255-b of the Judiciary Law require that a court clerk search and make available the "files, papers, records, and dockets in his office" and that a "docket-book" be "kept open" during business hours "for search and examination by any person". Further, the Appellate Division has held that:

> "...the general policy of our State [is] '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'"[Werfel v. Fitzgerald, 23 AD 2d 306 (1965)].

Based on the preceding discussion, I suggest that you again contact the Clinton County Court Clerk and request the transcripts which you seek. There may be a fee for copies of such records, so it is advised that you initially request an estimate of the cost and then foward the fee with a request for the records. 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3570

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

January 2, 1985

Ms. Ellen Barohn
The Village Times
P.O. Box VT
Setauket, NY 11733

The staff of the Committee 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. Barohn:

I have received your letter of December 3 in which you requested an advisory opinion. Please accept my apologies for the delay in response.

According to your letter and the attachments, you requested copies of the time sheets reflecting the hours worked by Robert E. Cummings, from July 5, 1983 through May 12, 1984. During a recent telephone conversation, you explained to Mr. Freeman that Mr. Cummings is the Village Constable and that he signs in and out of work on the police blotter. In response to your request, the Village Clerk stated that the time sheets are personnel records of a confidential nature and are not available to you.

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

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

I believe that paragraphs (a) and (b) of §87(2) are relevant to your inquiry. Those provisions permit an agency to withhold records or portions thereof that are exempted from disclosure by state or federal statute or records which, if disclosed, would constitute an unwarranted invasion of personal privacy.

Section 50-a of the Civil Rights Law provides that personnel records used to evaluate the performance of a

police officer are confidential and not available for public inspection, unless the express written consent of a police officer is given. Even if records pertaining to Mr. Cummings fall within the scope of §50-a, however, it is my opinion that the police blotter is not a personnel record as contemplated by §50-a. Therefore, a copy of the police blotter should not, in my view, be withheld on the grounds that it is a confidential personnel record. Moreover, it has been determined that a police blotter is accessible under the Freedom of Information Law [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

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". 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 determined 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)]. Based on the cited cases, it is my view that the time records of the Village Constable should be made available for public inspection.

Lastly, in a recent decision involving a request for records of a named police officer, it was held that an attendance record kept apart from personnel records must be made available [see Capital Newspapers v. Burns, Sup. Ct., Albany Cty., May 5, 1984; Supplemental decision, June 9, 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

cc: Sandra Swenk, Old Field Village Clerk

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3571

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

January 2, 1984

Mr. Peter van Schaick
Counsellor at Law
86 Hudson Street
Hoboken, NJ 07030

The staff of the Committee 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 Mr. van Schaick:

I have received your letter of December 7, as well as the materials attached to it.

According to your letter, the Flatbush Development Corporation and the New York Neighborhood Anti-Arson Center requested reports of fire insurance claims maintained by the New York City Arson Strike Force. Information concerning the claims is apparently kept by the "Property Insurance Loss Register (PILR), the central organization designated by the Superintendent of the Department of Insurance. PILR provides the state with a computer tape of this information which is now processed by the Arson Strike Force of the City of New York.

The Coordinator of the Arson Strike Force has been advised by Ms. Joan Schafrann of the Office of Corporation Counsel that his office need not make available to community based organizations information maintained by the PILR. Ms. Schafrann wrote that, "based upon an examination of §336-a and its legislative history, it is our conclusion that it was not the intent of the Legislature that the subject information be disclosed to the aforementioned organizations and other members of the public".

Section 336-a(1) of the Insurance Law states that:

> "[I]nsurers shall report all fire losses in excess of five hundred dollars or such larger amount as prescribed by the superintendent, arising under policies covering property located in this state to a central organization engaged in

> property loss registration, as designated by the superintendent, in accordance with regulations promulgated by the superintendent. The information contained in such reports shall, in accordance with regulations promulgated by the superintendent, be available to law enforcement agencies, to tax districts which have, pursuant to the provisions of section twenty-two of the general municipal law, filed with the superintendent a notice of intention to claim against the proceeds of a policy of fire insurance, to the office of fire prevention and control of the department of state, and to appropriate governmental agencies charged with the responsibility of demolition of structures."

It is your view that the language quoted above, while indicating that information may be shared with various agencies, could not be characterized as a statute that specifically exempts records from disclosure in the manner envisioned by §87(2)(a) of the Freedom of Information Law.

I am in general agreement with your contentions regarding the capacity to deny pursuant to §336-a of the Insurance Law, for I do not believe that the cited provision exempts records from disclosure.

However, since you referred to a letter sent by the Flatbush Development Corporation to Mr. Francis McGarry of the Office of Fire Prevention and Control, I have taken the liberty of contacting Mr. McGarry and his staff for the purpose of learning more about the information maintained by PILR.

I was informed that information maintained by PILR includes personally identifiable information regarding insureds, the nature of policies, the types of loss by category, and the identities of parties who have interests in property. In short, although I am unfamiliar with the specific information maintained by PILR, it appears that there may be issues relative to personal privacy. It is noted in this regard 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, and perhaps more important, information maintained by the PILR apparently represents a portion of the information reported by insurers to agencies concerning investigations of fires pursuant to §336 of the Insurance Law. I have been told that all of the information maintained by the PILR is also obtained under §336. In this regard, §336 of the Insurance Law states that:

> "[A]ny information or evidence furnished pursuant to this section shall be held in confidence by the appropriate agency until such information is required to be released pursuant to a criminal proceeding, or if such agency shall be served a summons or subpoena to testify as to any information or evidence in its possession regarding such fire loss in any civil action where an insured or other person is seeking recovery under a policy against an insurer for fire damage to real or personal property."

Under the language quoted above, information furnished pursuant to §336 of the Insurance Law would in my view be considered as exempted from disclosure by statute. While I am not an expert concerning the Insurance Law or the relationship between §§336 and 336-a, if the records to be maintained by the PILR under §336-a are the same as or based upon those considered confidential under §336, it might appropriately be contended that the statutory exemption from disclosure could justifiably be asserted. Nevertheless, it is reiterated that I am not completely familiar with the relationship between §§336 and 336-a of the Insurance Law. Perhaps the most appropriate source of expertise would be Counsel to the Insurance Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3572

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

January 2, 1985

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 December 4, as well as the correspondence attached to it.

Your inquiry concerns a request made on November 26 sent to the Superintendent of the facility in which you are housed. The request was made in conjunction with §5.13 of the regulations promulgated by the Department of Correctional Services concerning a "subject matter list". The Superintendent's designee, Rodney Moody informed you on November 30 that no such list exists.

Pursuant to the regulations that you cited, a subject matter list riquired to be prepared under §87(3)(c) of the Freedom of Information Law must be maintained by every "custodian" of records, including the Superintendent of your facility.

Specifically, §5.13 states in relevant part that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in his possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office...

> (c) The master index shall be updated not less than twice per year...Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered."

Based upon the provisions quoted above, I believe that it is clear that a subject matter list is required to be prepared, and that it must be made available for inspection and copying at your facility.

In order to attempt to enhance compliance with the Freedom of Information Law and the regulations of the Department of Correctional Services, a copy of this communication will be sent to Rodney Moody.

I hope that 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: Rodney Moody

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL- AO-3573

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

January 2, 1985

Miss Kelley O'Kane
[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 Miss O'Kane:

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

According to your letter, you took a civil service examination administered by Suffolk County in April. Although there is an age requirement for eligibility, you wrote that the announcement of the examination indicated that "persons not meeting the minimum age requirement, nineteen years, would be allowed to take the examination but would not be included on the eligible list". You apparently took the exam based upon the hope that the minimum age requirement would be changed. Nevertheless, when the results of the exam were disclosed, you were told that you were ineligible due to your age, and that you could not receive your grade.

Having requested the grade under the Freedom of Information Law, the County Civil Service Department denied access. An appeal to the County Attorney also resulted in a denial. In his justification for the denial, the County Attorney wrote that:

> "[N]ew York Public Officers Law §87 (2)(a) permits an agency to deny access to records that are specifically exempted from disclosure by state statute. I find that your grade on the Police Officer examination is specifically exempted from disclosure by New York State

> Civil Service Law Section 50, subd. 4(a) and by 4 New York Code of Rules and Regulations §3.5(b).
>
> New York Civil Service Law Section 50, subd. 4(a) pertains to disqualification of applicants or eligibles and provides as follows:
>
> 4. Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible
>
> (a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies;
>
> 4 New York Code of Rules and Regulations §3.5(b) pertains to the rating of examinations and provides as follows:
>
> (b) After a candidate's rating has been determined, he shall be notified of such rating unless he has otherwise been disqualified (emphasis added)."

In this regard, for the reasons descirbed below, I disagree with the determination by the County Attorney.

First, although §50(4)(a) of the Civil Service Law might have appropriately been cited to disqualify you from being certified on an eligible list, that provision in my view has no bearing upon rights of access to records.

Second, it is true that §87(2)(a) of the Freedom of Information Law, which is Article 6 of the Public Officers Law, permits an agency to withhold records that "are specifically exempted from disclosure by state or federal statute". While the provisions promulgated by the Department of Civil Service, 4 NYCRR §3.5(b), might apparently permit a denial of access, that provision is part of the Department's regulations; the regulations do not constitute a "statute". It is noted that it has been found by the courts that an agency's regulations are not the equivalent of a statute, and that regulations are void to the extent that they restrict rights of access in a manner inconsistent with the Freedom of Information Law [see Zuckerman v. NYS Board of Parole, 53 AD 2d 405 (1976); Morris v. Martin, 55 NY 2d

1026 (1982)]. As stated in Zuckerman, supra, "[I]t is established that a regulation cannot be inconsistent with a statutory scheme...and that 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" (id. at 407, emphasis added by the Court). As such, it is my view that the regulations of the Department of Civil Service can not be cited to restrict access.

Third, the Freedom of Information Law contains provisions that enable an agency to withhold from third parties records which, if disclosed, would constitute an "unwarranted invasion of personal privacy" [see §87(2)(b)]. However, §89(2)(c)(iii) of the Freedom of Information Law states that, unless a different ground for denial can be cited, disclosure would not result in an unwarranted invasion of personal privacy "when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

In sum, assuming that a record exists that contains your grade, I believe that it 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:ew

cc: Theodore D. Sklar

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3574

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

January 2, 1985

Mr. Roosevelt Williamson
#75-A-0795
Cell# C2-23
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 Mr. Williamson:

I have received your thoughtful letter of December 2, concerning a variety of difficulties that you have encountered, and in which you requested advice concerning the Freedom of Information Law (see attached).

Specifically, you wrote that you are interested in obtaining transcripts of various tape recorded proceedings pertaining to you that have been conducted at correctional facilities, as well as other records, such as evaluations and reports, about you.

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 that the Committee on Open Government promulgate general regulations concerning the procedural implementation of the Law. In turn, §87(1) requires each agency to adopt rules and regulations in conformity with the Law and consistent with the Committee's regulations. According to the regulations of the Department of Correctional Services, a request for records kept at a facility should be directed to the Superintendent or his designee . A request for records kept at the Department's central office in Albany should be sent to the Deputy Commissioner for Administration. In the event of a denial of a request, an appeal may be sent to Counsel to the Department.

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, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) states in part, that, as a general rule, an agency is not required to create a record in response to a request. If, for example, tape recordings of proceedings have not been transcribed, the Department would not in my view be obliged to prepare a transcript on your behalf. However, assuming that a tape recording is accessible to you under the Law, I believe that you could have the right to listen to the tape or to pay to have a copy made.

Fourth, §89(3) of the Freedom of Information Law also 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, identification numbers, descriptions of events and other information that might enable agency officials to locate the records sought.

Lastly, although the Freedom of Information Law provides broad rights of access, some of the records in which you are interested might justifiably be withheld in whole or in part. For instance, you referred to "evaluations". Section 87(2)(g) of the Freedom of Information Law permits 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."

While the language quoted above grants access to some aspects of inter-agency or intra-agency materials, it permits an agency to withhold portions of such materials consisting of advice, opinion, recommendation and the like. Therefore, evaluations reflective of staff opinions or advice pertaining to you could likely by denied.

I hope that 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.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3575

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

January 2, 1985

Mr. Keith J. Roland
Roland & Fogel
Attorneys at Law
1 Columbus Place
Albany, NY 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. Roland:

I have received your letter of December 4 in which you requested an advisory opinion under the Freedom of Information Law.

Your questions are whether the Department of Taxation and Finance:

> "1. May withhold correspondence between AT&T Communications and the Department regarding possible taxation.
>
> 2. Whether the Department is obligated to provide specific listing of all documents being withheld under claims of privilege or intra-agency exemption."

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

First, I am unaware of the contents of the communications that you are seeking. I believe that rights of access would be dependent, in great measure, upon the nature of the correspondence in question. For example, under the circumstances, it is possible that the materials pertain to a report or return made by a taxpayer. Under such a circumstance, it is likely that the records would be considered confidential under one or more provisions of the Tax Law [see, e.g., §697(e)] and, therefore, would be exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a)]. Further, it is possible that correspondence from AT&T Communications might contain trade secrets. To that extent, §87(2)(d) of the Freedom of Information Law

could be cited as a basis for denial. However, assuming that neither of those two exceptions could be cited to withhold correspondence between the Department and AT&T Communications, I believe that the records would be available, for no ground for denial in the Freedom of Information Law would apparently exist.

Second, although various cases decided under the federal Freedom of Information Act require that a "specific listing of all documents being withheld" must be prepared on request [see e.g., Vaughn v. Rosen, 523 F. 2d 1136 (D.C. Cir. 1975)], no decision rendered under the Freedom of Information Law of which I am aware indicates that a written denial must contain the degree of specifity required by a "Vaughn index". As such, the Department would not in my view be obligated to list, with specifity, each document or portion thereof that is 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: Karl Felsen

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3576

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

January 3, 1985

Ms. Patricia Keegan
Education Editor
Westchester Rockland Newspapers
Corporate Park 11
One 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 Ms. Keegan:

As you are aware, I have received your letter of December 21 in which you requested an advisory opinion under the Freedom of Information Law.

Your question is whether the Freedom of Information Law "requires local school districts to release printed statistical information on their students' average scores on the Scholastic Aptitude Tests." Attached to your letter is an example of the information in which you are interested, which consists of "the first two pages of a report which the College Board sends each high school in the fall after it releases the national and state average scores." As you point out, the materials do not include individual scores that could in any way identify a particular student or students; on the contrary, the materials include "only the average scores of all in the senior class who took the test."

In my opinion, the records in question must be made available by the respective school districts for the following reasons.

First, it is emphasized that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations,

memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, once the materials in question come into the possession of a school district, they constitute "records" that fall within the scope of the Freedom of Information Law. Moreover, the Court of Appeals, the state's highest court, has construed the definition of "record" as broadly as its language indicates [see Washington Post v. Insurance Dept., 61 NY 2d 557, 565 (1984); also Westchester News v. Kimball, 50 NY 2d 575, 581 (1980)].

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

Third, under the circumstances, it is my view that none of the grounds for denial could appropriately be asserted to withhold the records that are the subject of your inquiry.

Even if the records could be characterized as inter-agency materials, which is not the case, for the College Board is not an "agency" [see definition of "agency", §86(3)], I believe that they would be available. While §87(2)(g) permits the denial of certain "inter-agency or intra-agency materials", "statistical or factual tabulations or data" found within those materials must be made available under §87(2)(g)(i) of the Freedom of Information Law.

In sum, it is my opinion that the statistical records in which you are interested are clearly available, for no ground for denial appearing in the Freedom of Information Law could appropriately be asserted to deny access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3577

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

January 5, 1985

Reverend David W. Arnold
County of Ulster
Arson Task Force
Box 66
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 Reverend Arnold:

Secretary of State Shaffer has forwarded your letter of November 9 to the Committee on Open Government. 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 an opinion regarding the release of information by the Ulster County District Attorney. Specifically, you indicated that you are a member of the Ulster County Arson Task Force, an entity designated by the County Legislature. The goal of the Task Force is "to bring about cooperation between police, fire, insurance, judicatory and the public sector of our community to combat the crime of arson".

When there is a possibility of arson, records are apparently prepared and maintained by the Office of the District Attorney, who, to date, "has ruled that none of this information may be released". The question is whether completed forms, samples of which are attached to your letter, "can be shared with police agencies, fire agencies, [and] insurance company fire investigators...".

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

First, it is clear that several of the agencies that might seek the forms would do so in order to perform their official duties. Further, there is no law of which I am aware that would prohibit the District Attorney from sharing the information. Consequently, I do not believe that the District Attorney is obligated to withhold the information.

Second, under the provisions of the Freedom of Information Law (see attached), the records in question would likely be available in great measure, if not in toto, to any person.

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.

It appears that three of the grounds for denial may be relevant to the records in question. Nevertheless, it is unlikely in my view that they could be properly asserted to withhold the records in their entirety.

Perhaps most important 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."

From my perspective, the language quoted above is based upon potentially harmful effects of disclosure. Having reviewed the forms, it does not appear that disclosure would result in the harm described in §87(2)(e), except possibly in relation to one item.

The "Ulster County A.T.F. Couse & Origin Investigative Report" contains a section entitled "investigative findings". Depending upon the content of that section, it would be available to the public or deniable as determined by the effects of disclosure.

Another ground for denial of possible significance 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 policies or determinations must be made available.

The information on the forms consists of purely "factual" material. As such, I do not believe that §87(2)(g) could be asserted as a basis for a denial. It is noted, too, that one of the first decisions rendered under the Freedom of Information Law pertained to a "chief's report" of a fire and was found to be available on the ground that it would constitute a "final opinion" [Application of Dwyer, 378 NYS 2d 894 (1975)].

The remaining ground for denial of potential relevance is §87(2)(b), which permits an agency to withhold records or portions thereof the disclosure of which would result in "an unwarranted invasion of personal privacy". Some aspects of the forms would, if disclosed, indicate the names of owners or residents of the property, as well as their addresses. In my view, it is doubtful that disclosure of those items would constitute an unwarranted invasion of personal privacy, for the same information is likely available from other sources. For instance, a police blotter entry indicating the site of the fire would be accessible [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. Further, often the name of an owner of real property, as well as details regarding structures or the property, are available in various records pertaining to assessments [see Sears Roebuch & Co. v. Hoyt, 202 Misc. 43, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969)].

In sum, I believe that the forms in which you are interested are accessible to any person under the Freedom of Information Law in great measure, if not in their entirety.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Michael Kavanagh, District Attorney

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3578

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

January 7, 1985

Mr. Rocco Ferran
[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. Ferran:

I have received your letter of December 13.

According to your letter, you believe that you were verbally abused while reviewing records which you requested from the Brittonkill Central School District. In short, while reviewing the records at the Superintendent's office, two School District employees "[lambasted your] legitimate presence in the office, and generally made [you] feel put upon, intimidated, abused..." You asked whether you have any protection from this behavior under the Freedom of Information Law or "Privacy Law". Furthermore, you would like to know whether you can request a "neutral" place to review the records which you request.

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

The Freedom of Information Law requires each agency to promulgate rules and regulations pertaining to the times and places records are available, the persons from whom such records may be obtained and the fees for copies of such records [Freedom of Information Law, §87(1)(b)]. Moreover, an agency's rules must comply with the regulations of the Committee on Open Government. Section 1401.3 of the Committee's regulations requires agencies to designate the locations where records shall be available for public inspection and copying. No provisions, however, exist which would permit an individual to choose a location for reviewing requested records.

The Freedom of Information Law does, however, permit an individual to obtain copies of records available under the Law. If you wish to review records of the School Dis-

trict without encountering the District's employees, you may offer to pay the statutory fee for the records, usually twenty-five cents per copy not in excess of nine by fourteen inches, and have the copies sent to your home.

In addition, you may wish to bring the incident to the attention of the Brittonkill Central School Board, with which you may find the direct type of recourse that you seek.

I hope 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3579

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

January 7, 1985

Ms. Jo A. Fabrizio
[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. Fabrizio:

I have received your letter of December 3 in which you requested an advisory opinion.

According to your letter, you requested the following records from the County Clerk of Cayuga County:

> "1. Copies of contracts of insurance between the County of Cayuga and any insurers covering Cayuga County Community College;
>
> 2. Copies of contracts of insurance between Cayuga County Community College and any insurers;
>
> 3. Any additional record which shows:
> a. name, address and phone number of the insurer(s);
> b. numbers of any insurance contracts, (policy numbers);
> c. the effective date(s) of any contract(s);
> d. the extent of coverage;
> e. the amount of allowable indemnification and/or reimbursement.
>
> 4. Contracts of employment between Robert E. Gray and the County of Cayuga from 1980 to the present;
>
> 5. Contracts of employment between Robert E. Gray and the Cayuga County Community College."

Specifically, you would like to know whether such records are available under the Freedom of Information Law.

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

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

Second, the records that you requested, in my opinion, do not fall within any of the categories listed in §87(2) of the Law, which would permit an agency to withhold the records. Relevant to your request, however, are provisions which allow an agency to deny access to records which, if disclosed, would constitute an unwarranted invasion of personal privacy or impair present or imminent contract awards.

Section 87(2)(b) of the 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. Moreover, records relevant to the performance of a public employee's official duties are generally available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975)]. Based upon case law, if an employment contract exists, such a document is clearly relevant to the performance of the duties of Robert E. Gray, and therefore, I believe that §87(2)(b) could not be cited as a basis for withholding.

Section 87(2)(c) enables an agency to withhold records which:

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

In my opinion, if the insurance contract which you requested has been awarded, disclosure would not impair present or imminent awards.

In sum, the records which you seek, in my view, should be made available 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-
FOIL-AO-3580

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

January 7, 1985

Ms. Diane A. Goodman
Counsel
The New York State Lottery
Swan Street Building
Empire State Plaza
Albany, NY 12223

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

Dear Ms. Goodman:

I have received your letter of November 30 in which you raised several questions regarding the applicability of the Personal Privacy Protection Law to the Division of the Lottery. With respect to your inquiries, I would like to offer the following comments.

First, §94(7) of the Personal Privacy Protection Law provides that when personal information is maintained by a licensing agency for the purpose of determining whether administrative or criminal action should be taken or to grant, deny, suspend or revoke a license, the agency need not collect personal information directly from the data subject or provide notification to data subjects as provided by paragraphs (c) and (d) of §94(1). Although the Law does not require an agency to promulgate regulations with respect to notification, I point out that it may be necessary for the Division to notify individuals other than those whom it licenses. For example, the Division may collect information from its employees or from prize winners to whom it must provide notification in accordance with §94(1)(d). Therefore, while the Division need not promulgate rules requiring notification, it must notify individuals pursuant to the above cited provision.

Second, §92(9)(e) provides that the term "record", for the purposes of the Personal Privacy Protection Law, does not include personal information which is not used to make any determination about the data subject if it is requested by the agency and necessary to answer unsolicited requests by the data subject. According to your letter, it is necessary for the agency to answer unsolicited requests from data subjects for information concerning lottery prizes and requirements for agent licensing. While the Division may collect personal information as a result of unsolicited requests, it is probable that some of that information is used to make a determination about the data subject, i.e., to determine whether an individual is a prize winner or is qualified to be a lottery ticket agent. Moreover, the Division collects and maintains personnel information which is not a result of unsolicited requests, for example, personnel records and investigatory records. For these reasons, I do not believe that §92(9)(e) exempts the Division's records, in their entirety, from coverage under the Personal Privacy Protection Law.

Third, with respect to any contradiction between the Personal Privacy Protection Law and the Freedom of Information Law, I direct your attention to §95(8) of the Personal Privacy Protection Law, which provides that:

> "Nothing in this section shall limit, restrict, abrogate or deny any right a person may otherwise have including rights granted pursuant to the state or federal constitution, law or court order."

It is the Committee's view that §95(8) must be read to mean that the Personal Privacy Protection Law does not limit any rights of access to records available under the Freedom of Information Law. To the contrary, the Personal Privacy Protection Law broadens the right of access to records maintained by a State agency by permitting an individual to review records pertaining to such individual that might be properly withheld under ther Freedom of Information Law. For example, an agency may withhold records which constitute inter or intra-agency materials which are not statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations. However, under the Personal Privacy Protection Law, if those inter or intra-agency materials pertain to an individual, that individual may review those materials.

Additionally, I do not believe that §94(3)(a) of the Law conflicts with the intent of the Freedom of Information Law. Section 94(3)(a) requires a state agency to keep an accurate accounting of each disclosure of a record of personal information made to certain governmental agencies and to others involving compelling circumstances affecting the health or safety of a data subject. As you may know, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy. While disclosure of personal records in the situation listed in §96(1)(d)(i) and (1) of the Personal Privacy Protection Law may not be considered an unwarranted invasion of personal privacy, §94(3)(a) provides a data subject more protection by requiring an agency to account for disclosure of such personal records. In my view, §94(3)(a) does not contradict the intent of the Freedom of Information Law but rather goes further in balancing personal privacy and the necessary dissemination of personal information.

Fourth, you wrote that the Division maintains a policy of denying access to lists of its agents and of prize winners for security reasons. Under the Freedom of Information Law, an agency may withhold lists of names and addresses if such lists would be used for commercial or fund-raising purposes on the grounds that disclosure would constitute an unwarranted invasion of personal privacy [see §89(2)(b)(iii), Freedom of Information Law]. Thus, in my opinion, the Division may not deny lists of agents if those lists would merely indicate the name and business address of the authorized agent. Moreover, that there is no personal privacy to protect in this matter is underscored by the listing of lottery agents in local telephone directories. Furthermore, the Personal Privacy Protection Law pertains only to information concerning natural persons, rather than commercial entities.

Finally, with respect to information maintained on prize winners, lists of winners and their home addresses may likely be withheld for the reasons stated above.

In sum, I believe the Division should continue drafting its regulations and taking the appropriate steps to comply with the Personal Privacy Protection Law. In you have any further questions, please do not hesitate to call or write.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3581

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

January 8, 1985

Mr. Charles D. Schwartz
[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. Schwartz:

I have received both of your letters of November 20. Please accept my apologies for the delay in response.

Both letters pertain to requests directed to the New York Department of Employment. Following what appears to have been denials of access, you appealed to Commissioner Gault. However, as of the date of your letters, determinations on appeal had not been rendered.

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

First, §89(4)(a) of the Freedom of Information Law pertains to appeals and 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..."

Second, if an applicant has properly appealed, but the agency has failed to respond within the statutory time limit, it has been held that the appellant has exhausted his or her administrative remedies and may therefore challenge a constructive denial of access by means of a proceeding brought under Article 78 of the Civil Practice Law and Rules.

Lastly, as you are aware, I have conferred with Ms. McNamara of the Department of Labor in the past on your behalf. I do not believe that any new information could be added to our previous discussions. Nevertheless, copies of this correspondence will be sent to Ms. McNamara and Commissioner Gault.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Ms. Ann McNamara
Ronald Gault, Commissioner

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3582

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

January 8, 1985

[redacted]
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 [redacted]:

I have received your letter of December 11 in which you requested assistance in obtaining medical records from the Department of Correctional Services.

According to your letter, the Department has failed to respond to your requests for certain medical records in accordance with the time limitations set forth in the Freedom of Information Law. You explained that on numerous occasions, you requested "any and all [diagnosis], prognosis, etc. regarding a [cyst] that [you] encountered in this State System and the removal of same and any and all treatment relative to this". You asked that this office assist you in obtaining the records.

On your behalf, I contacted Ms. Dinah Morrison at the Department of Correctional Services. She informed me that a response to one of your earlier appeals has been forwarded to you. She explained that portions of the records which you requested were available to you but that those portions of the records which contain the notes of health care providers were not available.

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

First, the medical records that pertain to you and are maintained by the correctional facility are intra-agency materials. Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold intra-agency materials which are not statistical or factual tabulations or data, instructions to staff that affect the public or final agency

policy or determination. Generally, to the extent that intra-agency materials consist of opinions or advice, those materials may be withheld.

Second, it appears that you have been granted access to those portions of your medical records which are not the opinions and advice of health care providers. In any view, the denial of the health care providers' notes is consistent with the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Ms. Dinah Morrison, Office of Counsel

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3583

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

January 8, 1985

Ms. Nance E. Falter
School District Clerk
West Irondequoit Central
School District
370 Cooper Road
Rochester, NY 14617

The staff of the Committee on 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. Falter:

I have received your letter of December 20 in which you requested an advisory opinion.

Your inquiry was precipitated by a request by a parochial school for "a listing of all three and four year old children living within the West Irondequoit School District". In the request, it was suggested that the list include children's names and addresses, parents' names, phone numbers and the sex of the children. You wrote that the Board of Education has not established any policy concerning the disclosure of directory information pursuant to the federal Family Educational Rights and Privacy Act.

In order to provide guidance, I would like to offer the following comments.

While the information sought is similar to "directory information" as defined in §99.3 of the regulations promulgated under the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), commonly known as the Buckley Amendment, I do not believe that the regulations or the Buckley Amendment are applicable.

The same provision of the regulations defines "student" broadly, but states further that "[T]he term does not include any individual who has not been in attendance at an educational agency or institution." Since the preschoolers who are the subject of the request have not yet attended school, the records in my view fall outside the scope of the Buckley Amendment.

Since there is no specific direction in the Education Law of which I am aware that pertains specifically to the disclosure of census information (see Education Law, §§3240-3243), it appears that the Freedom of Information Law governs rights of access.

In this regard, one of the grounds for denial in the Freedom of Information Law, §87(2)(b), permits an agency to wihthold records when disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b) also lists five examples of unwarranted invasions of personal privacy. Although all of the information sought does not in my opinion fall within any of those five examples, I believe that the examples represent but five among conceivable dozens of unwarranted invasions of privacy. Further, when dealing with questions of privacy, subjective judgments must often be made. While one reasonable person might believe that disclosure of certain personal information would be innocuous, thereby resulting in a permissible invasion of privacy, an equally reasonable person might view disclosure of the same information as offensive, thereby resulting in an unwarranted invasion of personal privacy.

From my perspective, the information contained in the census records that you enclosed, such as home addresses, dates of birth and home telephone numbers could generally be withheld under §87(2)(b) of the Freedom of Information Law.

While, as indicated earlier, I do not believe that the information falls within the scope of the Buckley Amendment, perhaps the regulations could serve as a guide to appropriate action by the school district. Specifically, the regulations indicate that an educational agency cannot disclose directory information unless it has followed the procedure set forth in §99.37. That provision requires that public notice of the intent to disclose directory information be given to parents of students. The parents then may essentially veto disclosure of any item of directory information pertaining to their children.

In sum, I believe that the provisions of the Freedom of Information Law concerning the protection of privacy could justifiably be asserted to withhold the information sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3584

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

January 8, 1985

Mr. Michael Murphy
#84-C-198
Cell location 17-40
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. Murphy:

I have received your letter of December 17 in which you requested guidance concerning the Freedom of Information Law.

According to your letter, you sent a request in April to the Niagara County Probation Department, which, in response, indicated that the County Court Judge "disapproved" the request. You renewed your request in December, and in reply, an official of the Department wrote that "the only one who has authority to release this information is the sentencing judge". It was added that "your request should be sent directly to the judge".

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

Based upon the nature of the responses by the Probation Department, it appears that you requested a copy of the presentence report. If that is so, I would agree with the contentions expressed by Department officials for the following reasons.

The first ground for denial of access to records in the Freedom of Information Law, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law concerning pre-sentence reports. Subdivisions (1) and (2) of §390.50 state that:

> "1. [A]ny pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon speicific authorization of the court."
>
> "2. [N]ot less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination by the defendant's attorney, the defendant himself, if he has no attorney, and upon such examination the prosecutor shall also be permitted to examine the report or memoranda. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are not disclosed, the court shall state for the record that a part or parts of the report or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to appellate review."

In view of the foregoing, it appears that a pre-sentence report may be made available only by a court, and only under the circumstances described in §390.50. As such, it is suggested that you might want to discuss the issue further with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3585

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

January 8, 1985

Mr. Edwin V. Vedder III
[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. Vedder:

I have received your letter of December 20 in which you raised questions concerning rights of access to records.

The initial area of inquiry concerns a meeting of December 5 of the Schoharie Central School District Board of Education, during which the Superintendent made a proposal concerning the 150th anniversary of the Schoharie Central School. You wrote that the proposal was distributed to Board members, and that you later requested a copy. The request was initially denied on the ground that it consisted of "notes of Superintendent". You appealed the denial, and the report was made available as a "courtesy". Your question is whether the report is subject to the Freedom of Information Law.

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

First, the Freedom of Information Law is applicable to all records of an agency, such as a school district. Further, §86(4) of the Law defines "record" broadly to include:

> "any information kept, held, filed, produced or reporduced 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, even "notes" would in my view constitute a "record" subject to rights of access granted by the Freedom of Information Law. I point out that it has been determined judicially that "personal" notes taken at a meeting fall within the scope of the definition of "record" and, therefore, within the requirements of the Law [see Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

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

Third, it is possible that one of the grounds for denial might have been applicable. Specifically, §87(2)(g) provides that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. insturctions 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 notes or report could in my view have likely been characterized as "intra-agency" material. To the extent that it contained factual information, I believe that it would have been accessible under §87(2)(g)(i). To the extent that it consisted of advice or a recommendation, for example, it might have been deniable. If, however, the proposal or report was adopted or approved by the Board, I believe that it could be available as a "final agency policy or determination" pursuant to §87(2)(g)(iii).

The second area of inquiry pertains to the same meeting, during which the Board discussed the "monthly discipline report". You requested two monthly reports and specified that "anything that may identify the student" could be "blocked out". Although the reports were denied pursuant to the Buckley Amendment, it is your view that the reports should be available after any identifying details have been deleted.

While I am in general agreement with your contention, I believe that the surrounding circumstances dictate the extent, if any, to which the contents of the reports should be disclosed.

As you may be aware, the federal Family Educational Rights and Privacy Act, commonly known as the "Buckley Amendment", generally prohibits the District from disclosing "education records" that are "personally identifiable" to a particular student or students without the consent of the parents of the students.

Section 99.3 of the regulations promulgated pursuant to the Buckley Amendment by the U.S. Department of Education defines a series of terms. Among those terms is "personally identifiable", which is defined 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, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable."

From my perspective, the key phrase in the language quoted above is "easily traceable". In some situations, the deletion of identifying details might adequately protect the privacy of a student who is the subject of disciplinary action. In such situations, the substance of a reprot could be disclosed after having deleted identifying details. In other situations, the deletion of identifying details alone might not be sufficient to protect the privacy of a student, for the remainder of the report might nonetheless render it "easily traceable" to a student. In short, I believe that the specific facts and circumstances surrounding a disciplinary action pertaining to a student must be considered to determine the extent to which such a report should 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:ew

cc: Charlotte Gregory, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3586

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

January 10, 1985

Mr. Louis Feren, P.C.
Feren and Flynn
Attorneys at Law
68 William 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. Feren:

I have received your letter of December 17 in which you requested assistance in obtaining copies of records related to a certain accident.

According to your letter, you requested the records of the Port Authority of New York and New Jersey which pertained to the accident. Under the Port Authority's Freedom of Information policy, it offered to make available copies of the police blotter extract and the motor vehicle accident report. You appealed to the General Counsel when no response was received from the Port Authority with respect to the photographs and the Port Authority police report.

In addition, you explained that similar information was requested from the State Insurance Fund. According to a letter from the State Fund, the agency's position is that "since anything obtained in any investigation was in connection with actual or potential claims or suits against our policyholder, it constitutes material prepared for litigation and attorney work product." It appears that the State Fund is defending the employer in an action in which you represent the plaintiff. For that reason, the State Fund is withholding the records which you seek. Moreover, the State Fund claims that the investigative materials are intra-agency materials and it has also denied access on that basis.

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

First, with respect to the Port Authority, a bi-state agency, neither the New York nor the New Jersey access statutes apply to the records maintained by the Port Authority. The reason for this, of course, is that neither New York nor New Jersey has the authority to impose its laws upon another state. Thus, the Port Authority is not an "agency" as defined by the Freedom of Information Law. Any rights of access to the records maintained by the Port Authority are governed by the Port Authority's own policy as adopted by its Board of Directors.

Second, with respect to the State Fund, there may be merit in the agency's claim that the records are properly withheld as material prepared for litigation and attorney work product. In my view, Farbman v. New York City Health and Hospitals, (62 NY 2d 75), 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. However, 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).

It is my opinion that material prepared for litigation is "specifically execpted" by statute and may be withheld under the Freedom of Information Law.

However, it is unclear how or why the records of the State Fund were developed or obtained. I point out that the Second Department held in Westchester Rockland Newspapers, Inc. v. Mosczydlowski, (58 AD 2d 234), that a police report did not qualify as material prepared solely for litigation because it had multiple purposes. The Court found that the report enabled the District Attorney to determine whether a crime had been committed, it enabled the Police Department to determine whether any of its personnel were guilty of breach of duty and it was conducted in the regular course of official police business. Without a more detailed description of the records withheld by the State Fund, I am unable to advise whether they are materials prepared for litigation as contemplated by Article 31 of the Civil Practice Law and Rules.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3587

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

January 10, 1985

Mr. Yacub Shamsid-Deen
a/k/a Jory Lowrance
#77-A-3323
F-1-29
Box 51
Comstock, NY 12821-0051

Dear Mr. Shamsid-Deen:

I have received your letter of January 8 in which you requested from this office records pertaining to "Extension #84-2414 for Tier III Hearing..."

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 generally 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. Nevertheless, I would like to offer the following comments and suggestions.

First, as a general matter, a request for records should be directed to the agency that maintains the records. In this instance, it appears that the records are kept at your facility or perhaps at the central office of the Department of Correctional Services.

Second, §87(1) of the Freedom of Information Law requires each agency to promulgate regulations concerning the prodecural implementation of the Law. In this regard, the regulations of the Department of Correctional Services indicate that a request for records kept at a facility should be directed to the facility superintendent or his designee. If records are kept at the Department's Albany offices, a request should be sent 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:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3588

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

January 10, 1985

Mr. Willie Welch
Clinton Correctional Facility
Box B.
Dannemora, NY 12929

Dear Mr. Welch:

I have received your letter of January 5 in which you request a copy of grand jury minutes pertaining to you.

Please be advised that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does not maintain possession of records generally, such as those in which you are interested.

Nevertheless, 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."

As such, the Freedom of Information Law does not include the courts or court records within its coverage.

Second, although the Freedom of Information Law does not include court records within its scope, various provisions of the Judiciary Law and other court acts often require that court records be made available. Therefore, it is suggested the you direct your request to the clerk of the court in which you were convicted. It is also recommended 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

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3589

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

January 14, 1985

Mr. Paul J. Harding
American Tube Cleaning
Systems, Inc.
44 South Bayles Avenue
P.O. Box 1226
Port Washington, NY 11050

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

Dear Mr. Harding:

Your letter of December 17 addressed to Ms. Betty Keyes of the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is responsible for providing advice with respect to the Freedom of Information Law.

According to your letter and the materials attached to it, your firm, American Tube Cleaning Systems, Inc. (ATCS), submitted an apparently unsuccessful bid to the State University Construction Fund regarding the possible use of your products at the State University College at Brockport. It is your view that "ATCS feels that the Fund did not do an engineering evaluation of the products, but made a decision based upon information supplied by other vendors." Further, in a letter of November 30 addressed to Albert Schlosberg, the Fund's Chief Engineer for Architectural and Engineering Services, you sought the reasons for the rejection of your proposal and wrote that:

> "ATCS would also like specifically to know why verbal approval was given to Dineen Mechanical Contractors on the morning of November 29, 1984, and then retracted by yourself on the same afternoon. Also, all documents which may be in your files which may be accessed under the 'Freedom of Information Act', including all notes pertaining to your contacts with our customers which have been operating our equipment for many years, are hereby requested."

As of the date of your letter to Ms. Keyes, it does not appear that an appropriate response had been given.

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

First, I believe that the State University Construction Fund is an "agency" required to comply with the Freedom of Information Law [see attached, Freedom of Information Law, §86(3)], for §371 of the Education Law states that "[T]he fund shall be a corporate governmental agency constituting a public benefit corporation."

Second, the Freedom of Information Law is applicable to all records of an agency. It is noted that §86(4) of the Law defines "record" broadly to include:

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

Therefore, any materials maintained by the Fund falling within the scope of your request to Mr. Schlosberg are "records" subject to rights granted by the Freedom of Information Law.

Third, the Freedom of Information Law is applicable to existing records. Section 89(3) states in part that, as a general rule, an agency is not required to create or prepare a record in response to a request. Consequently, if, for example, no record exists that indicates the reasons for the rejection of your bid, the Freedom of Information Law would not require the Fund to create such a record on your behalf.

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 (i) of the Law.

Under the circumstances, it appears that three of the grounds for denial might be relevant to the records sought. However, the extent to which any or all of those grounds may appropriately be asserted would be dependent upon the nature and content of the records, as well as the effect of disclosure.

Perhaps most relevant is §87(2)(c), which permits an agency to withhold records or portions thereof which:

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

If, for example, no contract has been awarded, to the extent that disclosure would "impair" an imminent contract award, records may be withheld. If, on the other hand, a contract has been awarded, any "impairment" as a result of disclosure would likely have disappeared. Further, in a situation in which an unsuccessful bidder sought materials concerning a successful bid, the court found that:

> "[T]he respondents have not sustained their burden of proof by the mere summary repetition of the statutory exemption. Moreover, it would appear that disclosure of the contents of the successful bid proposal and the basis of the determination to accept the successful bid proposal by the agency together with its findings, reports and memoranda would be expressive of the legislative purposes set forth in section 84 P.O.L....[Public Officers Law]...
>
> "Furthermore, in view of the P.O.L., the successful bidder had no reasonable expectation of not having its bid open to the public..." [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196, 198 (1980)].

A second potentially relevant basis for withholding 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 position of the subject enterprise."

Once again, the language quoted above is based upon potentially harmful effects of disclosure. It does not appear, based upon the language of your letter, that any trade secret information has been requested.

A final ground for denial of possible significance is §87(2)(g), which enables an agency to deny access to certain aspects of internal communications or communications with other agencies. 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 or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Law, prescribe 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 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:ew

cc: Betty Keyes
Albert M. Schlosberg
General Manager, State University Construction Fund

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-12
FOIL-AO-3590

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

January 14, 1985

Mr. Daniel Procopio
#76-C-662
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr Procopio:

I recently received your letter of December 27 in which you raised a series of questions and requested various materials from this office.

One area of inquiry is the relationship between the Freedom of Information and the Personal Privacy Protection Laws, and "the use of Privacy exemptions to limit public access to records..." In this regard, it is emphasized that the Personal Privacy Protection Law preserves any rights granted by the Freedom of Information Law. Although the Personal Privacy Protection Law requires that certain records or personal information be withheld, §96(1)(c) permits "disclosure under article six of this chapter...", which is the Freedom of Information Law. Stated differently, nothing in the Personal Privacy Prctection Law diminishes rights of access to records established by the Freedom of Information Law.

It is noted, too, that §95(1) of the Personal Privacy Protection Law generally provides rights of access to an individual to records pertaining to him. Nevertheless, rights of access provided by the Personal Privacy Protection Law do not apply to "public safety agency records" [see Personal Privacy Protection Law, §§95(7) and 92(8)]. Even though "public safety agency records" are not subject to rights of access granted by the Personal Privacy Protection Law, they are subject to whatever rights exist under the Freedom of Information Law.

A second question pertains to the possibility of a requirement similar to that established under the federal Freedom of Information Act in Vaughn v. Rosen (484 F. 2d 820). While §89(3) of the Freedom of Information Law re-

quires that a denial of request be given in writing, there is no decision of which I am aware that requires the degree of detail as that required in a Vaughn index.

Third, with respect to the waiver of fees, although the federal Act specifically refers to the possibility of a waiver, no such provision exists in the New York Freedom of Information Law. As a general rule, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy; no fee is permitted for searching for records or personnel time.

Lastly, enclosed are the materials that you requested. Included is the latest annual report of the Committee, which contains an index to advisory opinions prepared under the Freedom of Information Law and summaries of judicial determinations. Both the index and the case summary are cumulative and include reference to opinions and decisions rendered since the enactment of the Freedom of Information Law. There is no index to opinions regarding the Personal Privacy Law, for that Law became effective recently, September 1, 1984. Further, there have been no judicial decisions rendered under the Personal Privacy Protection Law. Also enclosed are copies of an explanatory pamphlet regarding the Freedom of Information Law, and copies of the advisory opinions and the decisions that you requested. Although there is no waiver provision, the materials are being made available to you at no cost.

I hope that 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

Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13
FOIL-AO-3591

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

January 15, 1985

[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 December 24 in which you requested an advisory opinion regarding documents related to a Civil Service oral exam.

According to your letter, in October, 1984, you requested access to all documents, written and on tape, concerning your oral exam. You explained that your request was denied based upon the Freedom of Information Law and regulations of the Department of Civil Service. In addition, you requested access to examiners' notes and individual rating sheets prepared during the exam. Finally, you requested that a letter to you, included in your file at Civil Service, be corrected pursuant to the provisions of the Personal Privacy Protection Law.

Based upon the letters attached to your correspondence and a telephone conversation with Mr. Harold Snyder of the Department of Civil Service, it appears that you were granted access to many of the documents that you requested. According to the letter of November 19 from Ms. Kathy A. Bennett, you have been allowed to listen to a tape recording of your oral examination and have been given a summary of the examiners' rating sheets. Apparently, the only documents to which you have been denied are the oral examiners' notes and the examiners' individual rating sheets. The denial of those records is based upon the Freedom of Information Law and the regulations of the Department.

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

First, the Personal Privacy Protection Law requires state agencies to make available records containing personal information, e.g., information concerning an individual which is identifiable to him or her, upon the request of that individual. However, certain records need not be made available, for example, records to which an individual is specifically prohibited by statute from gaining access [Personal Privacy Protection Law, §95(6)(a)]. Although §87(2)(h) of the Freedom of Information Law permits an agency to withhold records or portions thereof which consist of examination questions or answers that may be administered in the future, I do not believe that §87(2)(h) is a statute which specifically prohibits a person from gaining access to personal information. Section 87(2) lists various categories of records to which an agency may deny access. In my view, that section does not require an agency to withhold the types of records listed.

Second, the only instances in which records must be withheld involve situations in which a statute prohibits disclosure. The Department has based its denial, in part, on three of its regulations which provide for the security of examination questions and answers. If the examiners' rating sheets and notes are released, the Department believes the examination questions and answers will be revealed.

However, it appears that you have already had access to the examination questions when you were permitted to listen to the tape recording of the oral examination. Moreover, the cited regulations do not directly address the disclosure of examination answers. Furthermore, in my view, regulations promulgated by an agency are not statutes which specifically prohibit a person from gaining access to personal information as contemplated by §95(6)(a) of the Personal Privacy Protection Law [see, Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405; 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)]. Although the regulations were promulgated pursuant to §74(4) of the Civil Service Law which directs the President of the Commission to "make regulations for and have control of examinations", in my view, the statute does not prohibit all of the personal information contained in the examiners' rating sheets and notes.

Finally, with respect to your request that your record be corrected, I direct you to §95(2) of the Personal Privacy Protection Law. Basically, that section provides a procedure whereby an individual may request that an agency correct or amend a record or personal information, pertaining to that individual, which he or she believes is not accurate, relevant, timely or complete.

According to your letter, you requested that Ms. Bennett's letter of November 19 to you be corrected to delete the three regulations which she cited to deny you access to the examiners' records. It is your belief that the three regulations are irrelevant to your request and that they should therefore be deleted from her letter. In the alternative, you would like to file a statement of disagreement with your record.

In my opinion, Ms. Bennett's letter, although it pertains to you, need not be corrected or amended. While you may believe that Ms. Bennett's reliance upon the regulations is incorrect or irrelevant, the basis of her determination is indeed relevant to your request. Moreover, her reliance upon the regulations is a part of her interpretation of law, that is, her opinion, and in my view, it does not affect the correctness or relevance of personal information maintained about you by the Department.

In short, I do not believe that §95(2) permits an individual to request that a state official's interpretation of law be corrected, even if that interpretation pertains to the individual.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

cc: Mr. Harold Snyder
Ms. Kathy A. Bennett, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3592

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

January 16, 1985

Mr. Lawrence Cipollone
#83-A-6607
354 Hunter Street (M 372)
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. Cipollone:

I have received your letter in which you asked how you might obtain records.

Specifically, you wrote that you are interested in obtaining a "presentence investigation report" and the "arresting Detective's" personnel file.

In this regard, although the Freedom of Information Law provides broad rights of access, the records in question in my view fall outside the scope of the Freedom of Information Law in great measure or perhaps in their entirety.

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 first ground for withholding, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". Both of the types of records that you are seeking likely are "exempted from disclosure" by statute.

In brief, a pre-sentence report must be kept confidential pursuant to §390.50 of the Criminal Procedure Law. Further, I believe that only the sentencing judge may disclose a pre-sentence report. As such, it is suggested that you, perhaps with the assistance of an attorney, might want to seek the report from the sentencing judge.

With respect to the detective's personnel file, §50-a (1) of the Civil Rights Law states in relevant part that:

> "[A]ll personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department...shall be considered confidential and not subject to inspection or review without the express written consent of such police officer ...except as may be mandated by lawful court order."

In sum, based upon the provisions described above, it does not appear that the Freedom of Information Law could be used to gain access to the records that you seek.

I hope that 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-3593

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

January 16, 1985

Mr. Joseph Scott
Great Meadow Correctional Facility
P.O. 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. Scott:

I have received your letter of December 20 concerning access to medical records.

Specifically, you indicated that you sent a request, a copy of which is attached to your letter, to the Kings County Hospital Center for records of "treatment receive[d] at Kings County Hospital". Although the request is dated August 20, you apparently never received a response.

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

First, since the Kings County Hospital Center is a part of the New York City Health and Hospitals Corporation, I believe that it is an "agency" required to comply with the Freedom of Information Law.

Second, in conjunction with the regulations promulgated by the Committee on Open Government, each agency is required to designate one or more "records access officers" who have the duty for coordinating the agency's response to requests for records under the Freedom of Information Law. Since your request is merely addressed to the Kings County Hospital Center in Brooklyn, it is suggested that you resubmit a request to the records access officer of the Health and Hospitals Corporation at 125 Worth Street, New York, NY 10013. According to the City Record, the records access officer is the secretary to the Corporation. As such, perhaps a request could be directed to the secretary, while suggesting that, if that office is inappropriate, your request might be forwarded accordingly.

Third, it is noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Although your request might have enabled the agency to locate the records in which you are interested, it is recommended that additional detail be given, such as dates of treatment or admission, descriptions of medical problems and the like.

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

Under the circumstances, it is possible that not all medical records pertaining to you must be made available under the Freedom of Information Law. While test results and similar factual materials must in my view be made available, diagnostic opinions or recommendations, for example, might justifiably be withheld [see attached, Freedom of Information Law, §87(2)(g)].

There is another statute particularly relevant to medical records. Section 17 of the Public Health Law provides that physicians designated by a competent patient may request and obtain on behalf of the patient medical records maintained by another physician or hospital. Therefore, a physician, perhaps at the facility, could request and obtain the medical records from Kings County Hospital Center on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3594

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

January 16, 1985

Mr. Leo B. Harford
[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. Harford:

I have received your letter of January 1 in which you request an advisory opinion under the Freedom of Information Law.

According to your letter:

> "[A]t Onondaga Community College each semster [sic] the Advising Coordinator prepares a schedule of faculty personnel to advise students during certain periods. After the schedule is prepared the coordinator notifies the faculty member in writing as to dates the faculty member is to advise the students assigned."

Your question is whether, in my opinion, the work schedule that you described is accessible under the Freedom of Information Law. In this regard, I would like to offer the following comments.

First, I believe that Onondaga Community College is an "agency" subject to the requirements of the Freedom of Information Law, for it is part of the State University system and is operated by Onondaga County.

Second, the Freedom of Information Law includes within its scope all records of an agency. It is noted that §86(4) of the Law defines "record" broadly to include:

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

Based upon the language quoted above, the work schedules in my view clearly constitute "records" that are subject to rights granted by the Freedom of Information Law.

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

Of potential 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.

Further, as you have described the records, they consist solely of factual information. If that is so, §87(2)(g) could not be cited as a basis for withholding.

The other ground for denial of relevance is §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy". Based upon various judicial determinations, as a general rule, records that are relevant to the performance of a public employee's official duties have been found to be available, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Gannet 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); Geneva Printing Co. and Donald C. Hadley v. South Seneca School District, Sup. Ct., Monroe Cty., July 12, 1982; 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]. In my view, the work schedule of a faculty member is relevant to the performance of his or her official duties, it would not indicate any personal details regarding the faculty member and, therefore, it would be accessible.

Lastly, it is unclear from your letter whether students are identified on the work schedules. If students are not identified, once again, I believe that the schedules would be accessible, for no ground for denial could appropriately be cited. Assuming, however, that students' names appear on the schedules, I believe that their names or other identifying details pertaining to the students would have to be deleted prior to making the remainder of the schedules available. In brief, the federal Family Educational Rights and Privacy Act prohibits the disclosure of education records identifiable to students unless parents of students under the age of eighteen or, in this case, the students themselves consent to disclosure. Therefore, if the schedules identify students, those portions of the schedules must in my opinion 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:ew

cc: Public Information Officer, Onondaga Community College

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3595

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

January 16, 1985

Mr. Jack McAndrew
[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. McAndrew:

I have received your letters of December 31 and January 2 in which you raised a series of questions "relative to the actions of the Port Jervis School District".

Your first question is whether the District must "maintain a subject matter list". You wrote that you have requested such a list since September, but that it has not yet been produced. In this regard, although the Freedom of Information Law generally provides that an agency need not create a record in response to a request [see §89(3)], one of the exceptions to that rule involves the so-called "subject matter list". Specifically, §87(3)(c) states that:

> "[E]ach agency shall maintain: ...
>
> (c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

Therefore, I believe that the District is required to prepare, maintain and make available a subject matter list. It is noted, too, that the Freedom of Information Law has required the maintenance of a subject matter list since its enactment in 1974.

Second, you wrote that:

> "[T]he negotiated contracts of the Port Jervis School District with its employees states (sic) that personnel

> files are privilege information between the employee and the employer. Material in the files are not available to the general public."

In a related vein, you added that, having recently reviewed your personnel file, you found various material of a general nature, which is not, to your knowledge, "cross-filed and available elsewhere to the public". In this regard, you asked if it is:

> "appropriate for the school district to include documents of a general nature in employees' personnel files and make said material available to the general public elsewhere? If the school district is not going to cross-file this material of a general nature, should all employee personnel files be index[ed]?"

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

From my perspective, a contract or collective bargaining agreement cannot serve to abridge rights granted by a statute, such as the Freedom of Information Law. Consequently, to the extent that a contract diminishes rights provided by the Freedom of Information Law, I believe that it is void. Further, the nature and contents of records, not where they are filed, determine whether they are accessible to the public. In my view, the mere placement of records in personnel files does not make them privileged or confidential. On the contrary, the only basis for determining the extent to which records may be available or deniable is the Freedom of Information Law and, from there, whether any of the grounds for denial listed in the Freedom of Information Law may appropriately be asserted [see e.g., Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Geneva Printing Co. and Donald C. Hadley v. South Seneca School District, Sup. Ct., Monroe Cty., July 12, 1982; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Montes v. State,406 NYS 2d 664 (Court of Claims, 1978)].

With regard to indexing, other than the subject matter list, which is supposed to provide an indication of the types of records maintained by an agency, the Freedom of Information Law contains no requirements concerning the means by which an agency files or indexes its records.

In your third area of inquiry, you wrote that agendas prepared for meetings of the Board of Education identify in a general manner the topics to be discussed. However, the Board receives a "packet" containing a variety of "documents prepared by the administration addressing" issues. You have asked whether the "agenda packet" should be available to the public when the agenda is made available, or perhaps "when the packet is made available to Board members".

It is noted that neither the Freedom of Information Law nor the Open Meetings Law refers to agendas, and I am unaware of any statute of general application that requires the preparation of an agenda.

With regard to access to the "packet", I believe that the contents determine rights of access. If indeed the administration prepares the packet, at least one of the gournds for denial would apparently be relevant. Records prepared by staff and transmitted to the Board could likely be characterized as "inter-agency materials", and §87(2)(g) of the Freedom of Information Law states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available. To the extent that such materials contain opinions, advice, recommendations, and the like, they would fall within the scope of the exception and access might appropriately be denied.

Other factors may be present as well. For instance, if a record prepared for review by the Board pertains to a particular student or students, it might be confidential pursuant to the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) and, therefore, outside the scope of rights granted by the Freedom of Information Law [see §87(2)(a)]. There may be situations where disclosure would result in an "unwarranted invasion of personal privacy" [§87(2)(b)]. In short, it is reiterated that the packet would be available or deniable, depending upon its contents.

You added that, in the past, "the District has required five-days from the date of the meeting before permitting public access to said agenda packets" and asked whether this is appropriate. Section 89(3) of the Freedom of Information Law requires that an agency respond to a written request for records reasonably described within five business days of its receipt. However, I do not believe that an agency must wait five business days before responding; on the contrary, five business days should in my view generally be considered a deadline for responding to a request that may be honored at any time prior to five business days from the receipt of a request.

Lastly, according to your letter, on December 17, the Board approved a stipulation of agreement between the negotiating committee of the Teachers' Association and the District. The Board minutes state that:

> "A copy of the Agreement is on file with the Superintendent of Schools in the District's Administrative Office..."

Although your request for the minutes of the meeting of December 17 was granted, the Superintendent denied access to the agreement, "stating that the document was not available to the public until the Board approved their minutes of the December 17, 1984 meeting at their next meeting of January 8, 1985". You asked whether the Superintendent's action was correct.

In my view, the approval of the minutes by the Board is irrelevant to rights of access to an agreement approved by the Board. The only ground for denial in the Freedom of Information Law that might have been relevant is §87(2)(c), which states that an agency may withhold records or portions thereof that:

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

The issue, based upon the language quoted above, is whether disclosure of the agreement would "impair present or imminent....collective bargaining negotiations." Unless I am mistaken, the agreement appears to have signified an end to the negotiations. If that is so, disclosure would not result in any "impairment" of the collective bargaining process. Assuming that I have interpreted the facts accurately, the agreement would be available as soon as it exists.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Frank Moscati
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3596

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

January 17, 1985

Mr. Collin Fearon, Jr-El
#74-B-395
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. Fearon:

I have received your letter of January 3.

Your inquiry pertains to a request for "information", rather than documents. Since your request "was denied on the fact that the Freedom of Information Law only allows for disclosure of records", you asked for "an official statement on this matter".

In this regard, the title of the Freedom of Information Law may be somewhat misleading, for it pertains to requests for existing records, not information. As such, the Freedom of Information Law is not a vehicle under which agency officials must answer questions. Further, §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 for information that does not exist in the form of a record or records. In short, the Freedom of Information Law pertains to existing records, which are accessible or deniable pursuant ot the grounds for denial listed in §87(2)(a) through (i) of the Law.

As you requested, a copy of this response will be sent to Rodney Moody, 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:ew

cc: Rodney Moody

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3597

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

January 17, 1985

Mr. Joseph Hop-Wah
#79-B-1770
Box 500
Elmira, NY 14902

Dear Mr. Hop-Wah:

I have received your letter of January 9, in which you requested from this office a report concerning conditions at the Attica Correctional Facility.

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 the report 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 like to offer the following comments and suggestions.

First, as a general matter, a request for records should be directed to the agency that maintains the records. In this instance, it appears that the records are kept at your facility or perhaps at the central office of the Department of Correctional Services.

Second, §87(1) of the Freedom of Information Law requires each agency to promulgate regulations concerning the procedural implementation of the Law. In this regard, the regulations of the Department of Correctional Services indicate that a request for records kept at a facility should be directed to the facility superintendent or his designee. If records are kept at the Department's Albany offices, a request should be sent 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3598

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

January 17, 1985

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 January 3 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns requests for and rights of access to municipal records. In your words, the following questions were raised:

> "Specifically, is it possible for [you] to ask for a copy of every letter sent to a Town in a week, month or year?...isn't any record, including correspondence on file with the town accessible?"

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

With respect to the specificity of requests, it is noted that the Freedom of Information Law when initially enacted required that an applicant request "identifiable" records [see original Freedom of Information Law, §88(6)]. That requirement was in many instances difficult to meet, for without knowledge of the existence of a particular record, an applicant could not identify the record sought. As a consequence, when the original provisions were repealed with a new Freedom of Information Law, effective January 1, 1978, the standard was changed. Currently, §89(3) of the Law requires that a written request "reasonably describe" the records sought. As such, an applicant need not request a record with particularity; on the contrary, in a situation involving thousands of records, the Court of Appeals, the states' highest court, found that the Freedom of Information Law:

> "requires only that the records be 'reasonably described'...so that the respondent agency may locate the records in question... While complaining that the request is so broad as to require thousands of records, respondents have not established that the descriptions were insufficient for purposes of locating and identifying the documents sought" [M. Farbman & Sons v. New York City, 62 NYS 2d 75, 476 NYS 2d 69, 72 (1984)].

Based upon the language of the Freedom of Information Law and its judicial interpretation, if a request describes the records sought in a manner that enables the agency to locate the records, the request would in my opinion meet the requirements of the Law. Therefore, I believe a request for letters sent to a town, or perhaps to a particular office, officer or department of town government, within a specific week or month, for example, would "reasonably describe" the records sought in accordance with the Freedom of Information Law.

In terms of rights of access to records, 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.

Although it may be presumed that letters sent to a town are accessible, it is possible that some letters might be deniable, perhaps in part, depending upon their contents and effects of disclosure. As a general matter, the grounds for denial are based upon potentially harmful effects of disclosure. For example, a situation that arises often concerns complaints sent to agencies pertaining to any number of situations (i.e., an unleashed dog, a dirty restaurant, a door to door vendor, etc.). It has been advised that the substance of a complaint is accessible, but that identifying details concerning the person who made the complaint may be deleted when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. In that kind of situation, an agency could photocopy the complaint in response to a request and delete identifying details to protect privacy.

In sum, I agree with your intimation that the records in question are presumptively available. Nevertheless, it is possible in some instances that they may be withheld in whole or in part, depending upon their contents, in accordance with the grounds for denial appearing 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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3599

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

January 17, 1985

Mr. Charles Brown
#82-A-2471
Elmira Correctional Facility
Box 500
Elmira, NY 14902-500

The staff of the Committee on Open 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 January 1 in which you requested assistance in obtaining records.

In brief, in response to a request for a report of the Commission of Corrections, which is entitled "State Correctional Facility Health Services: A Systemwide Perspective", you were informed that the report consists of 108 pages, and that it would be made available upon payment of a fee of $27.00. Since you do not have funds, you asked that I assist you in obtaining the report free of charge.

Please be advised that §87(1)(b)(iii) of the Freedom of Information Law generally permits an agency to charge up to twenty-five cents per photocopy. Therefore, if the response to your request involves the making of photocopies by the Commission, I believe that the fee of $27.00 would be legal under the Freedom of Information Law. It is also noted that although the federal Freedom of Information Act contains provisions concerning the possible waiver of fees, the New York Freedom of Information Law does not include any similar provisions.

It is suggested that you discuss the matter with the librarian at your facility. Perhaps the librarian or other official of the facility could arrange to obtain the report for the facility library.

I regret that I cannot be of assistance in this matter. 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-3600

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

January 17, 1985

Mr. Jory Lowrance
#77-A-3323
F-1-29
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. Lowrance:

This is to acknowledge receipt of your letter of January 10.

According to your letter, on January 9 you directed a request under the Freedom of Information Law to B.W. Ward, Senior Correction Counselor at Great Meadow Correctional Facility. Although your request was denied in writing, you were not given information regarding the person to whom you may appeal the denial.

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

First, §87(1) of the Freedom of Information Law requires each agency to promulgate procedural regulations in conformity with the Law and the Committee's regulations. An agency's regulations must include the designation of one or more "records access officers" who respond initially to requests, as well as an appeals officer.

Second, the regulations of the Department of Correctional Services indicate that, for records kept at a facility, the records access officer is the Superintendent or his designee. If Mr. Ward is not the designee of the Superintendent concerning requests made under the Freedom of Information Law, it is suggested that you direct a request to the Superintendent or the person designated to respond to requests.

Third, assuming that Mr. Ward is the Superintendent's designee, you have the right to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive or governing body, who shall within 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, the regulations of the Department of Correctional Services provide that appeals should be sent to Counsel to the Department 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3601

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

January 17, 1985

Mr. Collin Fearon, Jr-El
#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 January 3 in which you raised a series of questions.

Your first area of inquiry involves the Facilities Development Corporation, the name and title of the person who heads the Corporation, and whether it is "a State or private agency". Although these questions do not pertain to the Freedom of Information Law, as a service to you, research has been conducted on your behalf. In this regard, §4 of Chapter 214 of the Unconsolidated Laws states that the Facilities Development Corporation "shall be a corporate government agency constituting a public benefit corporation". As such, the Facilities Development Corporation is in my view a state agency. Further, the executive director of the Corporation is Walter J. Hinckley.

The other questions are whether the Freedom of Information Law may be used to seek information from "private companies" or "private individuals". I point out here that 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."

Therefore, as a general matter, the Freedom of Information Law does not apply to records maintained by private companies or private individuals, but rather to records of units of state and local government in New York.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3602

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

January 18, 1985

Mr. Thrameah Abdul Aziz
#83-A-5954
C-29-20
Attica Correctional Facility
Attica, NY 14011-0149

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

Dear Mr. Aziz:

I have received your letter of January 2 in which you requested assistance.

According to your letter and the attached correspondence, you unsuccessfully requested a copy of your pre-sentence report from the Attica Correctional Facility.

In this regard, although the Freedom of Information Law grants broad rights of access, it appears that the denial by the Department of Correctional Services was appropriate. The first ground 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". Based upon a review of §390.50 of the Criminal Procedure Law, pre-sentence reports are in my view generally confidential, and the Department of Correctional Services is likely prohibited from disclosing a pre-sentence report in its possession. Further, it appears that a pre-sentence report may be made available only by the court. As such, it is suggested that you direct your request to the court. It is also recommended 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:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3603

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

January 22, 1985

Mr. Ismael Saladeen
#83-C-722
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. Saladeen:

I have received your letter of January 4. In your letter, you explained that your "juvenile records were ordered sealed by the court 15 years ago, however, immediately preceding [your] arrest, the local media reported [your] juvenile adjudication in depth."

You would like to know how the media obtained such information and whether the Freedom of Information Law grants the media access to sealed records. In this regard, I would like to offer the following comments.

First, the Freedom of Information Law does not pertain to records kept or maintained by the courts. Since the juvenile records to which you refer are likely maintained by Family Court, no provision of the Freedom of Information Law would grant access to those records. Moreover, the Law permits an agency to deny access to records which are specifically exempted from disclosure by a state statute, for example, police records sealed under §784 of the Family Court Act.

Second, the Freedom of Information Law does not include any provision which grants the media different rights or privileges than those granted to the public generally. Under the Law, all persons, regardless of status, are entitled to the same rights of access to records pursuant to the provisions of the Law.

Finally, I am not aware of any statute which would permit the media to obtain access to the sealed records of a juvenile offender. I regret that I can offer no suggestion as to how the media obtained information concerning your sealed juvenile records.

I hope that I have been of some asssitance. 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

FPPL-AO-6
FOIL-AO-3604

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

January 22, 1985

Mr. Bennett Liebman
State of New York
Executive Chamber
The Capitol
Albany, NY

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

Dear Mr. Liebman:

I have received your memorandum of January 16 in which you requested an advisory opinion under the Freedom of Information Law.

According to materials attached to your memorandum, a letter was sent to the Executive Chamber involving a request for "listings...of all gubernatorial appointments." It appears that one type of listing includes the name, agency, title, salary, dates of nomination and confirmation, and the county of residence of all such appointees. The request also pertains to records characterized as "Special Minority Listings for Hispanics and Blacks".

Your question is "whether data indicating the ethnic background or race of an appointee may be withheld pursuant to §87.2 of the Public Officers Law". In this regard, I would like to offer the following comments.

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

Second, I believe that a general listing of all gubernatorial appointees, without reference to data pertaining to ethnicity or race, would be accessible. Somewhat analogous to that type of a list is a payroll record required to be compiled pursuant to §87(3)(b) of the Freedom of Information Law. 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..."

The payroll record required to be prepared by agencies under §87(3)(b) is in my view clearly accessible to any person under the Freedom of Information Law [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, 59 AD 2d 765 (1976)].

Third, one of the grounds for denial appearing in the Freedom of Information Law, §87(2)(b), permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy" Although that standard often requires the making of subjective judgments, there are several judicial determinations pertaining to public employees that serve to provide guidance. As a general matter, when records pertaining to public employees are relevant to the performance of their official duties, it has been held that they are available, for disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy [see e.g., Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff;d 45 NY 2d 954 (1978); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Geneva Printing Co. and Donald C. Hadley v. South Seneca School District, Sup. Ct., Monroe Cty., July 12, 1982; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Octover 30, 1980]. Conversely, when records are irrelevant to the performance of one's official duties, it has been found that they may be withheld pursuant to §87(2)(b) [see e.g., Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, January 11, 1979; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1983].

From my perspective, based upon the Freedom of Information Law and its judicial interpretation, if an appointee's race or ethnicity is irrelevant to the performance of his or her official duties, such a record could likely be withheld under the Freedom of Information Law.

Consequently, to the extent that a list of all appointees contains racila or ethnic data identifiable to appointees, the racial and ethnic data could in my view be deleted on the ground that disclosure owuld constitute an unwarranted invasion of personal privacy. Similarly, I believe that a :special minority list: identifying minority appointees could be withheld on the same basis.

Lastly, if indeed disclosure of the ethnic and racial data would result in an unwarranted invasion of personal privacy, §89(2)-a of the Freedom of Information Law, when

read in conjunction with the Personal Privacy Protection Law, would prohibit the disclosure of the data. The cited provision, which was added to the Freedom of Information Law effective September 1, 1984, states 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."

Section 96(1) of the Public Officers Law, which is a part of the Personal Privacy Protection Law, prohibits state agencies from disclosing personal information identifiable to individuals, unless an exception permitting disclosure listed in §96(1) may be appropriately asserted. Based upon a review of those exceptions, if disclosure of ethnic or racial data would constitute an unwarranted invasion of personal privacy, I believe that the data must be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3605

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

January 25, 1985

Mr. Mark S. Truex
#80-B-1986
One Correction Way
Ogdensburg, NY 13669-2288

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

Dear Mr. Truex:

I have received your letter of January 6 in which you raised several issues regarding the Freedom of Information Law.

In your letter, you asked the following questions:

> "1. Can a request for copies of any and all records concerning myself, made to a specific department within this facility, such as Inmate Records [Coordinator] or Freedom of Information Access Officer for this facility, be denied as not being specific enough in regard to what exact information I am requesting?
>
> 2. Can this facility deny my request for information for the reasons stated in question #1, and then turn around and refuse to surrender a copy of a master index that would enable me to be more specific in my request as to the exact information I am seeking?
>
> 3. Can an indigent person compel an agency to provide copies of records, without being made to pay fees or costs, if thay can show a need for said copies and an inability to pay fees?
>
> 4. Finally, can you tell me where I can obtain more information regarding the Freedom of Information Act, both

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

First, I believe that your request for copies of any and all records concerning yourself made to the Inmate Records Coordinator does not contain sufficient detail to permit the agency to respond. Section 89(3) of the Freedom of Information Law provides that an agency respond within five business days to a request for a "record reasonably described". The purpose for describing the records sought is to enable the agency to locate the records. It is likely that the facility cannot easily locate records related to you without a more adequate description of the types of records that you seek.

Second, I have enclosed a copy of the regulations promulgated by the Department of Correctional Services pertaining to the Department's records. I direct your attention to §5.13(a) regarding subject matter lists. Section 5.13(a) requires each custodian of records, the superintendent or director of a facility, to maintain a reasonably detailed, up-to-date subject matter list of all records in his possession. A master index of all records maintained by the department must also be kept. Section 5.13(c) requires each custodian to make the index kept by him/her available for inspection and copying. The section also provides that any person desiring a copy of such list may request a copy, in writing and upon payment of the appropriate fee. In my view, you should be permitted to review the master index to determine the types of records maintained by the department. In addition, the regulations of the Committee on Open Government, 21 NYCRR 1401.2(b)(2), require the records access officer to assist the requester, if necessary, in identifying requested records.

Third, with respect to fees, I am not aware of any law which permits an indigent person to compel an agency to provide copies of records sought under the Freedom of Information Law without payment of fees. However, §5.36 of the enclosed regulations provides that the fee for copies of a record shall be twenty-five cents per page not exceeding nine by fourteen inches. That section further provides that:

> "Notwithstanding the provisions of this section, the custodian of the record may, in his discretion, waive all or any portion of the fees authorized by this section for any department record."

I point out that if the custodian refuses to waive the fee for copies of records which you request, you may nevertheless review accessible records at no charge.

Finally, I have enclosed two publications; one concerns the Federal Freedom of Information Act, and the other explains the scope of the State Freedom of Information and Open Meetings Laws.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3606

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

January 25, 1985

Mr. John Malowsky
#83-C-424
Box 618
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. Malowsky:

I have received your letter of January 7 in which you requested assistance in obtaining records concerning your mother.

According to your letter, you obtained certain information about your mother's medical history from the Department of Correctional Services in 1982. The medical information, however, was not detailed and §87(2)(b) of the Freedom of Information was cited as the reason for the lack of details. In November, 1984, you requested additional information concerning your mother and yourself. You explained that Mr. Victor Zuckerman, Associate Counsel for the Department, stated that no additional information, beyond the extensive information provided in 1982 could be provided to you.

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

First, §87(2)(b) permits an agency to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy. Section 89(2)(b)(ii) of the Freedom of Information Law provides that an unwarranted invasion of personal privacy includes disclosure of items involving the medical or personal records of a client or patient in a medical facility.

Second, I am aware of no law which grants a right of access to medical records of another individual. With respect to medical records which relate to you, §17 of the Public Health Law provides, in part, that:

> "[U]pon the written request of any competent patient, parent or guardian of an infant, 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 said physician or hospital, all x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physician or hospital..."

Thus, if the medical records which you seek are maintained by a private hospital or facility, I do not believe that you have a direct right of access to them. However you may request that a doctor obtain your medical records on your behalf.

Third, if the records which you seek are maintained by the correctional facility, the provisions of the Freedom of Information Law would apply. As discussed above, however, an agency may properly withhold the medical records of a patient in a medical facility on the grounds that disclosure would result in an unwarranted invasion of personal privacy. Since you are concerned about possible genetic disorders, I suggest that you discuss the matter with the facility physician. He or she may be able to assist you in completing your medical history.

I regret that I cannot be of greater assistance to you. 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3607

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

January 28, 1985

Mr. Anthony Scala
#81-A-5444
Downstate Correctional Facility
P.O. 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. Scala:

I have received your letter of January 10 as well as the materials attached to it.

According to the materials, you requested various documents from Partick Henry, District Attorney of Suffolk County, the Suffolk County property clerk, and the Clerk of the Court, on December 20 pursuant to the state and federal Freedom of Information and Privacy Acts Acts. In response to the request, you were informed that you must request records on "the standard form", a copy of which was sent to you.

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

First, the federal Acts that you cited are not applicable, for those statutes pertain only to records maintained by federal agencies. Further, although New York has enacted the "Personal Privacy Protection Law", that statute is applicable only to state agencies; it does not apply to units of local government, such as Suffolk County. It is also noted that the Freedom of Information Law, which does apply to Suffolk County and the records of the District Attorney, does not include within its scope the courts or court records. Therefore, to the extent that you are interested in obtaining court records, it is suggested that a separate request be sent to the clerk of the court that maintains the records sought.

Second, the response to your request is in my view inappropriate, for the Freedom of Information Law does not require that any particular form prescribed by an agency be completed. In brief, it has been consistently advised that any written request that "reasonably describes" the records sought should suffice [see Freedom of Information Law, §89 (3)], and that a failure to complete a form prescribed by an agency cannot constitute a valid basis for delay or denying a request for records. Under the circumstances, however, it is recommended that you complete the form for the purpose of transmitting your request to the Office of the District Attorney. In an effort to provide guidance to that office, a copy of this letter will be sent to the District Attorney.

Third, your request was prepared in the format of an adversary proceeding; you cited yourself as "plaintiff" and the District Attorney as a "defendant". From my perspective, the procedure for making a request under the Freedom of Information Law is not adversarial, but rather administrative and informal.

Lastly, I disagree with your interpretation of Floyd v. McGuire. The Supreme Court found that a failure by an agency to respond to a request and an appeal enabled an applicant to bring suit due to the exhaustion of administrative remedies, and that the agency was required to produce the records sought [108 Misc. 2d 536]. However the Appellate Division found that an administrative default by an agency does not mandate disclosure of all of the records requested [87 A.D. 2d 388], and its decision was affirmed without opinion by the Court of Appeals [57 NY 2d 774 (1982)].

Enclosed for your review is an explanatory brochure pertaining in part to 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: Patrick Henry, District Attorney
Patricia A. Murphy, Assistant District Attorney

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3608

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

January 28, 1985

O. Shelley
87-84 165th Street
Apt. 110
Queens, NY 11432-3451

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

Dear Mr. or Ms. Shelley:

I have received your letter of January 11, in which you raised a series of qeustions that relate to an examination administered by the Department of Civil Service.

Your initial questions involve how "other parties faired [sic] when attempting to deal with..." the Department of Civil Service generally and particularly with respect to information pertaining to oral examinations. While I cannot provide a specific response concerning oral examinations due to an absence of any significant amount of experience in that area, I believe that the Department responds in good faith to requests made under the Freedom of Information Law.

The third question is whether an agency "can keep secret and confidential its 'rules, requirements and criteria' that are critical in their everyday functioning".

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

Relevant to the question is one of the grounds for denial, which, due to its structure, would in my view require the disclosure of the records that you described. Specifically, §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 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. "Rules, requirements and criteria" would likely represent "final agency policies" or perhaps "instructions to staff that affect the public" that are accessible under the Freedom of Information Law.

The fourth question pertains to the purpose of the Official Compilation of Codes, Rules and Regulations and, therefore, is outside the Committee's jurisdiction and expertise. The appropriate source of information on the subject would likely by the Administrative Regulations Review Commission, which is located at 1 Commerce Plaza, Albany, NY 12210, and which oversees the implementation of state agency regulations and the State Administrative Procedure Act.

The fifth question is:

> "[I]f an agency has claimed that a matter is confidential, and an interested party has then proceeded to invoke the applicable provisions of the open government laws, have there been any specific persuasive arguements [sic] that have been sucessfully raised when the appeal is filed with the agency's head or other designated official?"

There have been numerous situations in which agencies have disclosed records following requests or appeals made under the Freedom of Information Law. Further, often advisory opinions rendered by this office have served to persuade agencies to disclose. There are also dozens of judicial determinations that have required agencies to make records available under the Freedom of Information Law.

Your final question broadly deals with agencies' successes in relation to their implementation of "administrative law". Please be advised that hundreds of lawsuits are initiated yearly that challenge the administrative actions of state and municipal agencies. Consequently, there is no precise or short answer that can be given. Perhaps you could obtain information at a local library or law library relative to administrative law in New York.

Lastly, it is noted that rights of access to records maintained by state agencies pertaining to individuals has been enhanced by the Personal Privacy Protection Law. I suggest that you review that statute, for it may be relevant to requests that you might submit. Of particular significance is §95, which describes rights of access by individuals to records pertaining them when the records are maintained by a state agency.

Enclosed are copies of the Personal Privacy Protection Law and the Committee's recent annual report, which provides an overview of the Committee's activities. The report also contains 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

Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3609

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

January 29, 1985

Mr. Ernest A. Arico
The Times Record
501 Broadway
Troy, NY 12181

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

Dear Mr. Arico:

I have received your letter of January 17 in which you requested an opinion concerning a statement of policy on the release of information issued by George W. O'Connor, Troy Public Safety Commissioner.

The statement, which is attached to your letter and which is dated January 14, provides that:

> "[E]ffective this date, it shall be the policy of the department to prevent the release of any information to the news media on any cases in which persons are provided with basic or advanced life support services by our personnel. The freedom of information law does not require that the public (or the media) be given access to information of a medical nature. Accordingly, we will withhold all such medical information. Persons treated, their immediate family, medical practitioners attending the person treated and law enforcement personnel can be provided with copies as needed.
>
> "In cases of arson or fires of suspicious origin, fire personnel should refer media representatives to the police officer in charge of the police investigation. While general information as to the time,

> location and extent of a particular fire may be released, any information which deals with the cause or origin in fires which become the subject of a criminal investigation should not be given out."

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

First, in my view, the statement issued by Commissioner O'Connor, to the extent that it pertains to records, is unnecessary, for the "policy" concerning the disclosure of government records has been established by the State Legislature by the enactment of the Freedom of Information Law and numerous other statutes that deal with access to records. Consequently, to the extent that the policy adopted by the Commissioner conflicts with the Freedom of Information Law or any other statute, I believe that it would have no legal effect.

Second, while I concur with some aspects of the Commissioner's policy, others are in my opinion so broadly stated that they may indeed conflict with the Freedom of Information Law and its judicial interpretation.

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. It is noted, too, that the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of one or more of the ensuing grounds for denial. As such, I believe that the quoted language indicates that the Legislature envisioned situations in which a single record or report may be both accessible and deniable in part. The same language in my view also requires that an agency review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Moreover, many of the grounds for denial are based upon potentially harmful effects of disclosure. Consequently, the facts and circumstances that relate to incidents determine the extent to which records concerning the incidents are accessible or deniable.

For example, the policy in question states that "any information" dealing with "the cause or origin in fires which become the subject of a criminal investigation should not be given out". Here I direct your attention to §87(2)(e) of the Freedom of Information Law, which is often cited with

respect to records concerning criminal investigations. 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."

The language quoted above, as suggested earlier, is clearly based upon the effects of disclosure.

Disclosure of many records, while a criminal investigation is in progress, might interfere with the investigation. To that extent, it is likely that they could be withheld under §87(2)(e) of the Freedom of Information Law. However, it is possible that some records or portions of records pertaining to an investigation would not, if disclosed, result in the harmful effects of disclosure described in §87(2)(e), particularly when an investigation has ended. To that extent, there may be no ground for denial.

In short, due to the structure of the Freedom of Information Law, records may be accessible or deniable, depending upon several factors, including their specific contents, when they are requested, and the effects of disclosure. Therefore, a broad policy statement indicating that a class of records is generally accessible or deniable would in my opinion be inappropriate.

When medical information is the subject of a request, I would agree that often that type of information 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) and 89(2)(b)]. Nevertheless, in many cases, identifying details can be deleted from a record to protect personal privacy, while the remainder of the record can be made available. In other cases, records may be available, such as motor vehicle accident reports, even though they contain personally identifiable information.

Lastly, the Freedom of Information Law is a statute that concerns access to records maintained by government in New York. As such, the use of the Freedom of Information Law may be incidental to requests for "information". For instance, when questions are asked at the scene of a fire, the Freedom of Information Law is not applicable, for no records are involved. This is not to suggest that information should not be provided, but rather that the Freedom of Information Law is not the vehicle for seeking or responding to requests for information in that kind if situation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Commissioner O'Connor

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3610

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

January 30, 1985

Mr. Mark Searle
Research Analyst
Electronic Data Systems
Corporation
6430 Rockledge Drive
P.O. Box 34269
Bethesda, MD 20817

Dear Mr. Searle:

As you are aware, your letter of December 28 addressed to the Attorney General of New York has been forwarded to the Committee on Open Government.

You have requested information concerning "the issue of public information in all branches of the government.

In this regard, enclosed is a copy of the New York Freedom of Information Law, which is applicable to all entities of state and local government in New York. Although records of the State Legislature are treated differently from those of agencies generally, direction concerning access to records of the State Legislature is provided in §88 of the Freedom of Information Law. Further, while the Freedom of Information Law specifically excludes the courts and court records from its scope, various provisions of the Judiciary Law and court acts often grant broad rights of access to court records.

It is noted, too, that §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 each agency to adopt its own regulations consistent with the Law and those promulgated by the Committee. Enclosed are the Committee's regulations.

The State Legislature over the years has also enacted a variety of statutes involving specific records or classes of records. Some of those statutes specifically grant access; others exempt particular records from disclosure.

To provide you with additional information, enclosed are copies of an explanatory pamphlet that may be useful to you, as well as the Committee's latest annual report. The report contains an index to written advisory opinions prepared by the Committee and 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.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3611

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

January 31, 1985

Mr. Curtis Stanback
#81-A-3109
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. Stanback:

I have received your letter of January 27, as well as the correspondence attached to it.

The materials indicate that you have had difficulty in obtaining medical records from the Department of Correctional Services. It is your view that the Department disregarded statutory requirements as well as its rules. You also suggested that the attempt to refuse access to medical records that are "relevant" and "necessary" represents an "injustice". Consequently, you have requested any and all procedures that may be used in order to obtain the medical records.

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

First, it appears that you have or are fimiliar with both the Freedom of Information Law and the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law. Nevertheless, enclosed are copies of both of those provisions. As you are aware, §5.24 of the Department's regulations pertains specifically to medical records identifiable to inmates.

Second, with respect to rights of access, you wrote that you requested medical records under the Freedom of Information Law to be used in litigation. Please note that the Freedom of Information Law is a vehicle by which the public, including yourself, may seek and obtain certain records, without regard to status or interest. The terms that you used, "relevant and necessary", pertain to situ-

ations in which litigants seek information pursuant to discovery statutes. It is emphasized that although records may be "relevant and necessary" to you and your litigation, rights granted under the Freedom of Information Law are determined by standards set forth in the Law. Specifically, the Freedom of Information Law provides, in brief, that all agency records are available, except to the extent that they fall within one or more of the grounds for denial appearing in §87(2)(a) through (i). Whether the records may be relevant or necessary is not a consideration that arises under the Freedom of Information Law, but rather under discovery statutes, such as §3101 of the Civil Practice Law and Rules.

Third, with regard to your requests, your letter of October 16 involves a request for your "complete medical records". The only response to which you referred was made by C.R. Winch, First Deputy Superintendent of the Green Haven Correctional Facility. Mr. Winch noted that "you may receive medical records only if you specify precisely the period of time for which the records are being sought. Such period of time, in any event, cannot exceed one month."

Here I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. A request for "all medical records" may be so broad that agency officials cannot determine which records you may be interested in obtaining. However, if a request is sufficiently detailed that it enables an agency official to locate the records sought, I believe that an applicant would have reasonably described the records. Therefore, in my opinion, you need not "specify precisely" a period of time. It is suggested that you resubmit a request to your facility Superintendent or his designee for medical records "reasonably described" in such a manner that the records may be located with respect to records kept at the facility. To the extent that the records are kept at the Department's Albany office, the request should be directed to the Assistant Commissioner of Health Services.

Fourth, some aspects of medical records might justifiably be withheld under the Freedom of Infromation Law. For example, diagnostic opinions, recommendations or advice might be withheld under §87(2)(g) of the Freedom of Information Law. It is possible, however, that the same records might be available when requested pursuant to a discovery statute in conjunction with litigation. Therefore, it is reiterated that you discuss the matter with an attorney.

Lastly, §17 of the Public Health Law (see attached) pertains to access to medical records. While that statute does not grant rights of access to a patient, it enables a physician designated by a patient to request and obtain medical records on behalf of 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

RJF:ew

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3612

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

February 1, 1985

Mr. Joseph C. Joyner
[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. Joyner:

I have received your letter of January 8, which reached this office on January 23.

You wrote that you have experienced difficulty in obtaining records about yourself kept by your employer. You have requested information regarding the procedure for seeking and obtaining those records under the Freedom of Information Law.

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

First, it is emphasized that the Freedom of Information Law is applicable only to records of entities of government in New York. Specifically, the Law pertains 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, rights of access granted by the Freedom of Information Law concern records kept by an "agency". The Law does not extend to records in possession of a private firm or corporation. Therefore, if your employer is not a government agency, neither the Freedom of Information Law nor any other statute of which I am aware would provide you with rights of access to records about you kept by your employer.

Second, assuming that you are a government employee, the agency that employs you is required to have designated a "records access officer" who has the duty of responding to requests made under the Freedom of Information Law. When making a reqeust, §89(3) of the Law requires that an applicant "reasonably describe" the records sought. Further, the records access officer or the appropriate agency official must respond to a written request within five business days of its receipt.

Additional detail regarding the Freedom of Information Law, including a sample letter of request, is found in the enclosed pamphlet entitled "Your Right to Know". Also enclosed, as you requested, 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

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3613

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

February 1, 1985

Mr. Jeffrey M. Segal
[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. Segal:

I have received your letter of January 23 in which you inquired with respect to your rights as a "patient". Specifically, you questioned your capacity to review and gain access to medical, laboratory, and hospital records.

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

First, it is emphasized that the Freedom of Information Law is applicable only to records of entities of government in New York. Specifically, the Law pertains 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."

Based upon the language quoted above, the Freedom of Information Law would not be applicable to records maintained by a private physician, laboratory or hospital, for example.

Second, there is no statute applicable in New York that grants direct rights of access by patients to medical records pertaining to themselves. There is, however, a law that provides a patient what might be characterized as indirect rights of access to those records. Enclosed is a copy of §17 of the Public Health Law. In brief, §17 enables a competent patient to designate a physician who may request and obtain medical records on behalf of that 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

RJF:ew

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3614

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

February 4, 1985

Mr. J. C. McCrary
#74-A-3931
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. McCrary:

I have received your letter of January 8.

According to your letter, which again concerns a request sent to the New York City Police Department, you have not received the records that you requested related to a lab analysis report #10160. You attached copies of the reports which the New York City Police Department provided to you, which are not those that you described in your letter.

On your behalf, I contacted a representative of the Legal Affairs Division of the Department. I was informed that that office had received a copy of your letter and that a search for a more detailed laboratory report would be made. In addition, he indicated that a log book is maintained at the police lab which documents who handled evidence tested at the lab and when and where it was delivered. You may wish to request copies of the log book pages which refer to report #10160. Since the records are almost ten years old, I was informed that it may take some time to locate the records.

Finally, as Mr. Freeman explained in earlier correspondence, if the Department claims that the records which you seek do not exist, you may request that the Department certify that it does not have possession of the records or that the records could not be found after diligent search. Your request for certification can be made to the Department's records access officer.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-3615

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

February 6, 1985

Mr. William M. Kavanaugh
Corporation Counsel
City of Newburgh
83 Broadway, City Hall
Newburgh, NY 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. Kavanaugh:

Thank you for transmitting a copy of your determination regarding an appeal made under the Freedom of Information Law by Ms. Bette Smith and Ms. Katalin Hajba.

The request involved:

> "Original cassette tapes of meetings conducted by the Zoning Board of Appeals concerning application and proceedings of February 22, 1983, March 8, 1983, May 24, 1983, and all recordings of meetings, formal or informal, concerning Transcycle Industries as far as any such tapes exist."

You wrote that appellants had been furnished with a written transcript of the hearings, but you added that Ms. Smith and Ms. Hajba:

> "...are not entitled to listen to the original tapes since if they were erased or destroyed there would be no reliable record of what took place before the Zoning Board. Also when you inspected the exhibits that were introduced in this matter before the Zoning Board they were returned to the City Clerk in a state of disarray."

As such, the appeal was denied.

For the following reasons, I disagree with the determination.

First, the Freedom of Information Law is applicable to all records of an agency. In this regard, §86(4) of the Law defines "record"expansively to include:

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

Based upon the language quoted above, I believe that a tape recording of a meeting or a public hearing is a "record" subject to rights of access.

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

Third, the determination did not cite any ground for denial listed in the Freedom of Information Law. Moreover, since the tape recordings pertain to public proceedings, no basis for denial could in my opinion be appropriately asserted. It is also noted that, in a judicial determination, it was held that a tape recording of an opinion meeting is accessible under the Freedom of Information Law [see Zaleski v. Board of Education of Hisckville Union Free School District, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

With respect to the means by which a tape recording may be made available, as you are aware, the introductory language of §87(2) refers to the capacity to inspect and copy available records. From my perspective, the equivalent of "inspection" of a tape recording would involve listening to the tape. I do not believe

that the City must relinguish physical custody of a tape recording to enable a member of the public to listen to the tape. On the contrary, a person could listen to the tape in the presence of an agency official, who could maintain custody and control over the tape. In the alternative, the agency could, upon payment of the requisite fee, reproduce the tape. As indicated in Zaleski, supra, such a fee would be based upon the actual cost of reproduction "excluding the fixed costs of the agency such as operator salaries"or personnel time.

Lastly, you alluded to a situation in which the appellants returned records to the City Clerk "in a state of disarray", presumably after the records had been made available for inspection. It is reiterated that, in my view, an agency need not permit an applicant to remove records or enable an individual to review records in private. I believe that agency officials may be present or otherwise supervise when members of the public inspect records or listen to a tape recording.

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

cc: Ms. Bette Smith
Ms. Katalin Hajba

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3616

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

February 7, 1985

Mr. Peter Shipley
[redacted]

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

Dear Mr. Shipley:

I have received your letter of January 25, which pertains to a request directed to the State University of New York at New Paltz.

Specifically, according to your letter, on January 8, the Records Access Officer at State University of New York at New Paltz, Karen L. Summerlin, acknowledged the receipt of a certified letter in which you requested various materials from the State University. Thereafter, you received a response postmarked January 23, in which the Records Access Officer indicated that she would respond "within two weeks". Since you asked Ms. Summerlin why two additional weeks would be needed, she apparently stated that she would not be present at the University for two weeks and that "while she is away, no one else is allowed to do the duties of Records Access Officer".

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

First, as you are aware, 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)].

In the context of the situation that you described, I am in general agreement with your contentions. In my view, the Records Access Officer would have ten business days from the date of an acknowledgment of the receipt of a request to determine to grant or deny access. According to the facts as you described them, Ms. Summerlin waited beyond ten business days following the acknowledgment of the receipt of your request to grant or deny access.

Second, the absence of the records access officer could not in my view justify a delay resulting in inconsistencies with the provisions of either the Freedom of Information Law or the regulations. It is noted that the general regulations promulgated by the Committee, which describe the duties of a records access officer, indicate that the head or governing body of an agency may designate one or more persons as records access officer. Further, the records access officer, according to the regulations, "shall have the duty of coordinating agency response to public requests for access to records" [§1401.2(a)]. Consequently, since the records access officer is responsible for coordinating an agency's handling of requests, in her absence I believe that one or more other persons should have been designated to act in her stead.

Lastly, in order to attempt to enhance compliance with the Freedom of Information Law and the regulations, a copy of this opinion will be sent to Ms. Summerlin.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen L. Summerlin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1134
FOIL-AO- 3617

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

February 8, 1985

Mr. Robert McNary
Fulton County Community
Development Corporation
86 North Main Street
Gloversville, NY 12078

The staff of the Committee 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 Mr. McNary:

I have received your letter of January 9 in which you requested an advisory opinion.

Your inquiry concerns the application of the Freedom of Information and Open Meetings Laws to the Fulton County Community Development Corporation. Although I tried to reach you several times by phone without success in an effort to learn more about the Corporation, you assistant informed me that the corporation is a "local development corporation".

Based upon that assumption, I would like to offer the following comments with respect to your inquiry.

Questions regarding local development corporations have arisen in the past, and, based upon the direction provided by §1411 of the Not-for-Profit Corporation Law and the judicial interpretation of the Freedom of Information Law, it is possible that such corporations are subject to the provisions of the Freedom of Information Law. Further, meetings of the boards of such corporations in my view fall within the scope of the Open Meetings Law.

Section 1411(a) of the Not-for-Profit Corporation Law, which describes the purposes of local development corporations, states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

In view of the statutory language quoted above, it is in my opinion clear that if the Fulton County Community Development Corporation is a local development corporation, it performs a governmental function, presumably for a public corporation, such as Fulton County.

What is not entirely clear, however, is whether a local development corporation falls within the definition of "agency" appearing in §86(3) of the Freedom of Information Law. In this regard, "agency" is defined to include:

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

Since a local development corporation is a not-for-profit corporation, it is questionable whether it could be characterized as a "governmental entity", even though it might perform a governmental function.

The only judicial determination of which I am aware that dealt with a similar issue is Westchester-Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)]. In that decision, the Court of Appeals found that a volunteer fire company, also a not-for-profit corporation, was an "agency" in view of its functions, notwithstanding its corporate status. Nevertheless, the status of local development corporations under the Freedom of Information Law remains open to question and judicial review.

With respect to the Open Meetings Law, I believe that the meetings of the board of a local development corporation would be subject to that statute, for the definition of "public body" appearing in §102(2) of the Open Meetings Law may be more expansive than the definition of "agency" in the Freedom of Information Law.

"Public body" is defined to include:

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

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

With respect to your more specific areas of inquiry, assuming that the Freedom of Information and Open Meetings Laws are applicable, it is noted that both statutes are based upon a presumption of openness. In brief, the Freedom of Information Law states that all records are available, except to the extent that records or portions thereof may be withheld in accordance with one or more among nine grounds for denial listed in §87(2). Similarly, the Open Meetings Law requires that all meetings of public bodies be open, except to the extent that an executive session may be convened in accordance with the grounds for executive session appearing in §105(1).

Perhaps the most relevant grounds for denial in the Freedom of Information Law in relation to the types of records that the Corporation might maintain would be §87(2)(c) and (d). Those provisions state that an agency may withhold records or portions thereof that:

> "(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
>
> (d) are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

It is likely that the exception regarding entry into an executive session of greatest potential significance is §105(1)(f). The cited provision enables a public body to convene an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

With regard to the nature of a motion to enter into an executive session under §105(1)(f), it is suggested, based upon case law, that two components be present. For instance, in the event that the Board seeks to review the financial history of a specific corporation, a motion for entry into an executive session should indicate that the subject matter to be discussed will involve a "particular" corporation. The motion should also indicate one of the topics within §105(1)(f). By means of example, an appropriate motion might be "I hereby move to enter into executive session to discuss the financial history of a particular corporation". In my view, the name of the corporation need not be identified or included in the motion.

To provide you with additional information, enclosed are copies of the Freedom of Information and Open Meetings Laws, as well as an explanatory pamphlet that deals with both statutes. If you would like additional copies of the pamphlet, I will be happy to make them available upon request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3618

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

February 8, 1985

Mr. Alfred O. Kuhnle
[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. Kuhnle:

I have received your letter of February 1 in which you "appealed" a denial of a request for records by the New York City Fire Department.

According to the correspondence attached to your letter, you requested "the names and mailing addresses" of various retirees of the New York City Fire Department. Ms. Carol Hafer rendered an initial denial based upon §89 (7) of the Freedom of Information Law. You appealed to James E. Kohler, Deputy Fire Commissioner, who upheld the denial.

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

First, although the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, the Committee does not have the authority to render a determination on appeal, nor does it have the capacity to compel an agency to grant or deny access to records.

Second, under the circumstances, it appears that you have exhausted your administrative remedies. As such, the only remaining step that you might take would involve the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules.

Lastly, I believe that the denials made by Ms. Hafer and Mr. Kohler were appropriate under the Freedom of Information Law. §89(7) of the Freedom of Information Law states in relevant 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..."

Based upon the language quoted above, I do not believe that the Fire Department is required to disclose the home address of a former employee or a retiree of a public employees' retirement system.

I hope that 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. Carol Hafer
Mr. James E. Kohler

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3619

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

February 8, 1985

Ms. Lucia Hernandez
[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. Hernandez:

I have received your letter of January 22 in which you requested advice concerning your personnel files and other records maintained by the New York City Police and Corrections Departments.

You wrote that you have been disqualified from employment by both Departments and that you would like to know whether you may have access to any records that pertain to the reasons for your disqualification. Specifically, you would like to review memoranda, evaluations, recommendations, or letters of reference from past employers, including references transmitted between City agencies. In addition, you are interested in obtaining copies of the regulations related to the "FOIA and the Privacy Laws" as they apply to the New York City Police, Transit Police, Corrections and Parks Departments.

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

First, the Freedom of Information Law applies to all state and local governmental agencies except the state legislature and the courts. In brief, the Law requires that all records of an agency be made available except to the extent that records, or portions thereof may be withheld under §87(2)(a) through (i) of the Law. The Personal Privacy Protection Law, however, provides an individual certain rights with respect to records of a state agency which pertain to such individual. In other words, the Personal Privacy Protection Law does not apply to records of New York City agencies.

Second, the Freedom of Information Law requires each agency to promulgate regulations pertaining to its responsibilities under the Law. Moreover, the Committee on Open Government has developed regulations under the Freedom of Information Law. Each agency in turn is required to adopt regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee [see attached, Freedom of Information Law, §87(1)]. I have enclosed a copy of the Committee's regulations for your information. For copies of other agencies' regulations you should request them from each agency directly.

Third, the Freedom of Information Law permits an agency to withhold records which, if disclosed, would be harmful to an individual or to the function of an agency. With respect to the records which you seek, I believe that two sections of the Law may be relevant.

Section 87(2)(b) permits an agency to withhold records which, if disclosed, would constitute "an unwarranted invasion of personal privacy". In this regard, it is the Committee's view that to the extent that the letters and memos identify those who provided references, the records may be withheld. However, if the identifying details of such records can be deleted in such a way that the correspondents could not be identified, the records then would be available, unless a different ground for denial is applicable.

With respect to records created by one City agency and sent to another City agency, or internal memoranda, for example, §87(2)(g) regarding inter and intra-agency materials is applicable. That section provides that inter-agency or intra-agency materials may be withheld, except to the extent that the materials are statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations. In my view, to the extent that the references of a City agency are opinions or advice, the references may be withheld. However, to the extent that the references contain factual information, instructions or are final determinations as described above, I believe that they are 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

Cheryl A. Mugno

RJF:CAM:ew

BY Cheryl A. Mugno
Assistant to the Executive Director

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1135
FOIL-AO-3620

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

February 8, 1985

Ms. Maxine S. Palczynski
[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. Palczynski:

I have received your letter of January 29 in which you requested an advisory opinion regarding time limitations for responding to requests for records.

According to your letter, your local school board has repeatedly denied your requests for minutes of board meetings until four weeks after each meeting. You wrote that "[w]hen asked for the local procedure under the Freedom of Information Act, the Superintendent told us to contact PERB". You would like to know how to insure that the school district will comply with the Law with respect to your requests for public information.

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

First, the Committee on Open Government has promulgated regulations with which all agencies, including school boards, must comply. Moreover, §87 of the Freedom of Information Law requires each agency to adopt uniform rules and regulations pursuant to the general rules promulgated by the Committee. Included in the Committee's regulations is the requirement 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 536, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

Second, with respect to minutes of a meeting held by a public body, the Open Meetings Law requires that minutes be taken at all meetings of a public body. The minutes must consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon [see Open Meetings Law, §106(1)]. In addition, the minutes must be made available, in accordance with the provisions of the Freedom of Information Law, within two weeks from the date of an open meeting [see §106(3)]. Minutes of an executive session must be made available within one week of such session but need only be prepared if action by formal vote is taken. The minutes of an executive session must include a record or summary of the final determination of such action.

Finally, copies of the Freedom of Information Law, the Open Meetings Law and the Committee's regulations promulgated under the Freedom of Information Law, and an explanatory pamphlet concerning both laws have been enclosed for your consideration.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

JF:CAM:ew

Enc.

cc: Superintendent, Herkimer Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3621

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

February 8, 1985

Mr. Wellington B. David
84-C-65 I-3-S.H.U.
135 State 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. David:

I have received your letter of January 24 in which you raised questions concerning access to divorce papers pertaining to you.

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

First, the records in which you are interested are maintained by a court. Please be advised 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."

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 does not apply to the courts or court records.

Second, in an effort to assist you, even though the Freedom of Information Law is not applicable to the records in question, I direct your attention to §235 of the Domestic Relations Law, which is entitled "Information as to details of matrimonial actions or proceedings."

Subdivision (1) of §235 states that:

> "[A]n officer of the court with whom the proceedings in a matrimonial action or written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

Further, subdivisions (3) and (4) of §235 of the Domestic Relations Law provide that:

> "3. Upon the application of any person to the county clerk or other officer in charge of public records within a county for evidence of the disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a 'certificate of disposition', duly certifying the nature and effect of such disposition, judgment or order and shall in no manner evidence

> the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such action.
>
> "4. Any county, city, town or village clerk or other municipal official issuing marriage licenses shall be required to accept, as evidence of dissolution of marriage, such 'certificate of disposition' in lieu of a complete copy of the findings of fact, conclusions of law and judgment of dissolution."

I believe that the fee for a "certificate of disposition" is one dollar in counties outside of New York City.

Based upon the foregoing, it is suggested that you write to the clerk of the court in which the proceeding was conducted for the purpose of seeking records pertaining to the proceeding or perhaps only a certificate of disposition. You also might want to confer with an attorney or a representative of 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3622

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

February 11, 1985

Mr. Ronald Grippo
#83-C-606
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. Grippo:

I have received your letter of January 22 in which you requested advice with respect to obtaining various grand jury minutes, statements of witnesses, pretrial hearing and trial transcripts, a presentence report, sentencing transcript and related records maintained by the District Attorney. In this regard, I would like to offer the following comments.

The Committee on Open Government is authorized to provide advice to the public regarding the Freedom of Information Law, the Open Meetings Law and the Personal Privacy Protection Law. The rights of access to records granted under the Freedom of Information Law do not pertain to records which are maintained by the courts. Therefore, the Committee cannot advise you regarding the availability of court records. Nevertheless, I would like to offer the following suggestions.

First, §255 of the Judiciary Law provides 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 similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a

> document or paper, of which the custody legally belongs to him, can not be found."

Thus, upon payment of the appropriate fee, it appears that you may request all of the records in the file related to your trial that are maintained by the court in which you were convicted. Those files likely include many of the records you referred to in your letter.

Second, the Division of Criminal Justice Services maintains criminal history data on certain individuals. You may review any data which the Division maintains pertaining to you at a Division facility. You should contact the Division's records access officer at:

> Division of Criminal Justice Services
> Stuyvesant Plaza
> Executive Park Tower
> Albany, NY 12203

Third, with respect to records maintained by the District Attorney, I suggest that you contact the records access officer in the office of the District Attorney who prosecuted you. A sample letter for requesting records under the Freedom of Information Law in included in the pamphlet, Your Right to Know, which is enclosed. The pamphlet generally describes the scope of the Freedom of Information Law and the Open Meetings Law. In addition, I have enclosed a court opinion concerning the availability of presentence reports which holds that the agency in custody of such records is obligated to make them available, pursuant to court order, to assist the defendant in an appeal.

Finally, with respect to the Personal Privacy Protection Law, I point out that the Law applies only to state agencies and does not apply to the courts or to the District Attorney. Nevertheless, I have placed your name and address on our mailing list for the future publication of our pamphlet which explains the scope of the Personal Privacy Protection 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

Enc.

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3623

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

February 11, 1985

Ms. Josephine Kent
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 29, as well as the materials attached to it.

You have requested an advisory opinion regarding rights of access to the contents of the "Application for Alternative Veterans Exemption from Real Property Taxation", which is a form prepared by the State Board of Equalization and Assessment, as well as other materials that may be submitted with that application. It is your view that some aspects of the form might, if disclosed, "perhaps be an invasion of personal privacy".

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

First, as a general matter, records used or prepared in relation to assessments and the evaluation of real property have been found to be available to the public, even before the enactment of the Freedom of Information Law [see e.g., Sanchez v. Papontas, 32 AD 2d 948 (1969); Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Szikszay v. Buelow, 436 NYS 2d 558, 107 Misc. 2d 886 (1981)].

Second, as you are aware, the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. From my perspective, questions involving personal privacy often require the making of subjective judgments. Stated differently, one reasonable person might consider the disclosure of a particular item of personal information to be

offensive, thereby resulting in an "unwarranted" invasion of privacy. Nevertheless, an equally reasonable person might consider that disclosure of the same personal information would be innocuous, thereby resulting in a "permissible" invasion of personal privacy.

Under the circumstances, it is clear that disclosure of the form in question, as well as other information used or prepared in the assessment process would result in an invasion of privacy. However, based upon the decisions cited earlier and various statutory provisions, it appears that disclosure of that type of information would not generally result in an "unwarranted" invasion of personal privacy. On the contrary, the documentation in question is likely available, for disclosure in my opinion would constitute a permissible invasion of privacy.

It is noted that the exception for veterans is available only to those who are honorably discharged. Further, the personal information required relative to military service could likely be known now or perhaps at the time when an individual was involved in military service. Consequently, it is reiterated that the materials are in my view accessible under the Freedom of Information Law.

Lastly, I have discussed the matter with Steven Harrison of the Office of Counsel of the Division of Equalization and Assessment. Mr. Harrison generally concurs with this opinion.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Steven Harrison

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3624

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

February 12, 1985

Mr. Martin Bradley Ashare
Suffolk County Attorney
County of Suffolk
Hauppauge, NY 11788

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

Dear Mr. Ashare:

I have received your letter of January 25 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry pertains to an opinion prepared by Theodore D. Sklar of your office with respect to a request for pre-employment medical records made by two police officer candidates. You enclosed a copy of Mr. Sklar's opinion, as well as exhibits indicating the types of records sought.

In brief, at issue are four types of records considered by the Office of Medical Review in relation to candidates. All of the records are apparently completed by either the candidate or by employees of the County. Mr. Sklar contended that two of the records should be made available. Those records are the Minnesota Multiphasic Personality Inventory answer sheet and the Employment Medical History and Physical Examination. One of the records, in Mr. Sklar's view, a "Psychological Evaluation Report", is deniable in its entirety. The remaining document consists of a mixture of diagnostic opinions, evaluations, and raw test data. Mr. Sklar found that, among the contents of that document, the raw test data should be available, while the remainder could be withheld.

Having reviewed Mr. Sklar's opinion and the samples of the records that are the subject of the request, I am in general aggreement with Mr. Sklar's opinion.

From my perspective, two of the provisions of the Freedom of Information Law are relevant to rights of access to the records sought. Perhaps the most important is §87(2)(g). The cited provision enables the County 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. The remaining aspects of inter-agency or intra-agency material which in my view could be withheld involve advice, recommendations, opinions and the like [see Miracle Mile Association v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied, (1979); Ingram v. Axelrod, App. Div. 90 AD 2d 568 (1982); McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion)]. As such, I concur with Mr. Sklar's contentions that purely factual material must be disclosed while other portions of the materials consisting of evaluations or opinion may be withheld.

The remaining provision of potential significance is §89(2)(c) of the Freedom of Information Law. In terms of background, §87(2)(b) permits an agency to withhold records portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". It is noted further that §89(2)(c) states that:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:
>
> ii. when the person to whom a record pertains consents in writing to disclosure;

iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

The clause, "Unless otherwise provided by this article", would involve the capacity to withhold records pertaining to individuals sought by them when a separate basis for withholding, such as §87(2)(g), exists. To the extent that records may be withheld under §87(2)(g), I do not believe that the subjects of the records have the right to review those records.

In sum, it is reiterated that Mr. Sklar's opinion is in my view consistent with the requirements of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3625

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

February 14, 1985

Ms. Sylvia Lenoff
[redacted]

Dear Ms. Lenoff:

As you are aware, your letter addressed to Attorney General Abrams has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the New York Freedom of Information Law.

You have requested information regarding persons who are responsible for dealing with requests in a variety of programs that you identified.

Please note that the regulations promulgated by the Committee, which govern the procedural aspects of the Law, require that each agency designate one or more "records access officers" who are responsible for coordinating the agency's response to requests made under the Freedom of Information Law. For some of the programs that you identified, I am aware of the names and telephone numbers of the records access officers at particular agencies; in other agencies, however, I cannot provide the name of a particular individual, but rather only the address of the agency. Nevertheless, enclosed are copies of a directory of state agencies, which provides addresses and general information phone numbers for all state agencies, the Freedom of Information Law, and an explanatory pamphlet that may be useful to you, for it contains a sample letter of request that may be directed to the records access officer at any agency.

I believe that four of the programs that you cited are likely administered by the State Department of Social Services. They are Medicaid, WIC, food stamps and ATDC programs. The records access officer for the Department is Ms. M. Elizabeth Lyon, whose address is contained in the directory and who may be reached at (518) 474-9516.

It is noted further that records that are identifiable to either an applicant for or a recipient of public assistance are generally considered confidential under §136 of the Social Services Law.

One of the categories that you identified is the "public school system". If you want information from specific school districts, requests should be sent directly to them. General information can likely be made available by the State Education Department, whose records access officer is James Blendell, who can be reached at (518) 474-7770.

The state accounting system is generally administered by the Department of Audit and Control. The records access officer at that Department is Marvin Nailor, whose phone number is (518) 474-6046.

With respect to student loans, the most appropriate agency regarding information is the Higher Education Services Corporation, which is listed at the end of the state agency directory.

With regard to traffic violations and adjudication, I do not believe that there is any central source of those types of records. In some instances, such records may be kept by the State Police in various locations around the state; in others, they are kept by a municipality. As a general matter, I believe that those types of records are available under the Freedom of Information Law [see Johnson Newspaper Corp. v. Stainkamp, 61 NY 2d 958 (1984)].

Lastly, §89(3) of the Freedom of Information Law requires that an applicant request records that are "reasonably described". Therefore, when making a request, it is suggested that you include sufficient detail to enable agency officials to locate the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3626

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

February 14, 1985

Mr. Herbert Clauden
84-A-5290 D-3-17
Great Meadow Correctional Facility
Box 51
Comstock, New York 12821-0051

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

Dear Mr. Clauden:

I have received your letter of January 27 in which you requested assistance in obtaining records.

According to your letter, your attorney and the District Attorney have refused to make the records available to you. Moreover, you wrote that the courts and another agency have not responded to your requests for help. Specifically, you would like copies of complaint reports, UF-61 police reports and medical reports. Apparently, these records relate to the criminal investigation leading to your conviction.

In this regard, I 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, with respect to the complaint reports and the UF-61 police reports which you seek, I believe that two grounds for denial are relevant. Section 87(2)(b) permits an agency to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy. Section 87(2)(e)(iii) permits an agency

to withhold records which are compiled for law enforcement purposes and identify a confidential source or disclose confidential information relating to a criminal investigation. In my view, to the extent that the records identify complainants or witnesses, the records may fall within the grounds for denial described above if the identities of such individuals were not disclosed during the course of the criminal proceeding. If their identities were revealed to you, I believe that no privacy concerns exist which would permit the agency to withhold or delete identifying details.

Third, with respect to your medical records, I point out that the Freedom of Information Law pertains only to governmental agencies. If the records which you seek are maintained by a private physician, hospital or institution, the Freedom of Information Law does not govern the availability of the records. However, if your medical records are maintained by a correctional facility or another governmental agency, the records are subject to the provisions of the Freedom of Information Law. In that case, to the extent that your medical records do not include opinions, advice or recommendations, I believe that they would be available to you.

Moreover, §17 of the Public Health Law provides for the release of medical records as follows:

> "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 laboratory tests regarding that patient to any other designated physician or hospital..."

Based upon that provision, 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.

Fourth, please note that the provisions of the Freedom of Information Law do not apply to the courts or to records which are maintained by the courts. With respect to the records which you seek, §255 of the Judiciary Law may be applicable. That section provides that:

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

Thus, upon payment of the appropriate fee, it appears that you may request the records in the files that are maintained by the court in which you were convicted. Those files likely include many of the records that you seek.

Finally, the Division of Criminal Justice Services maintains criminal history data on certain individuals. You may review any data which the Division maintains pertaining to you at a Division facility. You may contact the Division's records access officer at:

> Division of Criminal Justice Services
> Stuyvesant Plaza
> Executive Park Tower
> Albany, New York 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:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-3627

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

February 15, 1985

Mr. Sam Rotenburg
[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. Rotenburg:

I have received your letter of January 17, which reached this office on January 28.

Enclosed with your letter is a response to an appeal rendered on July 29 by John R. Nolan, Secretary to the New York City Board of Education. In brief, you indicated that some of the materials to which Mr. Nolan alluded as having been made available to you were never sent. Further, you view Mr. Nolan's response as a "pretext" for the "concealment" of information on the part of the Board of Education.

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

First, various other items of correspondence regarding the same or similar issues have been sent to this office. Having discussed those issues with representatives of the Board of Education, I believe that, as a general matter, Board officials respond in good faith to requests.

Second, the response to your appeal made by Mr. Nolan was sent to you more than six months ago. In terms of legal remedies, if an applicant for records is denied access on appeal, he or she may initiate a proceeding under Article 78 of the Civil Practice Law and Rules within four months of the agency's final determination. Since no further review of your request is apparently available to you, it is suggested that you submit a new request to the records access officer.

Lastly, 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 sufficient detail to enable agency officials to locate the records sought.

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:ew

cc: Congressman Stephen Solarz
John R. Nolan, Secretary, Board of Education

No

FOIC-AO

3628

No

FOIC-AO

3628

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3629

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

February 19, 1985

Mr. Collin Fearon, Jr-EL
74-B-395
Great Meadow Correctional Facility
Box 51
Comstock, New York 12821-0051

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

Dear Mr. Fearon:

I have received your letter of February 1, in which you take issue with an opinion sent to you on January 17.

In that letter, it was explained that the Freedom of Information Law pertains to existing records, and that, as a general rule, an agency is not required to create or prepare a record in response to a request. You expressed disagreement with my opinion based upon §5.35 of the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services. The cited provision states in part "if agreeable to the person requesting the record, [the agency may] provide the information from the record rather than a copy of the record". You wrote that, "[A]s you can see, information can be obtained from a record that exists".

In this regard, it appears that you may have misunderstood my remarks. Although the provision that you quoted enables agency representatives to provide information, presumably orally, from a record, I believe that the provision is based upon the fact that a record exists. Under different circumstances, where no record exists from which information can be communicated, the Freedom of Information Law in my view would not apply. Similarly, it is reiterated that if a record does not exist, an agency is not in my opinion obligated to provide "information" or otherwise prepare a new record for the purpose of responding 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3630

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

February 20, 1985

Mr. John Middleton
D4-15
#85-A-0101
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. Middleton:

I have received your letter of January 31 in which you requested assistance from this office.

You wrote that you requested documents from the New York City Department of Corrections related to a property loss claim. You were informed by the records access officer of the Department that the requested records would be made available to you upon receipt of the copying fee, twenty-five cents per page. You explained that you requested a substantial number of pages and that the fee for that many copies is beyond your means. You would like to know how to obtain the records without paying the fee.

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 charge up to twenty-five cents for photocopies nine by fourteen inches in size or less. Although an agency is generally authorized to waive the fee for copies, I am unaware of no law which requires an agency to provide copies of records sought under the Freedom of Information Law to indigent persons without payment of the fee.

Second, I suggest that you request or arrange to review the records which you seek. Perhaps records could be forwarded by the Department to the facility superintendent where you could inspect them. Upon review, you may find that only a few records need be copied for your purposes and thus result in a substantial savings 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3631

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

February 20, 1985

Mr. Charles P. Shaw
[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. Shaw:

I have received your letter of February 8 in which you requested an advisory opinion with respect to the records of the Town of Stanford's Zoning Commission.

According to your letter, you requested records of a public hearing held by the Commission in October, 1984 and the minutes of Commission meetings held between October and December, 1984. Your request was directed to the Chairman of the Commission, Mr. Gerrado Fernandez, who, you were informed, is the records access officer for the Commission. A copy of your request was forwarded to the Town Clerk who has been designated by a Town Board resolution as the Town Records Access Officer. Your requests were filed on January 4 and, since you received no response, you appealed the "constructive denial" to the Town Clerk on February 5.

In addition, you explained that the Zoning Commission Chairman has physical custody of all of the Commission records prepared or received for the past eight years. You wrote that the Chairman has refused access to the records to several individuals other than yourself. Furthermore, you stated that, "[t]he Town Board has not, as of yet, or on several past occasions, given the Town Clerk the backing to obtain, or gain, public access to these records."

With respect to this matter, I 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, "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 Stanford Zoning Commission is an agency subject to the provisions of the Freedom of Information Law.

Third, §87(1)(a) requires the governing body of each public corporation to promulgate uniform regulations for all agencies in such public corporation pursuant to the provisions of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government. The regulations must include, at a minimum, the times and places records are available, the persons from whom such records may be obtained and the fees for copies of records [see Freedom of Information Law, §87(1)(b)(i-iii)].

Therefore, the Commission's records should be made available pursuant to the regulations adopted by the Town Board. It is unclear from your letter, however, who the Board has designated as records access officer with respect to the Zoning Commission's records, the Town Clerk or the Chairman of the Commission. Nonetheless, the records access officer is responsible for making the records available, even if the records are in the possession of another individual. Moreover, §30 of the Town Law provides that the town clerk of each town shall have the custody of all town records, books and papers. Thus, if the Town Clerk is the only officially designated records access officer, in my view, she would have the ultimate responsibility for obtaining the records and making them available even if the records are held by another individual.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Marge Willis, Town Clerk
Irving Burdick, Town Supervisor
John Kennedy, Esquire
Gerrado Fernandez, Zoning Commission Chairman
Richard Cantor, Esquire
William Stanton, Esquire
Concerned Citizens of Stanford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3632

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

February 20, 1985

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 January 28, as well as the correspondence attached to it.

Your letter constitutes a "complaint" against the Office of Counsel of the Office of Court Administration. You indicated that you made a request under the Freedom of Information Law in October for a "transfer request" that apparently was submitted in 1980. Although the receipt of your request was acknowledged on November 9, the records sought were neither granted nor denied as of the date of your letter to this office. You also enclosed a copy of an appeal sent to Judge Sise dated January 25.

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

First, as you may be aware, 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 536, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, based upon the facts as you have described them, I believe that your appeal to Judge Sise was appropriate, for your initial request was in my view "constructively" denied, thereby enabling you to appeal.

Lastly, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does not have the legal capacity, however, to compel an agency to grant or deny access to records. Nevertheless, in an effort to enhance compliance with the Law, copies of this opinion will be sent to Judge Sise, Mr. William Gallagher, Inspector General, and Michael Colodner, Counsel to the Office of Court Administration.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Honorable Sise, Judge
Mr. William Gallagher, Inspector General
Mr. Michael Colodner, Counsel, Office of Court Administration

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3633

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

February 20, 1985

Mr. John P. O'Connor
O'Connor Investigation Service Inc.
6 Elm Tree Place
Stamford, Connecticut 06906

The staff of the Committee on Open 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'Connor:

I have received your letter of February 1 as well as the correspondence attached to it.

According to the materials, you requested from the New York City Police Department a specific complaint report. Apparently, your initial request was denied. In response to an appeal, Rosemary Carroll, Assistant Deputy Commissioner, upheld the denial "since disclosure would constitute an 'unwarranted invasion of personal privacy' (Public Officers Law §87(2)(b) and the record is 'intra-agency' material (§87(2)(g)". You suggested that "to protect the privacy of victims", perhaps the names and the addresses of those individuals could be deleted, while the remainder of the report would be available to you. You have requested my advice concerning your suggestion.

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

First, I am unaware of the contents of the complaint report or any proceedings or investigations that may relate to the report. Consequently, my views must be considered to be based upon speculation.

Second, as a general matter, if disclosure resulting in an unwarranted invasion of personal privacy is the only consideration, I would concur with your suggestion that names, addresses and perhaps other identifying details could be deleted to protect privacy. As you may be aware, the introductory language of §87(2) permits an agency to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. Therefore, if the deletion of identifying details would adequately ensure that the disclosure of the remainder of the record would not constitute an unwarranted invasion of personal privacy, I would agree with your suggestion.

Nevertheless, §87(2)(b) was not the sole basis for Commissioner Carroll's denial, for she also cited §87(2)(g). That provision permits the Police 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 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. Section 87(2)(g) does, however, permit the Department to withheld those aspects of inter-agency or intra-agency materials that are reflective of advice, opinion, impression, recommendation and the like. Assuming that the record sought could justifiably be withheld on the basis of §87(2)(g), the Department in my view would have the capacity to deny, notwithstanding the possibility of deleting identifying details as you suggested.

I hope that I have 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3634

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

February 21, 1985

Ms. Martha L. Molnar
Patent Trader
272 North Bedford Road
Mount Kisco, NY 10549

The staff of the Committee on 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. Molnar:

I have received your letter of February 11 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns rights of access to the results of a "Climate Survey Questionnaire", a copy which you attached to your letter. The questionnaire was apparently completed by teachers in the North Salem schools. You wrote that "the Board of Education refuses to release the results of the study, claiming that it was 'intra-agency' material".

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

First, although the Freedom of Information Law grants braod rights of access, one of the grounds for withholding records pertains to "intra-agency" material. Specifically, §87(2)(g) of the Freedom of Information Law permits the District 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) permits an agency to withhold intra-agency materials reflective of opinion, advice, recommendations and the like.

Under the circumstances, since the questionnaires were completed by District employees and forwarded to District officials, I believe that they may be characterized as "intra-agency" materials. Further, the responses on individual questions consist of "suggestions", recommendations and opinions. As such, it appears that the responses could justifiably be withheld.

Second, if the District, based upon a review of the qeustionnaires, has developed a series of "results", of a statistical nature, for example, it is likely that those results would be available. As indicated earlier, to the extent that intra-agency materials consist of "statistical or factual tabulations or data", such materials are accessible. Therefore, while individual responses might be withheld, a tabulation or similar record reflective of a compilation or analysis of the responses would in my opinion be available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Board of Education

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3635

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

February 21, 1985

Mr. Wayne A. Vander Byl
Stanton & Vander Byl
555 West Main Street
Canal Park Place
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 Mr. Vander Byl:

I have received your letter of February 6 and appreciate your interest in complying with the Freedom of Information Law.

You indicated that you have reviewed an advisory opinion addressed to Ms. Nance E. Falter of the West Irondequoit Central School District in which I advised that census information maintained hy the District concerning preschoolers could be withheld under the Freedom of Information Law. You wrote further that, in a similar situation, you advised your client, the Marion Central School District, to the contrary. In a letter addressed to the Superintendent you advised that the names of prospective kindergarteners and their parents' names and addresses should be made available to the applicant for those records, the principal of a private school. Your opinion was based in part unon the decision rendered in New York Teachers Pension Associates, Inc. v. Teachers' Retirement System of the City of New York (71 AD 2d 250). You have asked that I reconsider the issue in view of the decision cited above.

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

First, as suggested to Ms. Falter in the opinion addressed to her, children not yet enrolled in a school district are not "students" for the purpose of the Family Educational Rights and Privacy Act (20 USC §1232g), commonly known as the "Buckley Amendment". My opinion was based in part upon a contention that, although the

records in question were not subject to the Buckley Amendment, they are so similar to student records subject to that statute that rights of access might justifiably be determined based upon the principles embodies in that federal enactment. In short, under the Buckley Amendment, an education record identifiable to a student is generally considered to be confidential, unless the parent consents to disclosure in writing or fails to prohibit disclosure in conjunction with a school district's policy on directory information. I point out, too, that the federal regulations promulgated under the Buckley Amendment define "personally identifiable" to mean:

> "(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."

As such, even the disclosure of the name of a student's parent by a school district would represent a violation of the federal Act, unless prior consent has been given.

Second, the examples of unwarranted invasions of personal privacy listed in §89(2) of the Freedom of Information Law in my view represent but five among conceivable dozens of unwarranted invasions of personal privacy. Consequently, I do not believe taht those examples necessarily represent the only instances in which disclosure would constitute an unwarranted invasion of personal privacy.

Third, I believe that New York Teachers Pension Associates, supra, would be decided differently today due to the addition of §89(7) to the Freedom of Information Law. In brief, that amendment provides that nothing in the Freedom of Information Law requires the disclosure of the home address of a current or former public employee [see also, New York Veteran Police Association v. New York City Police Department Article I Pension Fund, 61 NY 2d 659 (1983)].

Fourth, as suggested throughout the letter sent to Ms. Falter, its contents should be considered advisory. In the area of privacy in particular, subjective judgments often of necessity must be made. It may be difficult to draw a clear line of demarcation between an unwarranted as opposed to what might be characterized as a permissible invasion of personal privacy. In short, equally reasonable people viewing the same items of personal information might disagree with respect to the effects of disclosure. One might contend that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy; another might consider that disclosure would be innocuous, thereby resulting in a permissible invasion of privacy.

Lastly, the Freedom of Information Law is permissive. Once again, since the Buckley Amendment would not be applicable to records identifying children not yet in attendance, the Freedom of Information Law would be applicable. Under the Freedom of Information Law, although an agency may withhold certain records in accordance with the grounds for denial listed in §87(2), there is no obligation to do so. Therefore, the West Irondequoit Central School District or your client could in my opinion disclose census information regarding preschoolers. Nevertheless, I reiterate my opinion that the records sought could be withheld, for I believe 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

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3636

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

February 21, 1985

Mr. Angel L. Rivera
[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. Rivera:

I have received your letter of January 31 in which you requested assistance in obtaining access to a transcript of a news broadcast of a local television station.

You explained that the broadcast included information which is essential to your preparation of an appeal of an unfavorable Human Rights Commission decision. You wrote that the station's news director denied access since you had no attorney or court order. You would like to know how to gain access to the contents of the broadcast, even though the station is privately owned. In this regard, I offer the following comments.

The Freedom of Information Law generally pertains only to governmental agencies. Although the news broadcast was viewed by the public, the transcript and tape of the broadcast appears to be maintained by a private entity, the television station. The provisions of the Freedom of Information Law do not reach to private entities which have produced or hold information even if that information was made public. As such, your problem is beyond the scope of the Committee on Open Government's authority, which is limited to providing advice regarding the Freedom of Information Law.

Perhaps you could obtain the information you need from the journalists who produced the broadcast. The station's news director may be able to assist you further in this matter. I regret that I cannot be of greater assistance. Should you have any further questions, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
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-3637

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

February 25, 1985

Jonathan Slosser, D.M.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. Slosser:

I have received your letter of February 10 in which you requested an advisory opinion regarding the availability of records of the New York City Department of Housing Preservation and Development.

According to your letter, you sought inspection of the "7A file for 607 West 136th Street in Manhattan, Block and Lot 2002/41" maintained by the Department. Your written request was directed to the Records Access Officer, who suggested that you arrange an appointment with a Department employee for review of the file. On the day that the file was made available to you, you were accompanied by two companions. You explained that, shortly after commencing your review of the records, an individual you described as a Department official, Mr. Bruce Kramer, arrived and questioned you as to the identity of your companions and your purpose for reviewing the 7A file. You told Mr. Kramer that one of your companions was a friend and you explained your purpose for reviewing the file. At that point, you wrote that Mr. Kramer demanded the return of the file you were examining and asked you and your companions to leave. He stated that your reason for examining the file "changed things" and that although access to the file was granted to you, it was not granted to your companions. You explained that he also indicated that you had violated the Law by allowing your companions to review the file and that "future access would have to be reconsidered." You would like to know whether your rights under the Freedom of Information Law were violated.

With respect to this matter, I offer the following comments.

First, while you did not explain your reasons for reviewing the 7A file in your letter, the status or purpose of an individual seeking access to records under the Freedom of Information Law is generally irrelevant. In fact, the Court of Appeals has recently held that access to records of a governmental agency under the Freedom of Information Law is not affected by the fact that an individual is involved in pending or potential litigation [see Farbman & Sons v. New York City, 62 NY 2d 75]. Thus, records are available to a litigant just as they are available to any other person.

Second, the availability of records under the Freedom of Information Law is not generally determined by the status or purpose of the requester, but rather by the type of information the records contain. In other words, all records of an agency are available to any person, 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, with respect to the presence of your companions while viewing the file, it is my opinion that their presence was not a proper basis for denial. As discussed above, if the records are accessible to you under the Freedom of Information Law, the records are available to any individual. However, a situation which does not fall within the general rule may involve a record which, if disclosed, would constitute an unwarranted invasion of personal privacy. Although the record must generally be made available to the individual to whom the record pertains, it need not be made available to another person unless the individual to whom the record pertains consents in writing to disclosure [see Freedom of Information Law, §89(2)(c)].

In sum, from the information you provided, it appears that the 7A file was not denied under one or more of the grounds listed in §87(2), but rather because of your reasons for wanting to review the records and because your companions were also interested in reviewing the records. For the reasons stated above, it is my view that the records were improperly withheld from you. Moreover, §89(3) of the Freedom of Information Law requires an agency to deny a request in writing. The written denial must also include a statement of the reason for the denial [see 21 NYCRR 1401.7(b)]. I suggest that you request to review the records again.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Mr. Bruce Kramer
Mr. Garland Dixon
Mr. Mark D. Trachtenberg

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3638

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

February 25, 1985

Mr. Don B. Panush
Jacoby & Meyers
Room 63
200 West 72nd Street
New York, NY 10023

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

Dear Mr. Panush:

I have received your letter of January 23, as well as the materials attached to it.

You have requested an advisory opinion concerning rights of access:

> "to the items denied including a list of all personnel employed under the programs, their file numbers, salary, rates of pay, function and the specific grant or stipent to which they are assigned as well as a list of all grants, entitlements and stipends by year."

Based upon a review of the materials, it appears that the only aspect of your request involving a denial pertains to "file numbers" identifiable to certain employees. The files numbers were initially denied by the Deputy Records Access Officer of the New York City Board of Education under §87(2)(g) and §87(2)(b) of the Freedom of Information Law. Subsequently, you appealed to the Secretary to the Board, who upheld the denial on the basis of §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold to the extent that disclosure would result in "an unwarranted invasion of personal privacy".

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

First, I have contacted the Office of Counsel at the Board of Education on your behalf in an effort to learn more about the nature of the so-called "file numbers" that were denied. I was informed that a file number is assigned to each employee and that it is analogous to an identification number. I was also told that, like a social security number, for example, an employee's file number may be used to gain access to various types of information about an employee, some of which might be highly personal.

Second, based upon the description and uses of file numbers, it appears that the denial was appropriate. Although the standard concerning privacy in the Freedom of Information Law is subject to conflicting interpretations, it has been held that similar information that is irrelevant to the performance of a public employee's official duties would, if disclosed, constitute 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]. Since the file number is merely an identification number and since it is not relevant to the manner in which a public employee performs his or her duties, it appears that the denial was proper.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Nolan, Secretary

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3639

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

February 27, 1985

Mr. Mark D. Cohen
Chief
Appeals Bureau
County of Suffolk
Office of District Attorney
Criminal Courts Building
Center Drive South
Riverhead, NY 11901

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

Dear Mr. Cohen:

I have received your letter of February 11 in which you requested "statutory rule or case law support" for the January 28 advisory opinion sent to Mr. Anthony Scala.

The opinion concerned Mr. Scala's written request for various documents maintained by Suffolk County officials. In response to the request, Mr. Scala was informed that a request must be submitted on a standard form. The advisory opinion stated that the County's response to Mr. Scala's request was "inappropriate". You are concerned with the characterization of the response as "inappropriate" and have requested further clarification.

First, as Mr. Freeman explained in his letter to Mr. Scala, §89(3) of the Freedom of Information Law requires an agency to respond within five business days to a "written request for a record reasonably described" [see also, 21 NYCRR 1401.5(b)]. Moreover, the regulations promulgated under the Law by the Committee on Open Government provide that "an agency may require that a request be made in writing or may make records available upon oral request" [21 NYCRR 1401.5(a)]. Thus, the Law and the regulations are silent regarding the use of standard forms. Accordingly, in the Committee's view, any written request reasonably describing the records sought is sufficient under the Freedom of Information Law.

Second, the Committee has long advised that the requirement that a request for records be submitted on a standard form may be inconsistent with the five-day time limit for responding to a request set forth in §89(3). For example, assume that an individual requests a record, in writing, from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed. Thus, to the extent that the agency's response granting, denying or acknowledging the request is given more than five business days following the receipt of the initial written request, the agency would have failed to comply with the provisions of the Freedom of Information Law.

Third, although the content and format of the County's "Application For Public Access to Records" is appropriate, I do not believe that it can be used to delay a response to a written request for records reasonably described beyond the statutory five-day period. However, the standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a County office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is "inappropriate" to the extent that it unnecessarily serves to delay a response or deny 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

Enc.

cc: Mr. Anthony Scala

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1141
FOIL-AO-3641

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

February 28, 1985

Ms. Sally Webb
President
Albany County Chapter
League of Women Voters
24 Bayberry Road
Glenmont, NY 12077

The staff of the Committee on 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. Webb:

I have received your note of February 15, as well as the Rules of the Albany County Legislature. You have asked that I review the Rules and comment.

In this regard, having read the Rules, there are several points that I would like to offer. It is emphasized that the Rules, from my perspective, are reasonable. Therefore, please consider my comments not as criticisms but rather as observations or considerations upon which you might focus.

Several of the provisions, such as Rule 3 concerning special meetings, refer to notice to the members, which must be served personally or by mail upon the members at least forty-eight hours prior to the date of a special meeting. Since those requirements pertain to notice to members, the Open Meetings Law does not apply. Nevertheless, §104 of the Open Meetings Law requires that notice of the time and place be given to the public and to the news media prior to every meeting, whether regularly scheduled or otherwise.

More specifically, §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 by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(2) concerns meetings scheduled less than a week in advance and requires that notice be given to the news media and to the public by posting in the same manner as prescribed in §104(1) "to the extent practicable" at a reasonable time prior to such meetings.

Rule 5 states that "Cameras, microphones or similar equipment may be permitted in the Chambers with the permission of the Chairman". It also requires that requests to use such equipment "shall be made in writing prior to the commencement of each meeting". "Similar equipment" might be construed to include tape recorders. There are several judicial determinations which indicate that any person may use a portable, battery operated cassette tape recorder at an open meeting of a public body [see e.g., People v. Ystueta, 99 Misc. 2d 1105, 418 NYS 2d 508 (1979) and Mitchell v. Johnston, Supreme Ct., Nassau Cty., April 6, 1984]. In my opinion, with respect to the use of tape recorders, a prior written request to use such equipment might not, based upon case law, be necessary.

Rule 13 states in part that "The minutes of each meeting of this Legislature shall be prepared in full and mailed to each member within three weeks of the date thereof". Here I direct your attention to §106 of the Open Meetings Law, which pertains to minutes of meetings. In brief, the cited provision requires that minutes of open meetings be prepared and made available within two weeks of the date of such meetings. If action is taken during an executive session, the Law requires that minutes reflective of the nature of the action taken be made available in accordance with the Freedom of Information Law within one week. It is noted, too, that if minutes have not been approved by vote or otherwise, I believe that the time limitations imposed by the Open Meetings Law nonetheless apply. If minutes have not been approved within the time limits specified in the Law, it has been suggested that they be made available, but that they may be marked "unapproved" or "draft", for example. By so doing, the public can learn generally what transpired at a meeting; concurrently, the public is effectively informed that the minutes are subject to change.

Rule 15 states in part that "The ayes and nays shall be taken on any question whenver so required by law". I believe that the Freedom of Information Law requires that a record be kept indicating the manner in which each member cast his or her vote. Section 87 (3)(a) requires that each agency shall maintain:

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

As such, the Freedom of Information Law generally prohibits secret ballot voting or its equivalent on the part of the members of public bodies.

Lastly, Rule 24 pertains generally to standing committees, as well as subcommittees. Here I point out that §102(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 consturction law, or committee or subcommittee or other similar body of such public body."

Based upon the language quoted above and its specific reference to committees and subcommittees, those bodies created by the County Legislature are subject to the requirements of the Open Meetings Law to the same extent as the County Legislature itself.

In a related area, Rule 36 refers to the capacity of the County Legislature to "resolve itself into a Committee of the Whole...for the purpose of informal discussion..." Once again, a committee of the whole would in my view clearly be a "public body" subject to the Open Meetings Law. Further, if a public body seeks to conduct an "informal discussion", such a discussion, according to the state's highest court, would constitute a "meeting" within the scope of the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3642

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

February 28, 1985

Mr. Alfred O. Kuhnle
[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. Kuhnle:

I have received your letter of February 12 in which you requested an advisory opinion.

You were denied access to the names and addresses of various retirees of the New York City Fire Department. Mr. Freeman advised you in his letter of February 8 that the denial was appropriate under §89(7) of the Freedom of Information Law. Section 89(7) provides that disclosure of the home address of a former employee or retiree of a public employee retirement system is not required under the Freedom of Information Law. You would like to know whether a list of the names, without home addresses, of the retirees would be available.

In my opinion, a list of only the names of retirees of a public employees' retirement system should be made available. Since §89(7) of the Freedom of Information Law pertains only to "disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system", I do not believe that a list of names could be withheld based upon that provision.

Moreover, the names which you seek could not, in my view, be withheld under §87(2)(b) which permits an agency to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy. Disclosure of such a list, I believe, would be proper since it directly relates to benefits paid to a former public employee as a result of the individual's employment with a governmental agency.

Finally, I believe that the list of names which you seek should be made available to the extent that the list exists as a record or as part of a record from which other personal information can be deleted. However, an agency need not create a record which it does not already possess or maintain [see Freedom of Information Law, §89 (3)].

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3645

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

March 4, 1985

[redacted]
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 [redacted]:

I have received your letter of January 27 in which you requested assistance in obtaining certain records.

Specifically, you would like to obtain access to your mental health records from the Department of Correctional Services including copies of psychiatric evaluations conducted on your behalf. In addition, you would like a copy of your pre-sentence report. In this regard, I offer the following comments.

First, under §87 of the Freedom of Information Law, records of an agency, such as the Department of Correctional Services, are generally available unless they fall within one or more of the grounds for denial listed in §87(2)(a) through (i) of the Law. I believe that §87(2)(g) is relevant to your request for mental health records. That provision permits an agency to withhold records which are intra or inter-agency materials unless they are statistical or factual data, instructions to staff that affect the public or final agency policy or determinations. Thus, to the extent that your mental health records include opinions, recommendations, advice or psychiatric evaluations, I believe that those portions of the records may be withheld from you.

Second, I have enclosed a copy of a court opinion which concerns the availability of pre-sentence reports. In short, the court held that an agency in custody of a pre-sentence report is obligated to make them available, pursuant to court order, to assist the defendant in an appeal. Thus, it appears that you must obtain a court order directing the agency to make the report 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3646

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

March 4, 1985

[redacted]
Auburn Correctional Facility
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 [redacted]:

I have received your letter of February 13, in which you asked for assistance in obtaining a copy of a "misbehavior report" pertaining to you.

In this regard, you indicated in your letter and the correspondence attached to it that you were the subject of a misbehavior report. However, the decision of the hearing officer was reversed, and apparently the report was "expunged" from your records.

From my perspective, since the report in question was expunged, which means that it was destroyed and no longer constitutes a record, the Freedom of Information Law would not be applicable. The Freedom of Information Law pertains to existing records and states generally that all records of an agency are available, except to the extent that their contents fall within specified grounds for withholding. Under the circumstances, since the misbehavior report no longer exists, the Freedom of Information Law no longer applies. Similarly, since the report has been expunged from your records, I do not believe that any other statute could be cited to gain access to it.

Lastly, since the report has been expunged, of potential benefit to you is the fact that its contents can no longer be divulged to any other person or 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:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3650

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

March 5, 1985

Mr. O. Shelly
[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. Shelly:

I have received your letter of February 25 and appreciate your kind words.

Your question is whether information that is apparently disclosable under the Freedom of Information Law that is not maintained on paper, but rather on "audio tape", for example, remains available.

In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" to include:

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

Based upon the language quoted above, the Freedom of Information Law is applicable not only to information contained on paper, but also to information storage devices such as audio tapes, microfilms, and computer tapes.

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

As such, assuming that no ground for denial could appropriately be asserted with respect to the information found on an audio tape, I believe that it would be available under the Freedom of Information Law. It is noted, too, that it has been determined judicially that a tape recording of an open meeting is accessible [see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978] and that computer tapes containing wholly accessible information are also available [see e.g., Babigian v. Evans, 427 NYS 2d 688, aff'd 97 AD 2d 992 (1983) and Szikszay v. Buelow, 436 NYS 2d 558, 107 Misc. 2d 886].

Lastly, §87(1)(b)(iii) indicates that the fee for copying a record that cannot be photocopied must be based upon the actual cost of reproduction.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3651

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

March 5, 1985

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 correspondence of February 28 pertaining to a determination on appeal rendered by the New York City Department of Sanitation.

You wrote that the determination was signed by Kevin T. Smyley, Inspector General. You have questioned Mr. Smyley's dual role as inspector general and appeals officer under the Freedom of Information Law and suggested that his duties might result in a "conflict of interest."

I do not believe that there is any prohibition that would preclude Mr. Smyley from carrying out both functions. As you may be aware, §89(4)(a) of the Freedom of Information Law states in part that:

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

Further, having spoken with a representative of the Office of Counsel at the Department of Sanitation on your behalf, I believe that you will receive a letter that explains that Mr. Smyley's dual role is not inappropriate. In addition, the determination on appeal appears to be consistent with the requirements of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Kevin T. Smyley, Inspector General

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3652

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

March 8, 1985

Mr. Timothy M. Kozyra
Muscato, DiMillo and Kozyra
Attorneys at Law
188 East Avenue
Lockport, NY 14094

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

Dear Mr. Kozyra:

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

According to your letter, your client was placed in the care and custody of the Commissioner of Public Welfare, now the Niagara County Department of Social Services, in 1944. From 1944 to 1946, the Department contracted with the Wyndham Lawn Home, a private entity, for her placement in foster care. Presently, your client is seeking records, photographs and any other information which pertain to her and are maintained by Wyndham Lawn. You would like to know whether, in light of these circumstances, the requested records are available to your client under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides that all records of an agency are available unless they fall within one or more of the grounds for denial listed in §87(2)(a) through (i). "Agency" 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 statutory definition, it appears that Wyndham Lawn is not a governmental entity and thus, it is not an "agency" subject to the Freedom of Information Law.

However, as suggested in your letter, the Court of Appeals has held in Westchester News v. Kimball, [50 NY 2d 575 (1980)] that volunteer fire departments are subject to the provisions of the Freedom of Information Law. The Court found that no:

> "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."

As you indicated, the relationship between Niagara County and Wyndham Lawn might be analogous to the relationship between a local governmental entity and a volunteer fire department in that both provide an important service to a governmental entity. However, it is possible that Wyndham Lawn provides care for many individuals who are not placed by the County Department of Social Services. Moreover, Wyndham Lawn may be one of many private facilities placing children. On the other hand, a volunteer fire department generally provides the exclusive fire protection for a municipality.

Second, I point out that in holding that volunteer fire departments are subject to the Freedom of Information Law, the Court rejected the "nongovernmental function theory" which would subject an agency to the Freedom of Information Law only to the extent that its records relate to the agency's governmental function. Thus, if an entity is determined to be an agency under the Freedom of Information Law, all of its records are subject to the provisions of the Law. For that reason and the distinctions discussed above, a court may find that a private institution, such as Wyndham Lawn, is not subject to the Freedom of Information Law, even though, as you noted, the government would provide the care for a dependent child but for the contract with the institution.

Third, even if Wyndham Lawn is found to be subject to the Freedom of Information Law, I believe that the records which your client seeks could be denied under §87(2)(a) of the Law. That provision permits an agency to withhold records which are specifically exempted from disclosure by state or federal statute. In this regard, I believe that §372 of the Social Services Law limits the availability of records of a facility such as Wyndham Lawn.

Section 372(4) provides for the confidentiality of records maintained by a department of social services concerning children who are committed to the department's care. Paragraph (6) of that section appears to entend the confidentiality of the records to all agencys which fall within §372. Moreover, §372(3) provides:

> "Upon 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."

Thus, it appears that records of an institution, such as Wyndham Lawn, may be made available only by court order.

In sum, it is difficult to determine whether a court would extend the applicability of the Freedom of Information Law to an entity such as Wyndham Lawn. Nonetheless, I believe that the availability of the requested records must be determined under §372 of the Social 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

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-3653

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

March 11, 1985

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 February 28, to which you attached two appeals made under the Freedom of Information Law.

The appeals are directed to the Department of Law and the Office of Court Administration. You requested general information from both of those agencies. However, as of the date of your letter to this office, you had not received a response from either of the agencies.

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

First, having reviewed the materials attached to your letter, it is emphasized that the Freedom of Information Law is applicable to existing records. Consequently, to the extent that your requests may have involved information that does not exist in the form of a record or records, neither of the agencies would in my view be required to create records on your behalf in response to your requests. Further, it appears that some aspects of your requests may have involved questions directed to the agencies, rather than requests for records. Once again, since the Freedom of Information Law pertains to requests for records, it is possible that the questions involve information that does not exist as a "record".

Second, nevertheless, I believe that both agencies are responsible for acknowledging the receipt of your requests. Here I point out that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits within which agencies must respond 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 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 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)].

Third, as you are aware, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Having reviewed your appeals, it is possible that some aspects of your request may be so broad and incorporate so much information that they do not "reasonably describe" the records sought. Perhaps it would be worthwhile to contact the records access officers at the agencies in an effort to attempt to learn more about the types of records that are maintained.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Department of Law
Office of Court Administration

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1148
FOIL-AO - 3654

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

March 12, 1985

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

Secretary of State Shaffer has asked that I respond to your letter of March 2 on her behalf. You have raised a series of issues, some of which I can address directly; with respect to others, I hope to be able to provide appropriate direction to other state agencies.

With respect to strengthening the Freedom of Information and Open Meetings Laws, it is true that there is always room for improvement, and the Committee has recognized that teeth should be added to both laws. Please note that the Governor has recommended legislation which, if enacted, would give a court the authority to fine members of public bodies who engage in flagrant violations of the Law or a pattern of violations. The Governor's recommendation is based upon a proposal offered by the Committee in its annual report. In addition, legislation has been introduced that would include criminal penalties for violations of the Freedom of Information Law. If, for example, an agency official, in dealing with a request made under the Freedom of Information Law, responds knowingly and willingly, and with an intent to injure or defraud, that person could face criminal penalties as well as a civil penalty of $1,000 per violation. As such, efforts are being made to deter violations of both statutes.

You have recommended that a public body be required, at least a week prior to a meeting, to describe "the intent of the meeting" and why the meeting would or would not be open to the public. Although your suggestion might have merit, I am not sure that it would work. Having attended various meetings over the course of years, even though an agenda may be prepared, public bodies often move into topics

that are not referenced on an agenda. In addition, there may be situations in which public bodies must conduct emergency meetings on short notice. It is also noted that the Open Meetings Law as it currently exists provides that, even though a ground for executive session may be cited, there is no obligation on the part of a public body to convene an executive session. Moreover, it has been advised that, in a technical sense, a public body cannot predict or schedule an executive session. In short, prior to entry into an executive session, a motion to do so must be made during an open meeting and carried by a majority vote of the total membership. Unless the vote is affirmative, a public body cannot enter into an executive session. Further, until the vote is taken, it cannot be known whether a closed session will indeed be conducted. Once again, due to the nature of municipal bodies, it may be impossible for the members to know a week in advance of the specific nature of the topics to be considered at an upcoming meeting or to be sufficiently knowledgeable with respect to the issues to determine in advance whether a meeting will be open or justifiably closed.

With regard to communications with attorneys, I would like to emphasize that the Committee has made efforts to communicate with attorneys in a variety of ways. In addition to speaking before attorneys at meetings of various government associations, such as the New York State Association of Counties, Association of Towns, Conference of Mayors, the School Boards Association, and the New York State Bar Association Clinical Legal Education Program, several articles have also appeared in the New York Law Journal. That periodical is likely the most widely read legal publication in New York. Further, the opinions of the Committee are summarized by the Consolidated Law Service, which publishes statutes.

The other area of inquiry concerns relationships with the medical profession. Please note that legislation has been introduced on a yearly basis that would generally grant patients direct rights of access to medical records pertaining to them. Nevertheless, the legislation has never been approved by both houses. If you have a complaint regarding the actions of a particular physician, it is suggested that you contact the Office of Professional Medical Conduct at the State Health Department, which is located at the Empire State Plaza, Corning Tower, Albany, New York 12237. Issues involving ethics in the medical profession

are dealt with, in part, by regulations adopted by the Board of Regents, which licenses physicians. To obtain additional information on the subject, it is suggested that you contact the Professional Licensing Board for Physicians, which is located at the Education Department, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3655

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

March 13, 1985

William Randall
78-A-1777
354 Hunter Street
Ossining, NY 10562

Dear Mr. Randall:

I have received your letter of March 7 in which you requested up to date information concerning the Freedom of Information Law.

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

You also asked where you would direct a request for information regarding a parole officer. I suggest that you direct your request to the agency that employs the parole officer in whom you are interested. Please note that §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 in order to enable the agency to locate the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3656

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

March 13, 1985

Mr. Daniel A. Nardello
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10112

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

Dear Mr. Nardello:

I have received your letter of March 8, as well as the correspondence attached to it.

You have requested an advisory opinion with respect to a denial of access to records by the New York City Department of Investigation (DOI). In terms of background, on January 29, a reporter for your client, the New York Daily News, requested from the DOI copies "of all memoranda, reports and/or other written documents relating to your investigation of the handling of the Willie Classen autopsy by the office of the city's Medical Examiner". The Records Access Officer denied the request on Febrary 4 pursuant to §§87(2)(b) and (g) of the Freedom of Information Law. Following an appeal, the initial determination to deny was upheld. In his determination, Steven M. Rucker, General Counsel to DOI and its Appeals Officer, wrote that:

> "[A]s a result of the death of Willie Classen on November 28, 1979 and the allegation of the 'substitution' of body fluids and tissue samples the Department of Investigation conducted a study of the office of Medical Examiner that targeted the related areas of evidence procedures and security.

> "The study concluded with a letter to Dr. Gross, Chief Medical Examiner, that contained the results of our findings together with certain recommendations. The letter does not constitute a final determination of the issues. It was sent inter agency and had no binding effect on the Medical Examiner's Office. Its purpose was advisory and it was sent in the hope of assisting the Medical Examiner's Office in their own efforts to improve the functioning of their operation."

As such, Mr. Rucker concluded that the material requested could be withheld under §87(2)(g). He added that "disclosure of some of those records would violate Mr. Classen's privacy".

It is your view that the Freedom of Information Law grants access to "significant portions of the DOI's report..." 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 (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 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 with portions, if any, may justifiably be withheld or perhaps deleted.

Third, the major basis for withholding to which the denials 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, it appears that the records constitute "inter-agency" materials. However, if the materials contain any of three areas of accessible information described in subparagraphs (i), (ii) or (iii) of §87(2)(g), to that extent, I believe that they are accessible. 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 AD 2d 568, 456 NYS 2d 146, 148 (1982); emphasis added by court, see also Miracle Mile Assoc. v. Yudelson, 68 AD 2d 176 (1979)].

Therefo , even though the "letter" or memorandum that is the focal point of the request, in the words of Mr. Rucker, "does not constitute a final determination of the issues", statistical or factual information, or other information accessible under subparagraphs (ii) or (iii) of §87(2)(g), would not in my view be "exempt" under §87(2)(g), but rather available under the cited provision. Contrarily, to the extent that the materials are reflective of opinion, advice and the like, those portions could be withheld. Further, while the letter might not have constituted a final determination of all the issues, it might, depending on its contents, be characterized as the final agency determination of DOI.

Lastly, reference was made in the letters of denial to §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". From my perspective, that basis for denial is questionable at best, for the statement concerning the assertion of §87(2)(b) is conclusory and without specific explanation, and because the records pertain to an individual whose death occurred more than five years ago. I point out, too, that a footnote in Ingram, supra, indicated that, in conjunction with the facts of that case, records could not be withheld as an unwarranted invasion of personal privacy relative to a deceased person (id. at 569). In short, it is difficult to envision how disclosure would result in an unwarranted invasion of personal privacy with respect to the deceased, particularly in view of the length of time that has elapsed since the death.

I hope that I have 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 M. Rucker
Mary Ann Giordano

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3657

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

March 13, 1985

Mr. Frank Gennuso
#85-C-127
Wende Correctional Facility
P.O. Box 187
Alden, NY 14004-0187

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

Dear Mr. Gennuso:

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

According to the materials, you submitted a request under the Freedom of Information Law to the City of Buffalo for a copy of the "Buffalo Police Officer Personnel Policy and Procedures Manual". Mr. Samuel F. Houston, Assistant Corporation Counsel, denied your request "pursuant to 5 USC 552 and New York Public Officers Law section 87". You appealed the denial on February 8. In your appeal, you also requested a copy of a "subject matter list". As of the date of your letter, you had not yet received a response. You also requested that I supply the address of the Erie County "Civil Complaints Review Board".

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

First, having reviewed directories of both the City of Buffalo and Erie County, I was unable to locate any information that indicates either the existence or address of a civilian complaint review baord.

Second, with respect to your requests, 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.

As indicated earlier, the initial denial of your request cited 5 USC §552, which is the federal Freedom of Information Act. Since the federal Freedom of Information Act is applicable only to records maintained by federal agencies, I believe that it is irrelevant to the records that you requested. Further although §87 of the Freedom of Information Law is applicable, I would conjecture that, while portions of the manual that you are seeking might justifiably be denied, the remainder is likely available. Further, the City of Buffalo is in my view required to review the manual to determine which portions might justifiably be denied.

It appears that three of the grounds for denial are relevant with respect to rights of access to the contents of the manual. One 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.

Under the circumstances, although the manual could be characterized as "intra-agency material", it appears that it is reflective of the policy of the City. If my contention is accurate, §87(2)(g) could not justifiably be cited to withhold the manual.

Another ground for denial of 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..."

It is likely that various aspects of the manual are reflective of "routine criminal investigative techniques and procedures". To that extent, I do not believe that §87(2)(e) could be cited as a basis for withholding. Nevertheless, other aspects of the manual might indicate non-routine criminal investigative techniques or procedures, and, to that extent, the manual could in my view be denied [see Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979); DeZimm v. Connelie, __ NY 2d __ (1985)].

The remaining ground for denial, §87(2)(f), permits an agency to deny access to records to the extent that disclosure "would endanger the life or safety of any person." Since I am unfamiliar with the contents of the manual, I cannot conjecture as to the application of §87(2)(f).

Third, with regard to your appeal, I believe that an appeal is limited to a review regarding rights of access to records that were initially denied. As such, I do not believe that your appeal should have included an additional new request for a subject matter list. Consequently, it is recommended that you submit a separate request for a subject matter list,perhaps in relation to a particular department of the City of Buffalo.

Fourth, §89(4)(a) of the Freedom of Information Law requires that a determination on appeal be rendered within ten business days of its receipt. If more than ten business days have transpired, I believe that a constructive denial of access has occurred, that you have exhausted your administrative remedies, and, therefore, you have the capacity to initiate a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd, Matter of v. McGuire, 108 Misc. 2d 536, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, although you indicated that you are without funds, it is noted that the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy when a request is made for copies of records. Therefore, should your request be granted in part, the City of Buffalo could in my view assess a fee based upon §87(1)(b)(iii) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Samuel F. Houston

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3658

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

March 14, 1985

Ms. Gina M. LaJeunesse
[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. LaJeunesse:

I have received your letter of March 7 in which you requested an advisory opinion.

You wrote that you were denied access to questions and answers for the Fiscal Administrator exam (no. 38-281) by the Department of Civil Service. In response to your appeal, Ms. Kathy Bennett, General Counsel, explained that the Freedom of Information Law and Department regulations permit the Department to withhold the questions and answers from you. You pointed out that although the Department offered a review of the questions and answers a week following the exam date, you could not attend that review. You would like to know whether the denial of your request was proper.

In this regard, I 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, unless they fall within one or more grounds for denial listed in §87(2)(a) through (i) of the Law.

Second, as you are aware, §87(2)(h) provides that an agency may withhold records which are:

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

Since it appears that the Department has not "finally administered" the exam, I believe that the questions and answers may properly be withheld under the Freedom of Information Law.

Third, although I believe that the exam may be denied under the provisions of the Freedom of Information Law, it is unclear whether the denial of your request to review the questions and answers, as a member of the group who took the exam, was proper under the Department's regulations and the statutes pertaining to examination control. That issue, however, arises outside the area of the Committee's statutory authority. You may wish to seek the advice of a private attorney in 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

cc: Kathy Bennett, Counsel

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3659

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

March 15, 1985

Mr. David Corbin
[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. Corbin:

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, you are attempting to determine "the rent paid (or commercial real estate taxes paid) by a commercial tenant..." that you identified by name and address. You indicated that "tax information relating to real estate property in NYC is accessible to the public" and added,"Why not commercial rents?"

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

First, it is assumed that the records in which you are interested are maintained by an entity of New York City government. If that is so, they would be maintained by an "agency" subject to the requirements of the Freedom of Information Law [see attached, Freedom of Information Law, §86(3)]. On the other hand, if the records sought are maintained by renters or commercial establishments, for example, the Freedom of Information Law would not in my opinion be applicable.

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 (i) of the Law.

Third, having reviewed the Administrative Code of the City of New York, I have located provisions concerning the "commercial rent or occupancy tax". Section L46-16.0 pertains to the commercial rent or occupancy tax, and is entitled "Returns to be secret". The first sentence of the cited provision states that:

> "[E]xcept in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the director of finance of the city, any officer or employee of the department of finance of the city, any person engaged or retained by such department on an independent contract basis, or any person who, pursuant to this section, is permitted to inspect any return to whom a copy, an abstract or a portion of any return is furnished, or to whom any information contained in any return is furnished, to divulge or make known in any manner any information relating to the business of a taxpayer contained in any return required under this title."

Based upon the language quoted above, it would appear that §L46-16.0 of the Administrative Code is clearly intended to require confidentiality. Nevertheless, it is unclear whether the confidentiality requirement can be successfully asserted.

Here I direct your attention to §87(2)(a) of the Freedom of Information Law, which enables an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". The Administrative Code, based upon case law, is not a "statute" [see Morris v. Martin, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. Nevertheless, at the end of the provision in question, there is an indication that it was adopted pursuant to a local law enacted in 1963. In the case of New York City, some local laws are the result of action by the State Legislature. Under those circumstances, a local law in my view might be considered a "statute" that could exempt records from disclosure. In other instances, a local

law may have been enacted without any direction by the State Legislature. In those instances, I do not believe that a local law could be characterized as a statute. Since I am unfamiliar with the local law that led to the enactment of §L46-16.0 of the Administrative Code, it is questionable whether that provision may require confidentiality.

It is noted that other provisions of the Freedom of Information Law might also be relevant. Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Without knowledge of the specific contents of the records you seek, I could not conjecture as to the applicability of §87(2)(b).

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 position of the subject enterprise..."

Once again, without knowledge of the contents of the records sought, it is impossible to advise as to the applicability of §87(2)(d).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3660

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

March 15, 1985

Mr. Vincent J. Kiernan
Patent Trader
272 North Bedford Road
Mount Kisco, NY 10549

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

Dear Mr. Kiernan:

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

According to your letter and the correspondence attached to it, on February 19, you submitted a request for records under the Freedom of Information Law to the records access officer of the Metro-North Commuter Railroad Company. On March 1, the receipt of your request was acknowledged in writing, and you were informed that you would be contacted "in approximately thirty days to advise you of the status of the request". Your inquiry concerns the propriety of the response.

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 (21 NYCRR 1401), 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 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:ew

cc: Robert M. Lustberg
Walter E. Zullig, Jr.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3661

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

March 18, 1985

Mr. David Frish
83-C-813
Attica Correctional Facility
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. Frish:

I have received your letter of March 6 in which you requested information concerning your capacity to obtain medical records about yourself.

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

First, it is emphasized 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."

Based upon the language quoted above, rights granted by the Freedom of Information Law would apply to records maintained by an entity of government, such as the Department of Correctional Services. However, rights conferred by the Freedom of Information Law would not in my view be applicable to records maintained by a private hospital, for example.

Second, assuming that the medical records that you are seeking are maintained by the Department at the facility, a request should be directed to the facility superintendent. If such records are maintained at the Department's central offices in Albany, a request may be sent to the Deputy Commissioner for Administration.

It is noted that §89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you include as much detail as possible, such as dates of illnesses, the nature of treatment received, and similar information that would enable agency officials to locate the records sought.

In terms of your rights, medical records maintained by the Department that are of a factual nature would in my view likely be available to you; to the extent that such records are reflective of advice, recommendation or diagnostic opinion, for example, it is likely that they may be withheld [see Freedom of Information Law, §87 (2)(g)].

Third, assuming that the medical records are maintained by a private physician or hospital, I do not believe that you have direct rights of access to those records. However, §17 of the Public Health Law generally permits a competent patient to designate a physican of his choice to seek and obtain medical records about that patient from another physician or a hospital. Therefore, if the records are maintained by a private physician or hospital, it is suggested that you discuss the matter with a physician for the purpose of seeking the aid of that physician in obtaining medical records on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3662

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

March 18, 1985

[redacted]
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 [redacted];

I have received your recent letter in which you requested assistance concerning your capacity to obtain records about yourself.

According to your letter, several years ago, you were the subject of an adjudication as a youthful offender. At the time, you indicated that you signed various documents providing a "youth agency" with the authority to handle your case. You wrote that you would like to gain access to information concerning your youthful offender determination.

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

First, I would conjecture that some of the information in which you are interested is maintained by a court. Here I point out that the Freedom of Information Law is applicable to records of an "agency", which is defined in §86(3) to include various governmental entities. However, it specifically excludes the "judiciary", which is defined to mean the courts [see Freedom of Information Law, §86(1)]. As such, as a general matter, the Freedom of Information Law is not applicable to the courts or court records. Nevertheless, in many instances, court records are available pursuant to the Judiciary Law or particular court acts. Consequently, it is suggested that you write and explain your situation to the clerk of the court that maintains records relative to your youthful offender adjudication.

Second, the agency to which you referred is likely the Division for Youth. It is suggested that you submit a request concerning your youthful offender treatment to the Division, which is located at 84 Holland Avenue, Albany, New York 12208.

Third, when making a request, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, in a request, it is suggested that you include as much detail as possible, such as dates, index and identification numbers, descriptions of events and similar information that might enable agency officials to locate the records sought. Further, it is suggested that you direct your request to the "records access officer" at the Division for Youth. You might also want to 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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3663

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

March 18, 1985

Mr. Richard Adler
[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. Adler:

As you are aware, I have received copies of your correspondence of February 19, which consists of an appeal sent to the Department of Taxation and Finance.

According to your letter, you requested from the Department of Taxation and Finance information regarding companies that have sought credit from or filed an affidavit of compliance with the Job Incentive Board. Since you were initially denied, I waited until receipt of a copy of a determination on appeal to respond to your inquiry. It is noted that in the interim, at your request, I contacted the Department in order to obtain additional information on the subject.

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

As I understand the situation, the Job Incentive Board had initially operated in the Department of Commerce. Its functions were moved to the Department of Taxation and Finance as the program neared an end. Under the circumstances, it appears that the denial on appeal by the Department is appropriate, for the basis cited is §87(2)(a) of the Freedom of Information Law. That provision enables an agency to withhold records that are "specifically exempted from disclosure by state or federal statute".

Based upon conversations with representatives of the Department, it is likely that the same information, when it was transmitted by participating firms to the Department of Commerce, would have been available. At this juncture, however, since the program is nearing termination, the only mechanism by which the Department of Taxation and Finance

obtains the information that you are seeking is by means of tax return information. Since the provisions of the Tax Law cited by Mr. Kuperman require confidentiality, I believe that the Department likely had no choice but to uphold the denial. Due to the change in the method by which the information sought is reported, the information in my view could be characterized as confidential pursuant to the provisions of the Tax Law, to which Mr. Kuperman referred, and, therefore, deniable under §87(2)(a) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Carl Felsen
Max Kuperman

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3664

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

March 19, 1985

Ms. Joyce M. Pattengill
[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. Pattengill:

As you are aware, I have received your letter of March 6.

According to your letter, the Board of Education of the South New Berlin Central School District has "adopted the policy that public records could only be seen between 3 & 4 PM on days school offices were open." The district clerk expressed the contention that public viewing of records during school hours would be "disruptive". Further, the Superintendent, Frederick A. Hall, suggested that I contact the School District's attorneys for the purpose of communicating with respect to the issue.

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 on Open Government to promulgate general regulations concerning the procedural aspects of the Law. In turn, §87(1) of the Law requires that the governing body of a public corporation, in this instance, the School Board, adopt rules and regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee. As such, I do not believe that an agency's regulations can be more restrictive than those promulgated by the Committee. The Committee's regulations are found in the Official Compilations of Codes, Rules and Regulations as 21 NYCRR §1401.

Second, relevant to the issue raised in your letter, §1401.4 of the Committee's regulations, entitled "Hours for Public Inspection" states, in relevant part that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Based upon the Committee's regulations, which have the force and effect of law, if an agency maintains regular business hours, I believe that it is required to accept requests and produce records during those hours.

Lastly, in terms of the potential for disruption, I point out that the Board is also required to designate one or more "records access officers" [see regulations, §1401.2]. A records access officer has "the duty of coordinating agency response to public requests for access to records." Assuming that a person has been designated as records access officer, that individual in my view has the capacity to ensure that the process of making requests or reviewing records is not disruptive; concurrently, the records access officer also has the responsibility of dealing with requests and making records available during regular business hours, perhaps in a location that would prevent any disruption of services provided by the District.

As suggested in your letter, copies of this opinion will be sent to the attorneys for the School District, as well as the 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:ew

cc: Hogan & Sarzynski
Frederick A. Hall, Superintendent

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3665

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

March 19, 1985

Mr. Neil L. Howard
Superintendent
Hudson City School District
360 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 Mr. Howard:

I have received your letter of March 8 in which you requested assistance in responding to a request for information.

According to your letter and the attachments, your office has been asked to respond to a lengthy request for information concerning the Hudson City School District. You would like to know if it is necessary to research the questions raised in the request and whether a charge could be levied for this service. In addition, you suggested that much of the requested information had been provided to the requester's wife last summer and you believe that the present request "borders on harassment".

In this regard, I offer the following comments.

First, the Freedom of Information Law generally requires an agency to make records in its possession available to the public. However, an agency need not create a record in order to respond to a question or a request for information (see §89(3) of the Freedom of Information Law). Therefore, to the extent that the information sought does not exist in the form of a record or records, I do not believe that the District is obligated to prepare records on behalf of the applicant.

Second, although the information sought may not be maintained in the precise manner in which it was requested, it is probable that most of the information is contained in the various records of the District. I point out that the regulations of the Committee on Open Government require the records access officer, if necessary, to assist the requester in identifying requested records [see 21 NYCRR 1401.2(b)(2)]. Thus, the records access officer should provide assistance in locating the records from which an individual could obtain the information requested.

Third, to the extent that the pertinent records are made available, I do not believe that it is necessary for a records access officer to "research" a request for information. In other words, the access officer need not extract the requested information from a variety of records for the requester. For example, if there is no single record indicating annual expenses for heating a particular school, the records access officer would not be required to prepare a record indicating the annual expenses based upon the monthly bills.

Fourth, no fee may be charged for searching the records and making them available. Section 87(1)(b)(iii) permits an agency to charge up to twenty-five cents per photocopy of a record not in excess of nine by fourteen inches, or the agency may charge for the actual cost of reproducing any other record. The regulations of the Committee prohibit an agency from charging for the inspection of records, a search for records or any certification pursuant to the Freedom of Information Law.

Finally, I believe that the request should be considered without reference to the records provided in August, 1984. In my opinion, the present request seeks additional information and records different from the August request and, as such, merits an appropriate response 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3666

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

March 19, 1985

Mr. Michael Malinowski
#84-A-5568
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. Malinowski:

I have received your letter of March 5 in which you requested an advisory opinion regarding the applicability of the Freedom of Information Law.

Specifically, you wrote that you have directed requests to the clerk and police commissioner of the City of Yonkers concerning "a specific police vehicle, copies of several Yonkers police officers Gun Applications and permits and a list of there [sic] roster for that city". You also indicated, however, that you have not yet received any responses to your requests. You asked whether the Freedom of Information Law is applicable to the City of Yonkers and municipalities generally.

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 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 in my view that municipalities , including the City of Yonkers, are required to comply with the Freedom of Information Law.

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 specificity as possible in order to enable agency officials to locate the records sought.

Third, with respect to a "roster" of employees, §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..."

As such, the City is in my opinion required to prepare a payroll listing that identifies all employees by name, public office address, title and salary.

Fourth, with respect to "gun applications", although I am unfamiliar with specific provisions that may relate to police officers, as a general matter, approved pistol license applications are available from the County Clerk of the county of issuance [see Penal Law, §400.00(5); also Kwitny v. McGuire, 422 NYS 2d 867, aff'd 77 AD 2d 839 aff'd 53 NY 2d 968 (1981)].

Fifth, 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 municipality, i.e., the City Council of the City of Yonkers, to promulgate rules and regulations consistent with the Freedom of Information Law and the regulations adopted by the Committee. One aspect of the Committee's regulations concerns the requirement that the governing body designate one or more "records access officers". A designated records access officer is responsible for dealing with requests made under the Freedom of Information Law [see 21 NYCRR 1401.2]. Therefore, it is suggested that you direct your request to the "records access officer" at City Hall in the City of Yonkers.

Lastly, 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 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:ew

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3667

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

COMMITTEE MEMBERS

THOMAS H. COLLINS
FRED 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

March 20, 1985

Mr. J.C. McCrary
74-A-3931
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. McCrary:

I have received your letter of March 8 addressed to me and to Ms. Rosemary Carroll, Assistant Commissioner of the New York City Police Department.

Once again, you referred to a request for records of the Police Department concerning an event that occurred approximately ten years ago. Although you have received some documentation from the Department, the "voucher" that you are seeking has apparently not been made available, for it has not been located. In this regard, I do not believe that I can add to comments made in previous correspondence.

In short, if the record no longer exists, the Freedom of Information Law would not be applicable, for it pertains to existing records. Further, §89(3) of the Freedom of Information Law states in part that an agency is not required to create or prepare a record in response to a request.

I would like to point out that §89(3) also states that, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". In conjunction with the language quoted above, I believe that you may seek a certification from the records access officer regarding 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:jm

cc: Rosemary Carroll

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3668

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

March 20, 1985

Honorable John M. Sipos
County Attorney
County Attorney's Office
100 Hall Street
Seneca Falls, NY 13148

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

Dear Mr. Sipos:

I have received your letter of March 8 and appreciate your interest in compliance with the Freedom of Information Law.

Your inquiry is "whether or not the names of Defendants, who are apparently eligible youthful offenders, should be released to the press". The question was precipitated by a letter attached to your correspondence sent to you by Mr. Carlton K. Brownell, an attorney representing the Finger Lakes Times. Apparently his client has encountered difficulty in obtaining the information, particularly when it appears in police blotters and similar records, from a variety of law enforcement agencies.

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

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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, although several of the grounds for denial relate to the information in question, none could likely be cited appropriately to deny access.

The first ground for denial of potential significance is §87(2)(a), which provides that an agency may withhold records or portions thereof that "are specifically exempted from disclosure by state or federal statute". While records concerning youthful offenders might at some point fall within a statutory exemption from disclosure, that point is reached, in my view, only when or after a court adjudicates that a person is a youthful offender.

Most relevant to the issue is §720.15 of the Criminal Procedure Law, which as amended by Chapter 411 of the Laws of 1979, provides that:

> "1. When an accusatory instrument against an apparently eligible youth is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public.
>
> 2. When a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and with the defendant's consent, be conducted in private.
>
> 3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action to be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law."

Based upon the quoted provisions, I believe that it is clear that only a court has the authority to seal an accusatory instrument that identifies "an apparently eligible youth". Further, the amendment to subdivision (3) of §720.15 has narrowed the applicability of subdivisions (1) and (2) and the capacity to seal records or conduct private proceedings. As such, I do not believe that records pertaining to apparently eligible youths become "exempted from disclosure" by statute unless or until a court adjudicates

them as youthful offenders. Further, under the amendment to §720.15(3), the provisions regarding the sealing of an accusatory instrument are not applicable at all, as I interpret the amendment, if a youth has been charged with a felony.

The second ground for denial of relevance is §87(2)(b), which states that an agency may withhold records the disclosure of which would result in "an unwarranted invasion of personal privacy". In many instances, subjective judgments must be made regarding the protection of privacy due to the flexibility of the standard provided in the Law. However, it is clear that if there can be "unwarranted" invasions of privacy, there can also be "permissible" invasions of privacy. In my opinion, if the Legislature wanted to protect the privacy of all persons who might be characterized as youthful offenders, it would have done so. Nevertheless, the 1979 amendment to §720.15(3) indicates that the Legislature decreased the ability of a court to protect the privacy of apparently eligible youths. By so doing, I feel that the Legislature implicitly directed that disclosure of the names of youths prior to their adjudication as youthful offenders would result in a permissible as opposed to an unwarranted invasion of personal privacy. In essence, I feel that the arrest or booking records of such persons prior to their adjudication as youthful offenders should be treated in the same fashion as arrest records generally, i.e., they are available until they are sealed under §720.15 or other applicable provisions of law, such as §160.50 of the Criminal Procedure Law. As such, I do not believe that §87(2)(b) could appropriately be cited as a ground for denial prior to the adjudication of a youth as a youthful offender.

The third ground for denial of possible significance is §87(2)(g), which permits an agency to withhold inter-agency or intra-agency materials. The cited provision in its entirety states that an agency may withhold records or portions thereof that:

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

The quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations found within such records. Under the circumstances, the record of the arrest might properly be classified as "intra-agency" material. Nevertheless, the contents, including the name of the person arrested, constitute factual data that must in my view be made available. Therefore, I believe that §87(2)(g)(i) might be cited to provide a right of access to the information sought rather than a ground for withholding.

Lastly, §87(2)(e)(i) states that an agency may withhold records compiled for law enforcement purposes which if disclosed would "interfere with law enforcement investigations or judicial proceedings". It is important to emphasize at this juncture that an agency may withhold records "or portions thereof" that fall within one or more of the grounds for denial that ensue. Therefore, if a portion of a record compiled for law enforcement purposes would if disclosed interfere with an investigation, that portion of the record may be withheld. However, I do not believe that the information in question would if disclosed interfere with an investigation or judicial proceeding. Routinely, analogous information is provided with respect to adults who may have been arrested by means of booking records or police blotters that are generally accessible [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. I cannot see how disclosure of the same information with regard to youths would result in the harmful effects of disclosure envisioned by §87(2)(e).

Again, under the circumstances, §720.15 of the Criminal Procedure Law enables a court to seal records and close proceedings relative to a youthful offender. Until a youth is so adjudicated, however, I believe that the records remain open for public 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

RJF:ew
cc: Carlton K. Brownell
Donald Hadley, Editor, Finger Lakes Times

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3669

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

March 20, 1985

Mr. John H. Galligan
New York State Conference
of Mayors
119 Washington Avenue
Albany, NY 12210

Dear Mr. Galligan:

I have received your letter of March 13 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you asked "whether or not a copy of a public employee's federal W-2 form is a public record within the meaning of §86 of the Public Officers Law."

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

First, as you may be aware, the Freedom of Information Law defines "record" braodly 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 language quoted above, a W-2 form in possession of an agency in my opinion clearly consititutes a "record" 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 an agency 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, a home address, or social security number, among other items, could in my view justifiably be deleted 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:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3670

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

March 20, 1985

Mr. Robert Billings
[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. Billings:

I have received your letter of March 10.

In a "hypothetical situation" that you described in which a court determines that an agency improperly withheld records under the Freedom of Information Law, you asked whether there is any provision that permits a court to direct that the agency pay attorney's fees.

In this regard, I direct your attention to §89(4)(c) of the Freedom of Information Law, which pertains to judicial proceedings initiated under the Freedom of Information Law. Specifically, the cited provision states that:

> "[T]he court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

Based upon the language quoted above, under certain conditions specified in the Law, a court may award reasonable attorney's fees to a person who has substantially prevailed in such a proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3671

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 21, 1985

Mrs. Janette D. Hunter
Town Clerk
Town of New Castle
200 South Greeley Avenue
Chappaqua, NY 10514

Mr. Richard Saravay
[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. Hunter and Mr. Saravay:

I have received your respective letters of March 11 in which you requested advisory opinions regarding the same issue.

According to your letters, the Town Board of New Castle has adopted a local law restricting parking at its commuter lot to New Castle residents only. In January, all non-residents who had existing permits were notified that they would not be able to renew their parking permits on April 1. Subsequently, Mr. Saravay requested a list of the names and addresses of all existing holders of non-resident commuter parking permits. Mrs. Hunter, in her capacity as Town Clerk, spoke with Mr. Freeman, who indicated that disclosure of such list might constitute an unwarranted invasion of personal privacy.

Without disclosing the list of names and addresses, Mrs. Hunter agreed to mail letters supplied by Mr. Saravay to all non-resident commuters with parking permits. The purpose of the letters was to inform the non-residents of the new law and to organize them to discuss action. Apparently, many of the non-residents responded to the letters and a meeting was held at New Castle Town Hall.

Mr. Saravay is still interested in obtaining the names and addresses of the people who did not respond to the letter. You would like to know whether the list should be made available under the Freedom of Information Law.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. In other words, 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. Relevant to the present matter is §87(2)(b) which permits an agency to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy.

Second, §89(2)(b) provides that:

> "An unwarranted invasion of personal privacy includes, but shall not be limited to:...
>
> iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

If Mr. Saravay is merely interested in informing the non-residents of the Town Board's new parking law and seeking their support in challenging the law, I believe that §89(2)(b)(iii) could not be cited as a basis for denying the list of names and addresses. However, if the list were to be used, for example, to raise funds for litigation initiated to challenge the new law, it would be my opinion that the list could properly be denied under §89(2)(b)(iii).

Third, I point out that §89(2)(b) does not set forth exclusive examples of unwarranted invasions of personal privacy. Although the list might not be properly denied under §89(2)(b)(iii), it is possible that disclosure of the list of names and addresses might be unwarranted for a reason not specifically set forth in the examples provided in the law. In general, a records access officer and an appeals officer have the discretion to make initial determinations regarding privacy while, ultimately, a court may decide whether 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3672

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

March 21, 1985

Mr. Elliot Cohen
[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. Cohen:

I have received your letter of March 5, which reached this office on March 14.

Your inquiry concerns the New York City Civilian Complaint Review Board. Specifically, you wrote that you witnessed an act of "police brutality" in April of 1984 and filed a complaint with the Board. You were informed initially that the case precipitated by your complaint was being closed due to your "unavailability". Consequently, you contacted the Board and indicated that you are and have been available to make a statement. In response, a second letter was sent to you indicating that the case would be closed due to the "unavailability of the victim". In January, you submitted a request to the Board under the Freedom of Information Law concerning the file relating to your complaint. As of the date of your letter, you had received no response. You have asked that I "see to it" that the Board releases the file to you.

In this regard, I offer the following comments.

First, it is emphasized that the authority of the Committee on Open Government is advisory only. As such, this office does not have the capacity to compel an agency to grant or deny access to records.

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

Third, I point out that the introductory language of §87(2) indicates that an agency may withhold "records or portions thereof" that fall within one or more of the grounds for denial. Therefore, I believe that the Board, in response to your request, is required to review the records sought in their entirety to determine which portions, if any, might justifiably be withheld.

Under the circumstances, rights of access to the file would in my view be dependent upon its contents. Several of the grounds for denial appearing in the Freedom of Information Law might be relevant. The extent to which those grounds could appropriately be cited to withhold the records sought cannot be known without greater knowledge of the contents. At this juncture, I would like to review the grounds for denial that may be most relevant.

The first ground 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". One such statute that requires confidentiality is §50-a of the Civil Rights Law. That provision states that personnel records pertaining to police officers, maintained by any police agency of the state, which are used to evaluate performance toward continued employment or promotion are confidential. From my perspective, it is questionable whether §50-a of the Civil Rights Law could justifiably be cited to withhold the records, for, as I understand the functions of the Civilian Complaint Review Board, it is not a police agency per se, rather an agency separate from the New York City Police Department that deals with complaints made by the public concerning police officers.

The second ground for denial of possible significance is §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Once again, without knowledge of the contents of the records, I could not conjecture as to the applicability of §87(2)(b), particularly since the victim has apparently not come forward. If, for example, individuals are named or identified in the file, and if disclosure would result in an unwarranted invasion of their privacy, perhaps the identifying details could be deleted, while the remainder of such a record or records would be accessible.

Another potentially relevant ground for denial is §87(2)(e), which permits an agency to withhold records "compiled for law enforcement purposes" under circumstances specified in the Law. In my opinion, it is questionable whether the cited provision would be applicable, for it is possible that the Civilian Complaint Review Board does not carry out a law enforcement function and does not compile records for law enforcement purposes.

Assuming, however, that the records sought could be characterized as having been compiled for law enforcement purposes, those records may be withheld to the extent that they:

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

The language quoted above permits an agency to withhold based upon potentially harmful effects of disclosure. In this instance, if the case is closed, it would appear unlikely that the harmful effects of disclosure described above would arise.

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 and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public and final agency policy or determinations must be made available.

Records prepared by the Board might justifiably be characterized as "intra-agency" materials. To the extent that they are reflective of advice, opinion, recommendation and the like, I believe that they could be withheld. Conversely, to the extent that they contain the three categories of accessible information described in subparagraphs (i) through (iii) of §87(2)(g), this exception could not in my opinion be cited to withhold the records.

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 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: Civilian Complaint Review Board

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3673

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

March 22, 1985

Mr. Jack Kelly
PROCO
Box 15
Cold Spring-on-Hudson
New York 10516-0015

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

Dear Mr. Kelly:

I have received your letter of March 16.

You asked how you "can get a complete list of the voters" of two villages located in Putnam County.

In this regard, direction concerning voter registration information is found not in the Freedom of Information Law but rather in the Election Law.

Most often, lists of registered voters are made available by a county board of elections pursuant to §5-602 of the Election Law. That provision requires the preparation of a list of registered voters and in subdivision (3) states that:

> "[T]he board of elections shall prepare at least fifty copies of such pamphlet and shall send at least one copy of each such list to the state board of elections, at least two copies to the county chairman of each political party, and shall keep at least five copies for public inspection at each main office or branch of the board. Other copies shall be sold at a charge not exceeding the cost of publication."

In addition, in some instances, a register of voters is maintained by a village clerk in conjunction with §15-118 of the Elections Law. Having conferred with a representative of the State Board of Elections, I believe that if such a list is maintained by a village, 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

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 1152
FOIL-AO - 3674

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

March 25, 1985

Mr. William A. Miller
President
Evans Neighbors Association
7010 Schuyler Drive
Derby, NY 14047

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

Dear Mr. Miller:

I have received your letter of March 15 in which you requested an advisory opinion.

In your letter, you asked the following questions:

> "1. What is the policy for citizens taping town board meetings for newsletters for neighbor associations newsletters?
>
> 2. Can associations who pay taxes for Fire Protection by Volunteer fireman Districts, request monthly reports of financial items which tax money pays for?"

In this regard, I offer the following comments.

First, with respect to tape recording town board meetings, I point out that the Open Meetings Law is silent regarding the use of tape recorders. Nevertheless, the Committee on Open Government has consistently advised that the use of tape recorders should not be prohibited in situations in which the devices are inconspicuous. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not detract from the deliberative process.

Second, the Committee's position has been confirmed in a decision rendered in 1979. The Court, in People v. Ystueta, 99 Misc. 2d 1105 (1979), rejected a school board's contention that it could prohibit the use of tape recorders at its meetings. More 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, Supreme Ct., Nassau Cty., April, 1984]. In addition, the Attorney General has reversed earlier opinions on the subject and now advises that a town board may not preclude the use of tape recorders at public meetings of such board (1980 Op Atty Gen 145). Thus, it is my opinion that an individual may use a portable, battery-operated cassette tape recorder to record the open portions of a town board meeting to assist in preparing a neighborhood newsletter.

Third, with respect to the records of volunteer fire companies, the Court of Appeals, in 1980, found volunteer fire companies to be agencies subject to the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. Thus, I believe that the records of a volunteer fire company are available in accordance with the provisions of the Law. Specifically, if monthly reports of items funded by tax money exist, I believe that they should be made available to you. I point out that if such records do not exist, the fire company need not create the records. However, you may be entitled to records which relate to the information described above. Further, it is suggested that you direct your request to the records access officer of the Town.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-3675

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

March 26, 1985

[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 March 14 in which you requested an advisory opinion.

Specifically, you wrote that you believe that you "have been denied [your] rights as a parent of a school child". Apparently, you were denied information concerning your child by your school district, and high school officials have failed to disclose to you "information obtained on [your] son as a nominee for the National Honor Society". Further, it is your view that the information obtained regarding your son was "false".

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

First, although the Freedom of Information Law is generally applicable to records maintained by state and local government in New York, I believe that a provision of federal law deals specifically with the issue.

That provision is the Family Educational Rights and Privacy Act (20 USC §1232g), which is commonly known as the "Buckley Amendment". The Buckley Amendment is applicable to any educational agency or institution to which funds are made available under any federal program administered by the U.S. Department of Education. As such, the Buckley Amendment applies to virtually all public schools, colleges and universities, as well as numerous private educational institutions.

In brief, the Buckley Amendment requires that an educational agency or institution make available all "education records" concerning a student under the age of eighteen years to the parents of the student. Concurrently, the Buckley Amendment generally prohibits disclosure of education records identifiable to a student without the consent of the parents. Based upon the Buckley Amendment, I believe that, if the records in which you are interested continue to exist, they are presumptively available to you.

It is noted, too, that if a parent believes that the education records pertaining to a student are inaccurate or misleading, the parent may request that the records be amended. If the agency refuses to do so, the parent may seek a hearing and include a statement of disagreement with the record.

Lastly, I have contacted the Department of Education in Washington and conferred with the official responsible for oversight of the Buckley Amendment. We discussed records used in relation to the nomination of students for the National Honor Society and agreed that those records would be subject to the requirements of the Buckley Amendment. Therefore, in sum, I believe that records pertaining to your son maintained by the school district 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1153
FOIL-AO-3676

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

March 26, 1985

Honorable Sondra Bachety
Legislator
County of Suffolk
County Legislature
655 Deer Park Avenue
North Babylon, NY 11703

The staff of the Committee on 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. Bachety:

I have received your letter of March 6, as well as the correspondence attached to it. Please accept my apologies for the delay in response. Prior to the preparation of an opinion, in an effort to obtain additional information, I contacted Gregory M. Hensas, Assistant County Attorney, who forwarded relevant materials to me. Those materials led to additional research concerning the status of the Suffolk County Vanderbilt Museum.

Your inquiry concerns a request for minutes of meetings of the Board of Directors of the Suffolk County Vanderbilt Museum. According to your letter, the attorney for the Board advised "that they do not have to respond under the provisions of the Freedom of Information Act..." Mr. Hensas has advised, however, that the minutes are subject to the Freedom of Information Law.

You have requested assistance in resolving the issue and, in this regard, I would like to offer the following comments.

First, the Freedom of Information 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 my opinion, based upon the legislative history involving the role of Suffolk County in relation to the Vanderbilt Museum, I believe that the Board of Trustees of the Vanderbilt Museum is an "agency" required to comply with the Freedom of Information Law.

In terms of background, the establishment of the museum arose by means of a bequest made in the will of William K. Vanderbilt, II. In response to the bequest, a series of actions was initiated by the Suffolk County Legislature, the first of which was a resolution adopted on June 27, 1949. Later, the County Legislature acted in 1959 in accordance with §221 of the County Law, which pertains to the establishment of a county park commission, by means of resolution No. 55. Section 2 of Local Law No. 1 of 1966 states in part that:

> "(a) That the name of the Suffolk county park commission, created by resolution of the board of supervisors on June twenty-seventh, nineteen hundred forty-nine for the purpose of carrying out the educational purposes of the Vanderbilt museum, shall be changed to the Suffolk county Vanderbilt museum commission and the said commission shall carry on and have the same powers, functions and purposes as set forth in the said resolution of June twenty-seventh, nineteen hundred forty-nine. The Suffolk county Vanderbilt museum commission shall have the management and control of the Vanderbilt museum and not other county parks or lands."

Section 2 of Local Law No. 7 enacted in 1976 states that "The County Legislature has the sole power and control over the museum property and the funds provided for its operation, care and perpetuation subject only to the contractual

conditions under which the County accepted the Vanderbilt bequest". Section 3 of that Local Law states in part that "The Suffolk County Vanderbilt Museum Commission shall be the operating agency and the appointing body with respect to personnel except the director..." The most recent enactment of the County Legislature of which I am aware is Local Law No. 3, which was enacted in 1979. Section 6 of that Local Law states that:

> "The Suffolk County Vanderbilt Museum Commission devolved from the former Suffolk County Park Commission (which was established by a resolution of the Board of Supervisors adopted on June 27, 1949 and enlarged pursuant to Section 221 of the County Law by a resolution of the Board of Supervisors adopted on December 28, 1959) pursuant to the provision of Local Law No. 1, 1966 by Section 2(a) of which it was given the management and control of the Vanderbilt Museum."

Section 7 of the same Local Law states in part that "the County Legislature shall appoint members of the Suffolk County Vanderbilt Museum Commission." Section 11 of Local Law No. 3 of 1978 generally reiterates the language of an earlier Local Law, stating in part that:

> "The County of Suffolk is the sole and exclusive owner of the real and personal property, maintenance fund, tangible and intangible of the Vanderbilt Museum received from the Trustees under the will of William K. Vanderbilt, II..."

Based upon the history of the legislative activities relative to the Vanderbilt Museum, it is my view that the County has for a lengthy period had custody and control of the Museum. Consequently, I believe that the Museum is an agency of the County and that its records, therefore, are subject to rights of access granted by the Freedom of Information Law.

I point out that a different statute may also be relevant to rights of access to minutes. Specifically, the Open Meetings Law 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."

In view of the legislative history, I believe that the Board of Directors of the Vanderbilt Museum is a "public body" required to comply with the Open Meetings Law, for its Board of Directors is designated by the Suffolk County Legislature. Further, it appears that the Board of Directors conducts its business for or on behalf of Suffolk County, a public corporation. It is noted that in a somewhat similar situation, a town in Nassau County was given property by means of a will. The board of supervisors of the County was given authority to designate trustees responsible for carrying out the will. In that case, the Appellate Division, Second Department, found that the trustees constituted a "public body" required to comply with the Open Meetings Law [Burgher v. Purcell, 87 AD 2d 888 (1982)].

Assuming that the Board of Directors is a public body, §106 of the Open Meetings Law requires that minutes be prepared and made available to the public in accordance with the Freedom of Information Law.

Enclosed are copies of the Freedom of Information and Open Meetings Laws. In an effort to resolve the issue, this opinion will also be sent to Mr. A.J. Brandshaft, Executive Director of the Vanderbilt Museum.

I hope that 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: A.J. Brandshaft
Gregory Hensas

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3677

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

March 26, 1985

Joseph W. Latham, Esq.
Cole and Latham, P.C.
7 East Steuben Street
P.O. Box 232
Bath, New York 14810

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

Dear Mr. Latham:

I have received your letter of March 18, which concerns a request made under the Freedom of Information Law.

In your capacity as attorney for the Town of Avoca, the Town Supervisor requested that you seek an opinion relative to a specific controversy. The problem involves "the single appointed Assessor's Office as it relates to the Board of Review, the Town Board, and certain aggrieved taxpayers". Related to the contrversy is a request that has been made under the Freedom of Information Law by the "personal attorney" of the Assessor. The record in question is characterized as the "Assessment Review Report" and was prepared by one of the members of the Board of Assessment Review. The report was submitted to the Town Board and it consists of a variety of comments, findings and exhibits. The Town Board apparently believes that the report is an "intra-agency communication" and, therefore, may be withheld.

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, 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. In my opinion, the quoted language indicates that the Legislature envisioned situations in which a single record or report might be both accessible and deniable in part. I believe that the language also imposes a responsibility on an agency to review records sought in their entirety to determine which portions, if any, might justifiably be withheld.

Third, as suggested in your letter, it appears that the only relevant basis for withholding is §87(2)(g), which states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Neverthless, those portions of inter-agency or intra-agency materials reflective of advice, opinion, suggestion and the like may in my view be withheld. Therefore, while I would agree with the Town Board that the document in question constitutes an "intra-agency communication", both rights of access and the capacity to deny are in my view dependent upon the specific contents of the report and the exhibits. It is suggested that the report and the exhibits be reviewed for the purposes of determining which portions consist of information accessible under subparagraphs (i), (ii) or (iii) of §87(2)(g), and which aspects of the materials might justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Miller, Town Supervisor

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3678

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

March 26, 1985

Mr. Ernest Icesom, III
82-A-1455
Unit 9/2
Box 307
Beacon, NY 12508

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

Dear Mr. Icesom:

I have received your letter of March 15 in which you requested assistance from this office.

According to your letter and its attachments, you requested various records related to events which took place in the visiting room of your facility in February, 1985. Your request was denied, in part, on the ground that a particular report was an inter-agency communication which was advisory in nature.

On your behalf, I contacted a representative in the Counsel's Office of the Department of Correctional Services. He had spoken with a counselor at the Fishkill Correctional Facility concerning the report. You should expect a response from Counsel's Office concerning your appeal in the near future.

It appears that the record which you requested may include a report of an incident which took place in the visiting room of the facility in February. To the extent that the record contains a factual account of the incident, I believe that it should be made available to you. However, as you are aware, portions of the record which include advice or opinion may properly be withheld under §87(2)(g) of the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3679

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

March 27, 1985

Mr. Michael D. Grotch
[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. Grotch:

I have received your letter of March 18 in which you raised questions regarding the Freedom of Information Law.

Your first question is whether:

> "...a person or organization [can] request a state agency to allow the person or designee to personally review and go over minutes and records of the state board meetings; and policy guidelines relating to a regulation promulgated at the meeting?"

You added that the records pertain to a meeting conducted prior to the effective date of the Freedom of Information Law. Similarly, you also asked:

> "...whether a person can review state board minutes and records and policy guidelines in total, since there are no indexes for this period and the person does not known when the policy was promulgated..."

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

First, it is emphasized that the Freedom of Information Law is broad in its application, for it pertains to all records of an agency. Section 86(4) of the Law defines "record" to include:

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

Due to the language quoted above, it is my view that any records maintained by an agency fall within the requirements of the Freedom of Information Law, irrespective of when the records might have been produced or created.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, I do not believe that an applicant is required to identify records sought with particularity. On the contrary, it has been held that if the description of records sought enables an agency to locate the records, the applicant has met the burden of reasonably describing requested records [see e.g., M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Third, one of the few instances in which an agency is required to prepare a record involves a so-called "subject matter list". Specifically, §87(3) states in relevant part that:

> "[E]ach agency shall maintain...
>
> (c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

Assuming that an agency maintains an appropriate subject matter list, it may be possible to identify the category of the record sought by means of a review of such a list. It is also noted that an agency's designated records access officer is required to assist an applicant in identifying requested records, if necessary (see 21 NYCRR §1401.2).

Lastly, 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.

Relevant to your inquiry may be §87(2)(g), which, due to its structure, likely requires the disclosure of the types of records in which you are interested. 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.

To the extent that minutes exist, they likely contain final determinations made by an agency that would be accessible under §87(2)(g)(iii). Further, to the extent that "policy guidelines" concerning your area of interest exist, I believe that they would be available under the same 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3680

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

March 27, 1985

Mr. Stephen J. Marvin
[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. Marvin:

I have received your letter of March 19, which concerns a request directed to the Town of Richmondville under the Freedom of Information Law.

You indicated that you submitted a request to the Town on January 19. Since there was no response, you contacted the Attorney General's Office. A representative of that office apparently called David Ullman, the Town Supervisor on your behalf. Mr. Ullman, according to your letter, "said that he would take care of it". Nevertheless, as of the date of your letter, you had not yet received a response.

In this regard, I offer the following comments.

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations pertaining to the procedural aspects of the Law. In turn, §87(1) requires the governing body of each public corporation, in this instance, the Town Board, to adopt its own procedural regulations consistent with the Law and the Committee's regulations.

One aspect of the Committee's regulations involves the designation of a "records access officer", who has the duty of coordinating responses to requests made under the Freedom of Information Law. As such, I believe that the Town's records access officer should have responded to the request.

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 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)].

Third, although you did not refer to the nature of the records that you requested, 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 (i) of the Law.

Enclosed for your consideration are copies of the Committee's regulations and an explanatory brochure that may be useful to you. Further, in an effort to enhance compliance with the Law, copies of this opinion will be sent to the Supervisor and the Town Clerk.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: David Ullman, Town Supervisor
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3681

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

March 27, 1985

Mr. Curtis Stanback
#81-A-3109
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. Stanback:

I have received your recent letter which was received by this office on March 20, 1985.

You asked whether the Regional Health Services Administrator at the Greenhaven Correctional Facility had sent a copy of your appeal and the determination thereon to this office. With your letter, you included a copy of a memorandum from Michael Kalonick, the Regional Health Administrator at Greenhaven, which appears to be the determination of your appeal. You requested further advice concerning this matter.

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

First, I have been unable to locate the copy of your February 25 memorandum to Michael Kalonick which you said was sent to this office. Moreover, we have not received from Mr. Kalonick, a copy of his determination. Since I do not have a copy of your memorandum or appeal, it is difficult to determine the nature of the records which you requested.

Second, if your initial request for medical records was directed to the records access officer at Greenhaven, an appeal of a denial would, under the regulations of the Department, properly be made to Counsel's Office of the Department of Correctional Services in Albany. Thus, it is possible that this office has not received a copy of the determination because your memorandum to Mr. Kalonick was not treated as an appeal under the regulations of the Department.

Nonetheless, if you are seeking access to a particular medical record which has been denied, the denial should be in writing, explaining the basis of the denial. An appeal should be directed to:

Counsel's Office
Department of Correctional Services
Building 2
State Office Building Campus
Albany, NY 12226

I regret that I cannot be of greater assistance to you. If you have any further questions, 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-3682

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

March 28, 1985

Dr. George Silberman
[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. Silberman:

I have received your letter of March 11 in which you requested assistance from this office concerning an investigation by the Inspector General of the New York City Human Resources Administration.

According to your letter and the attachments included, you requested a report of the Inspector General's investigation of Deputy Commissioner Stephen Taylor. As you indicated, several of the responses you received from HRA suggest that the report is not available because the investigation is ongoing and no final determination has been made. Yet, another letter from the HRA denies you a copy of "the recently completed Inspector General's investigation of Stephen Taylor". The denial is based upon the privacy considerations set forth in §89(2)(b)(iv) and (v) of the Freedom of Information Law. In addition, the report was denied as an intra-agency record. However, the most recent letter from the HRA indicates that the investigation has not been completed and that no report has been issued. You asked for an "investigation" of this matter.

In this regard, I offer you the following comments.

First, on your behalf, I contacted a representative of the Inspector General's Office. He explained to me that the investigation of Mr. Taylor is still in progress. To date, I was informed, no reports or recommendations have been prepared. As you are aware, an

agency is not required, under the Freedom of Information Law, to create a record for an individual who requests information which does not already exist in some physical form. Thus, if no report exists regarding the investigation, the HRA is not required to make information available.

Second, even if no final determination has been made with respect to the investigation, it is possible that investigatory records do exist. Such records may include notes of the investigator's interviews, research or observations. In my opinion, it is likely that records of that nature may properly be withheld under §87(2)(g) as inter or intra-agency materials to the extent that they are, for example, opinions and not factual data or final determinations.

Moreover, records which relate to an individual who is the subject of an investigation may be withheld if disclosure would result in an unwarranted invasion of personal privacy. It is my belief that disclosure of the evidence or information collected during an investigation, before a final determination regarding the validity of the allegations, may represent an unwarranted invasion of personal privacy. For, if the changes are found to be meritless or unsubstantiated, the information would have little relevance to the performance of the employee or to the function of the agency. Further, disclosure could be unnecessarily damaging to the individual.

Third, if a report is prepared at the conclusion of the investigation and the charges are determined to be without merit, for the reasons above, I believe that the report could properly be withheld from you. If, however, the charges are substantiated after the investigation, it appears that the HRA would handle the matter in one of two ways. For instance, if the investigation produced evidence suggesting a crime, the Inspector General might forward its findings to the District Attorney's Office. In that case, I do not believe that the report need be made available to you since the investigation would be continuing.

On the other hand, the Inspector General's Office may determine that the matter should be handled administratively, i.e., as a disciplinary proceeding. Likewise, I believe that the investigative report would be deniable as the matter would not be final until a final determination is rendered.

In sum, it appears that, at present, no investigative report has been prepared regarding Dr. Taylor. Moreover, I believe that such a record may be withheld until a final determination of the allegations against him is rendered and that it must be made available only if the allegations are ultimately upheld.

I hope 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

cc: Alex Orgutsky
Inspector General's Office

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3683

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

March 28, 1985

Mr. Walter Henry
81-B-1621
Auburn Correctional Facility
135 State Street
Auburn, New York 13024

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

Dear Mr. Henry:

I have received your letter of March 17 in which you requested assistance.

Specifically, you wrote that you are trying to locate your family. You indicated further that you have a cousin who apparently lives in Rochester and who is a recipient of public assistance.

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

First, although the Freedom of Information Law provides broad rights of access to records, it contains various provisions that enable an agency to withhold records under certain circumstances.

Second, relevant to your inquiry is the first ground for denial in the Freedom of Information Law, which pertains to records that are "specifically exempted from disclosure by state or federal statute". Stated differently, if a provision of law other than the Freedom of Information Law requires confidentiality of certain records, the Freedom of Information Law cannot be used to gain access to those records. In this instance, §136 of the Social Services Law provides, as a general matter, that records that identify either an applicant for or a recipient of public assistance are confidential and cannot be disclosed.

Lastly, since you are a relative, it is suggested that you write to the Monroe County Department of Social Services and describe your situation. Perhaps officials of that agency can provide you with direction that may lead you to your family.

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

PPPL-AO-15
FOIL-AO-3684

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

April 1, 1985

Ms. Mary Lynyak
[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. Lynyak:

I have received your letter of March 18, in which you raised a series of questions concerning the Personal Privacy Protection Law.

In terms of the background of the legislation, it is noted that Chapter 677 of the Laws of 1980 required the Committee to obtain from state agencies notices of all systems of records maintained by state agencies from which personal information could be retrieved. This office received nearly 1,800 such notices. In addition, based upon the notices, the Committee prepared a special report, which includes a series of findings, statistical information and recommendations. In my view, the report provided impetus for the legislation, which was introduced on June 24, 1983, as S.6936 - A.8176. There were 24 Senate sponsors, and 109 Assembly sponsors. The legislation was signed by the Governor as Chapter 652 of the Laws of 1983 on July 25, 1983. Enclosed are copies of the Committee's special report and the Governor's approval message, both of which provide information regarding the intent of the Law.

With respect to the impact of the Personal Privacy Protection Law relative to rights of access to records, it is emphasized that the Law does not diminish public rights of access. Please note that §96(1) of the Law, which lists the circumstances under which personal information may be disclosed, refers to records accessible under the Freedom of Information Law and to disclosures that are "authorized by statute or federal rule or regulation". Therefore, if records are available under the Freedom of Information Law or some other provision of law, they remain available, notwithstanding the Personal Privacy Protection Law.

Further, since you referred to the numerous types of records containing names, I point out that the Freedom of Information Law permits an agency to withhold records when disclosure would constitute an "unwarranted invasion of personal privacy". There are numerous judicial decisions indicating that the disclosure of names and other identifying details often results in a permissible rather than an unwarranted invasion of personal privacy. As such, the fact that a name appears in a record does not necessarily mean that the record must be withheld.

With regard to records concerning elections, disclosure is likely governed by the Election Law. If that is so, the Personal Privacy Protection Law may have no effect upon public rights of access. Further, the Personal Privacy Protection Law is applicable only to records of state agencies; it does not apply to records maintained by a local government agency, such as a county board of elections, for example. If you have encountered a particular problem, please relate it to me; perhaps I can provide direction.

Lastly, the directory required to be compiled has not yet been prepared. This office is awaiting the delivery of word processing equipment, which will be used to prepare the directory.

I hope that 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.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3685

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

April 1, 1985

Mr. Tracey M. Himmel
[redacted]

Dear Mr. Himmel:

I have received your letter of March 25, as well as the materials attached to it. The letter constitutes an appeal following a denial of access to certain records maintained by Nassau Community College.

The records sought pertain to students at the College and were used in substantiating an award. Although some of the records sought were apparently made available to you, other records identifiable to students were denied by Bob Allen, the records access officer at the College.

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

First, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office does not have the capacity to grant or deny access to records maintained by another agency, such as the College. Further, while agencies must transmit copies of appeals and the ensuing determinations to the Committee, this office does not make determinations on appeal.

Second, the procedure for appealing a denial of access is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

> executive or governing body, who shall within 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 suggested that you contact the records access officer for the purpose of determining the identity of the person or body to whom an appeal should be directed.

Third, since the denial is based upon the federal Family Educational Rights and Privacy Act (20 USC §1232g), I note that the Act pertains to records identifiable to students. In brief, the Act requires that "education records" pertaining to a student must be made available to the parents of the students under the age of eighteen years or to "eligible students" to whom the records pertain. An eligible student is a person eighteen years of age or over who attends an institution of post-secondary education. Therefore, as a general matter, I believe that you have rights of access to records identifiable to you pursuant to the Act. Concurrently, however, the Act requires that education records identifiable to students be kept confidential with respect to third parties, unless the students consent to disclosure. Consequently, if I understand the facts correctly, records identifiable to students other than yourself would be considered confidential under the Act.

In terms of the relationship between the federal Act and the Freedom of Information Law, I point out that the first ground for denial listed in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". I believe that such a statute, when appropriately invoked, would be the Family Educational Rights and Privacy Act.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bob Allen
Dr. Sean Fanelli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3686

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

April 1, 1985

Mr. Scott Wexler
Executive Director
Coalition for Alcohol Issue Reform
P.O. Box 892
Albany, New York 12208

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

Dear Mr. Wexler:

I have received your letter of March 21, which pertains to a request directed to the State Liquor Authority under the Freedom of Information Law.

According to your letter, you submitted a written request to the Authority at its New York City office on February 14. After four weeks passed without a response, you telephoned the Authority and spoke with an individual who "identified herself as the records access officer". Again, after having received no appropriate response, you called the Authority's office on March 20 and a Mrs. Barton indicated that she had no record of your request. After having refreshed her memory, she contacted you and indicated that one aspect of your request involved records that would be made available, but that the remainder was "very complicated...and would take between 1 and 2 weeks to put together". You suggested to Mrs. Barton that your request should have been answered "within 5 days of submission" and that it should not be necessary to wait an additional two weeks before receiving a response. You wrote that "Her reply was that they (the SLA) were providing a public service and I should be satisfied with their cooperation". You suggested that responding to your request should not be considered the performance of a "public service" on her part, but rather an obligation. You added that "At this point she terminated the conversation by hanging up".

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

It is emphasized at the outset 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 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 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)]

In an effort to enhance compliance with the Law, copies of this letter will be sent to Mrs. Barton as well as the Chairman of the Authority.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mrs. Barton
Thomas Duffy, Chairman

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3687

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

April 2, 1985

Mr. Daniel Bankowski
83-A-6006 E3-23
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. Bankowski:

I have received your letter of March 21, which concerns your rights of access to a pre-sentence report.

In this regard, please note that §390.50 of the Criminal Procedure Law deals specifically with access to pre-sentence reports. As a general matter, pre-sentence reports are confidential with respect to the public and may be made available to a defendant only by a court. Since you referred to the possible importance of the report relative to an appeal, I point out that a recent amendment to subdivision (2) of §390.50 states that "[T]he pre-sentence report shall be made available by the court for examination and copying in conjunction with any appeal in the case, including an appeal under this subdivision". Further, in a decision concerning the amendment, it was found that:

> "[T]he obvious purpose of the legislature in enacting Chapter 132 of the Laws of 1984 was to make the presentence report generally more accessible to counsel and/or the defendant pro se. The spirit of such amendments was open disclosure and discussion of the information before the Court in sentencing and/or appellate review of

> sentencing and the need to remedy the mischief created by bureaucratic roadblocks to that process. Therefore, this Court holds that the agency in custody of such records should be obligated to make them available pursuant to court order..." [see People v. Zavaro, 481 NYS 2d 845, 846 (1984)].

Based upon the decision cited above, it appears that a county probation department must make a presentence report available pursuant to an order of the court.

Enclosed for your consideration is a copy of the decision rendered in People v. Zavaro.

I hope that I 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-3688

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

April 3, 1985

Mr. John Logan
[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. Logan:

I have received your letter of March 27, which pertains to the implementation of the Freedom of Information Law by the Village of New Paltz.

According to your letter, you requested from the Village Clerk a copy of a subject matter list. No such list has been made available, because it has apparently not been created. With respect to requests for other records, which began on February 10, some have been made available, others have not been provided, and some cannot be found. You added that "[I]t is well known that the Mayor maintains extensive files in his office and that these files might contain some of the missing documents. The Mayor has refused to provide anyone access to his files." It is your contention that "the files in the Mayor's office should be maintained in the Clerk's office so they would be available for public inspection."

You have requested that this office "take appropriate action to force the Village of New Paltz to obey the Open Government Laws by making their files available to the public."

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

First, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office does not have the legal capacity to compel an agency to grant or deny access to records.

Second, with respect to the subject matter list, the preparation of such list represents one of the few instances in the Freedom of Information Law in which an agency is required to create a record. Specifically §87(3) states in relevant part that:

> "[E]ach agency shall maintain...
>
> (c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

I point out, too, that the Freedom of Information Law has contained the requirement that a subject matter list be prepared since its enactment in 1974.

Second, in terms of the procedural implementation of the Freedom of Information Law, §89(1)(b)(iii) of the Law requires the Committee 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 Village Board of Trustees, to adopt regulations in conformity with the Law and consistent with the Committee's regulations (see attached, 21 NYCRR §1401).

One aspect of the regulations pertains to the designation of one or more records access officers by the Board of Trustees. Further, the regulations describe the duties of a records access officer. If, for example, the Clerk is the sole designated records access officer, I believe that he or she has the duty of responding to requests for all village records, including those kept in the Mayor's office. It is noted that, even though the Mayor might have physical custody of the records, he does not in my view have legal custody of the records, for §4-402 of the Village Law states in part that the Clerk shall "have custody of the corporate seal, books, records and papers of the village and all the official reports and communications of the board of trustees..."

Further, I do not believe that the records kept in the Mayor's office could be characterized as personal property or personal records. Under the Freedom of Information Law, all agency records are subject to rights of access, and the term "record" is defined in §86(4) to mean:

> "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."

Therefore, records "kept" in the Mayor's office in my opinion fall within the scope of the Freedom of Information Law. Once again, I believe that a request for such records should be answered by the designated records access officer, even though the records may be kept by the Mayor.

Lastly, 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 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 dyas 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)].

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the Mayor and the Village 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:ew

Enc.

cc: Mayor Remsnyder
Clerk, Village of New Paltz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3689

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

April 3, 1985

Mr. Donald R. Price
[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. Price:

I have received your letter of March 27 in which you raised a question regarding budget information prepared by a school district.

According to your letter, on March 21, you requested from the Sachem Central School District a "Budget Work Book" consisting of approximately 175 pages. You described that document as a "line item book which was available to the public in the past..." In response to your request, the records access officer denied access on the ground that "Budget item line draft worksheet is inter-agency information which contains narrative material that is exempt from disclosure under the Public 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 based upon a presumption of 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, I 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 ensuing grounds for denial. Therefore, I believe that the Legislature envisioned situations in which a single record

or report might be both accessible and deniable. Further, in my opinion, in view of the quoted language, an agency is required to review a record sought in its entirety to determine which portions, if any, might justifiably be withheld.

Third, I agree with the records access officer that the work book in question falls within the scope of the ground for denial appearing in the Freedom of Information Law that pertains to inter-agency or intra-agency materials. Nevertheless, due to the structure of that provision, it is likely in my view that much of the work book should be available. Specifically, the provision 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.

Under the circumstances, I believe that the report could be characterized as "inter-agency" material. Nonetheless, to the extent that it consists of "statistical or factual tabulations or data", I believe that it should be made available. It is noted that numerical figures found within so-called budget worksheets in possession of the State Division of the Budget that were reflective of estimates and were subject to change were found to be accessible under the Law [see Dunlea v. Goldmark, 390 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

To the extent that the report is reflective of opinion, advice, or recommendations appearing in the form of a narrative, I would agree that those portions could at this juncture 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: Jeannette Caravella

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-16
FOIL-AO-3690

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

April 3, 1985

Mr. Charles Juzek
[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. Juzek:

I have received your note of March 21 in which you requested information concerning the Personal Privacy Protection Law.

You would like to know whether the Law grants a patient a right to obtain copies of his or her hospital medical records. In addition, you would like to know whether any legislation regarding this matter has passed or is pending in the Legislature.

In this regard, I offer the following comments.

First, §95(6)(b) of the Personal Privacy Protection Law states that an agency is not required to provide an individual with access to "patient records concerning mental disability or medical records where such access is not otherwise required by law." Thus, the Privacy Law does not grant any rights of access to medical records in addition to those granted under other laws, for example, the Freedom of Information Law and §17 of the Public Health Law.

Second, under the Freedom of Information Law, I believe that medical records maintained by a State or municipal hospital are available to the individuals to whom the records relate to the extent that the records contain statistical or factual information. On the other hand, those portions of the records which include evaluations, diagnoses, opinion or recommendations could, in my opinion, be withheld [see Freedom of Information Law, §87(2)(g)]. I point out that the provisions of the Freedom of Information Law do not apply to records maintained by private hospitals.

Third, §17 of the Public Health Law provides a limited right of access to medical records. That section requires a physician or hospital to make a patient's medical records available to another physician or hospital on behalf of the patient who requests such records. However, §17 does not grant an individual the right to directly obtain his or her medical records.

Finally, with respect to legislation, I have been informed that bills proposing a right of access to medical records are introduced in the Legislature almost every year. Unfortunately, they have not, to my knowledge, successfully gained support. You may wish to contact the Health Committee of the Assembly for more information. Assemblyman James R. Tallon is the Chairperson of the Committee and he may be reached at:

Room 822
Legislative Office
Building
Albany, NY 12248
(518) 455-4646

I hope 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-3691

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

April 3, 1985

Mr. Anthony Romandette
#84-A-1849
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. Romandette:

I have received your letter of March 22 in which you raised questions regarding requests made under the Freedom of Information Law.

You indicated that requests were denied on February 21 by the Division of Criminal Justice Services and on March 8 by the Town of Colonie. You have asked whether the Division and the Town transmitted copies of the denials and, if so, whether this office furnished advice to those agencies.

First, in this regard, having searched our files relative to appeals, I did receive copies of both your appeal and the determination thereon by Jay Cohen, Deputy Commissioner of the Division of Criminal Justice Services. I could not locate a copy of any appeal directed to the Town of Colonie.

Second, it is noted that you referred to denials, and it is unclear whether you submitted an appeal following an initial denial to the Town of Colonie. Here I point out that an agency is not required to send to the Committee a copy of its original denial of a request. Section 89(4)(a) of the Freedom of Information Law requires that copies of appeals and the determinations that follow must be sent to this office.

Third, this office did not prepare any advisory opinion or send to either the Division of Criminal Justice Services or the Town of Colonie information regarding the requests to which you referred.

Lastly, you asked whether the Committee may "legally compel" an agency to fully explain its reasons for denying a request. You also asked whether penalties may be brought against an agency for failure to comply with the Freedom of Information Law. Here I point out that the Committee on Open Government has the authority to advise with respect to the Freedom of Information Law; this office has no authority to compel an agency to grant or deny access to records or to require that an agency's determination to deny be expansively explained.

With regard to penalties, as you may be aware, an applicant who has been denied access to records on appeal may initiate a proceeding under Article 78 of the Civil Practice Law and Rules. If an applicant substantially prevails in such a proceeding, the court may assess against an agency reasonable attorney's fees and other litigation costs where the court finds that:

> "i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record" [see Freedom of Information Law, §89(4)(c)].

I hope that 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-3692

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

April 4, 1985

Mr. Richard 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 25 in which you requested advice regarding the availability of your medical records.

In your letter, you explained that you were incarcerated at Westchester County Jail in 1982 when you were known as George Grace. You wrote that you sent two requests for all of your medical records produced during your incarceration to the office of Dr. Ian Loudan at the State Department of Correctional Services. Apparently, you have received no response from his office. You would like to obtain your medical records.

In this regard, I offer the following comments.

First, under the Freedom of Information Law, I believe that medical records maintained by a state or municipal hospital or facility are available to the individuals to whom the records relate to the extent that the records contain statistical or factual information. On the other hand, those portions of the records which include evaluations, diagnostic opinion, or recommendations could, in my view, be withheld [see Freedom of Information Law, §87(2)(g)]. I point out, however, that the provisions of the Freedom of Information Law do not apply to records maintained by private hospitals or physicians.

Second, §17 of the Public Health Law provides a limited right of access to medical records. That section requires a physician or hospital to make a patient's medical records available to another physician or hospital on behalf of the patient. However, §17 does not grant an individual the right to directly obtain his or her medical records. You may wish to contact a physician with whom you are familiar to obtain the medical records on your behalf.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-3693

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

April 4, 1985

Mr. William Nelson
83-A-7663
Watertown Correctional Facility
Dry Hill
Watertown, New York 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. Nelson:

I have received your letter of March 24 in which you requested an advisory opinion.

According to your letter, you have appealed several denials and "constructive denials" to Counsel's Office of the Department of Correctional Services. You wrote that the Department has not always complied with the time limitations set forth under the Freedom of Information Law and the regulations promulgated thereunder. You would like to know what remedies are available to compel the Department to comply with the statutory time limitations.

In this regard, I offer the following comments.

First, §89(4)(a) of the Freedom of Information Law provides that the person or body designated to determine appeals must respond to an appeal within ten business days of the receipt of the appeal. In Floyd v. McGuire [108 Misc. 2d 536, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)], the Court held that if the appeals officer fails to respond within ten business days, 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.

Second, §7803(1) of the Civil Practice Law and Rules provides that one of the proper questions that may be raised in a proceeding under Article 78 is:

> "Whether the body or officer failed to perform a duty enjoined upon it by law".

If you wish to proceed in this manner, I suggest that you contact an attorney for further advice.

I hope 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3694

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

April 4, 1985

Ms. Sandra A. Krom
[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. Krom:

I have received your letter of March 28 in which you requested an opinion regarding the Freedom of Information Law.

According to the materials attached to your letter, as a non-resident of the District, you received a notice from the Bradford Central School District indicating that the District had not received tuition payment for the attendance of your daughter. In response to that notification, you requested from the District various records under the Freedom of Information Law, including a statement of policy, a form sent to the Commissioner of Education regarding approval for a fee charged for tuition, the Commissioner's approval, a list of all non-district students and copies of records indicating payment to the District for tuition payed by non-residents. The superintendent, Kenneth J. Connolly, responded by enclosing a copy of the policy that you requested. He indicated that there is no requirement concerning approval by the Commissioner. Mr. Connolly also wrote that the School District attorney advised that the remainder of the information sought need not be divulged. He suggested that you contact the attorney's office if you have further questions. Subsequently, you appealed the denial, and Mr. Connolly again responded that the attorney reiterated that certain information pertaining to non-resident students need not be made available.

You have asked what procedure should be followed to obtain the information sought.

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

First, I point out that §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) of the Law requires the governing body of an agency, in this instance, the School Board, to adopt regulations in conformity with the Law and consistent with the regulations promulgated by the Committee.

One aspect of both the Law and the regulations of the Committee pertains to the right to appeal a denial of access to records. Specifically, §89(4)(a) of the Freedom of Information Law states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body who shall within ten business days of the receipt of such appeal fully explain the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

The regulations provide additional detail concerning an appeal and state in part that:

> "(b) 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 boyd established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer " [see attached regulations, 21 NYCRR, §1401.7(b)].

Under the circumstances, I do not believe that the response by Mr. Connolly "fully explained" the reasons for the denial either in response to your initial request or your appeal. Moreover, the regulations indicate that the records access officer cannot be the appeals officer. Obviously, if the same individual determines rights of access in response to an initial request as well as an ensuing appeal, the right to review becomes meaningless. Further, I believe that Mr. Connolly's initial denial should have identified the person or body to whom an appeal could have been directed. It is suggested that you contact Mr. Connolly for the purpose of learning the identity of such a person or body.

Second, as you may be aware, the Freedom of Information Law pertains to existing records. Therefore, if, for example, the communications to which you referred regarding an approval by the Commissioner of Education do not exist, the School District would not in my view be required to create such a record in response to a request. However, if such records do exist, whether or not there is a legal obligation to seek such approval, those records would in my opinion be subject to rights of access granted by the Freedom of Information Law.

Third, two aspects of your request concern the identities of non-resident students and the payment of tuition by the parents of such students. In this regard, "education records" personally identifiable to a particular student or students are generally considered to be confidential under the provisions of the federal Family Education Rights and Privacy Act (20 U.S.C. §1232g), unless the parents consent to disclosure. Concurrently, the federal Act grants parents rights of access to education records pertaining to their children.

The regulations promulgated by the U.S. Department of Education under the Act 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 students or 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.

However, the same information would not be considered confidential if 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 likely include names of students and their addresses, 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:ew

Enc.

cc: Kenneth J. Connolly, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3695

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

April 4, 1985

Ms. Kathleen M. Condon
Executive Editor
The Times Record
501 Broadway
Troy, NY 12181

The staff of the Committee on 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. Condon:

I have received your letter of March 29 concerning difficulties in obtaining information from the Troy Police Department.

Having reviewed a variety of materials and news commentary attached to your letter, new guidelines regarding disclosure by the Police Department have been developed during recent months. As you stated in a letter to John Buckley, the City Manager, these guidelines "boil down to the police not releasing any information on any case until the investigation is closed". Although you requested that the guidelines "be relaxed", Mr. Buckley's answer was not responsive to your request.

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

First, under the circumstances, I believe that it is important to provide background concerning the Freedom of Information Law. As you may be aware, the Freedom of Information Law was enacted in 1974. At that time, the Law granted access only to specified categories of records listed as available. As a consequence, rights of access

were limited. In addition, one of the grounds for withholding records, notwithstanding the categories of accessible information, involved "investigatory files compiled for law enforcement purposes" [see original Freedom of Information Law, §88(7)(d)]. Under that provision, any investigatory files compiled for law enforcement purposes could be withheld. Moreover, since the language was open ended, even if a crime might have been solved, the exception permitting denial would remain in effect.

Due to a series of deficiencies and problems arising under the original Freedom of Information Law, the Law was repealed and replaced with a new statute that became effective on January 1, 1978. Rather than restricting access to specified categories of records deemed available, the current Freedom of Information Law is based upon a presumption of 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.

Many of the grounds for denial are based upon potentially harmful effects of disclosure, thereby enabling an agency, such as a police department, to withhold records when disclosure might be damaging to an individual or a governmental process, for example.

Second, it is emphasized that the introductory language of §87(2) refers to the capacity of an agency to withhold "records or portions thereof" that might fall within the scope of one or more of the grounds for denial. Based upon the quoted language, I believe that the Legislature envisioned situations in which a single record might be both accessible or deniable in part. That language also in my view requires that an agency review records in their entirety to determine which portions, if any, might justifiably be withheld.

Third, due to the structure of the Freedom of Information Law, as well as its specific language, I believe that it is inappropriate for an agency, such as the City of Troy or its Police Department, to establish a policy or guidelines that impose the type of blanket restriction described in the materials that you sent. From my perspective, one of the purposes of the Freedom of Information Law is to provide statutory guidance concerning the capacity to withhold. Since the State Legislature has pro-

vided such direction, I believe that any rule or guideline established unilaterally by an agency is void to the extent that it conflicts with a statute, such as the Freedom of Information Law. If agency officials object to the terms of a statute enacted by the State Legislature, I believe that their remedy involves an effort to seek legislation; I do not believe that an agency has the authority to change the rules or adopt its own guidelines when they are inconsistent with a statute. The policy adopted by the City of Troy in my opinion represents an infringement upon rights granted by statute not only with respect to members of the news media, but also the public generally.

Fourth, the previous comments should not be construed to mean that all of the records of the Police Department must be made available. On the contrary, while rights of access granted by the Freedom of Information Law may be expansive, many of the grounds for denial listed in the Law are clearly intended to provide an agency with the capacity to withhold records under certain circumstances for reasons described in the Law. For example, in the context of records maintained by police departments, there may be several grounds for denial of relevance, which may be applicable in whole or in part depending upon the specific nature of the records and the events to which they relate.

Perhaps of greatest significance relative to records of a police department is §87(2)(e), which states that an agency may withhold records that:

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

From my perspective, records compiled for law enforcement purposes may be withheld under the language quoted above only to the extent that the harmful effects of disclosure described would arise. If, for instance, disclosure would interfere with an investigation or identify a confidential informant, the Law permits an agency to withhold records. Nevertheless, some records in possession of a police department might not be characterized as "records compiled for law enforcement purposes" and, if that is so, §87(2)(e) would not be applicable. Further, some records compiled for law enforcement purposes would not if disclosed result in the harmful effects described in the statutory language. For instance, the sample investigative report used by the Troy Police Department that is attached to your letter, when completed, contains numerous types of information. However, the top of the report containing twelve items of information appears to involve facts describing the nature of an incident, the time and location of its occurrence. In my view, it is difficult to envision how that aspect of an investigative report could be denied under any of the provisions of the Freedom of Information Law.

Another ground for denial of potential significance might be §87(2)(b). That provision enables an agency to withhold "records or portions thereof" when disclosure would result in "an unwarranted invasion of personal privacy". I point out that the fact that a name or other identifying detail appears in a record, would not, according to judicial decisions, permit an agency to deny access in every instance. The standard relative to privacy in the Freedom of Information Law is in my view flexible and often requires the making of subjective judgment. Disclosure involving the intimate details of peoples' lives might if disclosed result in "an unwarranted invasion of personal privacy". However, other disclosures might result in a permissible invasion of privacy, in which case the records could not be withheld under §87(2)(b).

A third ground for denial of possible significance is §87(2)(f), which permits an agency to withhold records or portions thereof when disclosure would "endanger the life or safety of any person". Obviously, the propriety of a denial based upon §87(2)(f) is dependent upon the facts and circumstances present in a particular case.

The remaining ground for denial of possible relevance is §87(2)(g), which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
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> 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. Portions of such materials reflective of advice, opinion, recommendation and the like may in my view be withheld.

By means of example, the investigative report used by the Police Department, since it is prepared by officials of the Department, could be characterized as "intra-agency material". However, the contents of the report would in great measure consist of factual information. To that extent, §87(2)(g) could not be cited as a basis for withholding. Other aspects of the report may be reflective of opinion, such as section 21 entitled "Solvability Factors". Perhaps that aspect of the report could be withheld under the cited provision. In addition, as suggested earlier, depending upon the facts and circumstances of a case, one or more of the grounds for denial described earlier might be asserted, at least in part, to withhold certain aspects of the report.

To reiterate, due to the direction given in the Freedom of Information Law, I believe that the policy of withholding all information unless a crime is solved clearly conflicts with the Freedom of Information Law. Concurrently, I believe that any agency, including a police department, is required to review records when a

request is made to determine the extent, if any, to which one or more of the grounds for denial might apply. If, for example, a portion of a record would if disclosed, interfere with an investigation, that portion of the record could be deleted, while the remainder might be required to be made available.

It is also noted that a police blotter or its equivalent has been found to be available under the Freedom of Information Law [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. Although the phrase "police blotter" is not specifically defined by any provision of law, the court in Sheehan, supra, based upon custom and usage, determined that a police blotter is a log or diary in which any event reported by or to a police department is recorded. It was specified in the decision that the blotter is available, for it contains no investigative information, but rather a summary of events of occurrences. Therefore, if the Troy Police Department maintains a police blotter or its equivalent, I believe that it should be made available.

Finally, I would conjecture that no useful purpose would be served by withholding information that briefly describes events in which the Police Department may be involved, whether minor or serious. It is my understanding that any person can listen to radio calls on a police scanner. If that is so, and even if no police blotter is maintained, information concerning crimes and other events is effectively available to the public. As indicated earlier, this is not to say that all records prepared in conjunction with an investigation must be made available in their entirety, for the Freedom of Information Law permits an agency to deny certain records or portions of records in accordance with the grounds for denial. However, once again, I believe that police records cannot be withheld in every instance, but only to the extent that the grounds for denial appearing in the Freedom of Information Law may justifiably be asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: John P. Buckley, City Manager
Chief Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3696

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

April 4, 1985

Ms. Eva M. Parziale
[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. Parziale:

I have received your letter of March 25 in which you requested an advisory opinion.

In your letter you asked:

> "Under the state's open records laws, can a state agency take up to 30 days to release documents to a requestor? And can that same agency restrict or limit the number of documents to five per day?"

In this regard, I offer the following comments.

First, 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. Section 89(3) of the Law requires an agency to respond to a request within five business days of the receipt of the request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing and state the reasons therefore. In the alternative, the receipt of the request may be acknowledged in writing if more than five days is necessary to review or locate the records and to determine rights of access. If access to records is neither granted nor denied within ten business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed.

Based upon the statutory time limitations, it is my opinion that an agency which makes records available more than fifteen business days after receipt of a request has violated the provisions of the Freedom of Information Law. However, the Law does not provide an effective means for compelling an agency to comply within the time limits. As in all cases of alleged violations of the Law, an individual's ultimate remedy involves the initiation of a judicial proceeding to challenge the action (or inaction) of an agency.

Nevertheless, an agency's failure to respond timely to an initial request may be considered a "constructive" denial and appealed to the appeals officer of the agency. Moreover, if the appeals officer fails to respond to an appeal within ten business days of the receipt of the appeal (see §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, you asked whether an agency may restrict the number of records made available to five per day. In my opinion, no such policy would be proper under the Freedom of Information Law and the regulations promulgated thereunder. The purpose of the five and ten business day time periods discussed above is to give an agency reasonable time in which to locate and make the records available. I believe that the Legislature has provided ample flexibility in the Law so as to foreclose the need for agencies to adopt such restrictive policies.

I hope 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: Records Access Officer, Insurance Department
Paul Altruda, Office of Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3697

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

April 9, 1985

Mr. Stephen Fromson
Greenberg & Wanderman
35 North Madison Avenue
P.O. Box 327
Spring Valley, 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.

Dear Mr. Fromson:

I have received your letter of March 27, as well as the correspondence attached to it.

According to the materials, you have been unsuccessful in obtaining documentation submitted by landlords to the State Division of Housing and Community Renewal and the Rockland County Rent Guidelines Board pursuant to the Emergency Tenant Protection Act. You wrote that the County Rent Guidelines Board will soon be holding public hearings for forthcoming rent increases and that the information you seek "is critical for the preservation of [your] clients' rights".

In terms of background, you originally requested the materials from the State Division, which denied access on the basis of §12(6) of the Emergency Tenant Protection Act. Subsequently, on July 27, you requested materials from Thomas Martin, Chairman of the Rockland County Rent Guidelines Board. Having received no response, you submitted a second request on December 19. A response was made on February 1, not by Mr. Martin or any representative of the Rockland County Rent Guidelines Board, but rather by J. Seldon-Loach, the Information Access Officer for the

State Division. Since your request was denied in part, you appealed, in accordance with the response to your request, to Nathaniel Geller, Assistant Deputy Counsel for the State Division. Mr. Geller upheld the denial with respect to item six of your request, which concerns "RTP-9 forms...which are to be considered by the Rockland County Rent Guidelines Board in implementing the 1984/85 guidelines". The basis for the denial is "Section 87(2)(a) of the Public Officer's Law and Section 12(a)(4) of the Emergency Tenant Protection Act of 1974".

Your question is:

> "[C]an a County Guidelines Board justifiably rely on the aforesaid section of the Emergency Tenant Protection Act to resist compliance with the Freedom of Information Law, as did the State Division of Housing?"

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

First, the Emergency Tenant Protection Act refers to several agencies, including the State Division of Housing and Community Renewal, as well as municipal rent guidelines boards [see Emergency Tenant Protection Act, §4]. Although there is a relationship between the State Division and the municipal boards, such as the Rockland County Rent Guidelines Board, I believe that they are separate entities.

Second, under the Freedom of Information Law, when an applicant seeks records from an agency, I believe that the agency to which the request is made has the duty of responding to the request. According to the materials, you sent a request to the Chairman of the County Board; nevertheless, the request was answered by representatives of the State Division. From my perspective, if the County Board maintains the records sought, it is responsible for determining rights of access to records that it maintains. A different agency, the State Division, would not in my view have custody of the records maintained by a county agency. While the State Division provides municipal rent guidelines boards with assistance under the Emergency Protection Act, it appears that the county rent guidelines boards make final determinations. Once again, if that is so, and if the County Guidelines Board maintains the records that you requested, I believe that the request should have been handled by the County Board rather than the State Division.

Third, the provision upon which the Information Access and Appeals Officers for the State Division relied, §12(6) of the Emergency Tenant Protection Act, states that:

> "[I]n furtherance of its responsibility to enforce this act, the state division of housing and community renewal shall be empowered to administer oaths, issue subpoenas, conduct investigations, make inspections and designate officers to hear and report. The division shall safeguard the confidentiality of information furnished to it at the request of the person furnishing the same, unless such information must be made public in the interest of establishing a record for the future guidance of persons subject to this act."

Based upon its language, I believe that §12(6) is applicable to activities of and information furnished to the State Division of Housing and Community Renewal. No reference is made in that provision to information maintained by a county rent guidelines board, for example. If that is so, a request directed to the State Division might result in a response based upon the provisions of §12(6). However, that provision could not in my view justifiably be cited to withhold records requested from and in possession of a county rent guidelines board. On the contrary, assuming that §12(6) could not be asserted by a county board, the provisions of the Freedom of Information Law would likely apply.

It is noted, too, that the cited provision indicates that the State Division may "safeguard the confidentiality of information furnished to it at the request of the person furnishing the same..." Having reviewed the response by the State Division, there is no indication that the submitters of the information sought requested confidentiality. The Division merely cited §12(6) as the basis for withholding, without more.

Since you began the process of seeking records many months ago, I point out that the Freedom of Information Law and the regulations promulgated by the Committee [21 NYCRR §1401 et seq.] 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 536, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

In sum, it is reiterated that, in my view, a request for records in possession of the Rockland County Rent Guidelines Board should have been determined by the County Board. Further, due to the language of §12(6) of the Emergency Tenant Protection Act, it appears that the provision in question may be asserted only by the State Division of Housing and Community Renewal and not by the County Rent Guidelines Board.

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

Sincerely,

Robert J. Freeman

Robert J. reeman
Executive Director

RJF:jm

cc: Thomas Martin, Chairman
Nathaniel Geller
J. Seldon-Loach

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3698

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

April 10, 1985

Mr. Curtis Stanback
81-A-3109
Greenhaven Correctional Facility
Drawer B
Stormville, New York 12582

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

Dear Mr. Stanback:

I have received your letter of March 29, as well as the materials attached to it.

One of the attachments is an appeal regarding a denial of access to records maintained by the Department of Correctional Services, and your first question is whether the appeal, which is addressed to the Office of Counsel at the Department of Correctional Services, was sent to the appropriate place. You also asked that I review the contents of the appeal to advise with respect to its adequacy.

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

First, Counsel to the Department of Correctional Services has been designated as the person to whom an appeal should be directed. Consequently, I believe that your appeal was sent to the appropriate office.

Second, with respect to your request, is is unclear from your correspondence which records were indeed requested. Here I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably

describe" the records sought. Having reviewed the correspondence, it appears that you have requested a variety of records involving your medical history. Nevertheless, the materials do not indicate whether the records sought pertain to a particular event or condition; further, there is no indication of a time period. Consequently, once again, it is uncertain whether you have reasonably described the records sought to the extent that Department officials could locate the records that you are seeking. If the Department cannot locate the records, it is suggested that you submit another request providing sufficient detail to enable Department officials to locate the records.

Third, you believe that the records are accessible, for you wrote that:

> "I would like to emphasize once again that everything in my medical record is factual since it indicates either the fact of what I have said to the staff, the fact of what they have found, the fact of what they have ordered, or the fact of what their opinions were of or about me."

Under the circumstances, if the records sought were prepared by agency officials, I believe that they could be characterized as "inter-agency or intra-agency materials" [see Freedom of Information Law, §87(2)(g)]. The cited provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, §87(2)(g) permits an agency to withhold portions of inter-agency or intra-agency materials consisting of advice, opinion, recommendation and the like.

In the context of medical records prepared by an agency, I would agree with your contention that those portions consisting of statistical or factual information should be made available. Nevertheless, although you indicated that it is a "fact" that certain individuals might have prepared opinions about you, those opinions would not in my view constitute statistical or factual information. If that is so, it is likely that they could be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3699

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

April 10, 1985

Ms. Joni Albanese
[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. Albanese:

I have received your letter dated March 13, which reached this office today. Please note that the letter was postmarked April 5.

In your letter, you requested under the Freedom of Information Law records concerning judicial decisions rendered against a named individual. 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. The Committee 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.

Second, I do not believe that the Freedom of Information Law is applicable to the records that you are seeking. The Law pertains 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 provisions quoted above, I believe that the Freedom of Information Law specifically excludes the court records in which you are interested from its coverage.

Third, although the Freedom of Information Law does not include the courts and court records within its scope, various other provisions of Law (see e.g., §255 of the Judiciary Law) often grant substantial rights of access to records maintained by the courts or clerks of courts. Under the circumstances, it is suggested that you write to or contact the clerk or clerks of the court or courts that you believe maintain the records sought for the purpose of requesting the records in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3700

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

April 10, 1985

Mr. Hank Purcell, Jr.
#84-C-357
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. Purcell:

I received your recent letter on April 12 in which you requested assistance from this office.

You wrote that you have been mailing copies of denials of access to records from the Division of Parole to this office. You also wrote that this office did not respond to your October 4, 1984 or December 16, 1984 requests for help. Apparently, you have sought certain records from the Department of Correctional Services which have not been made available to you because you did not "adequately describe" the records.

According to our files, we received postcards from you on October 10, December 4, and December 11 in 1984 regarding your requests and appeals to the Department and to the Division of Parole. Except for your December 6 correspondence in which you did not request our assistance, your questions have been addressed by our office.

In your recent letter, you wrote that the Department denied your requests for records because your request was not detailed. Although I do not have a copy of your request and cannot advise whether it was sufficiently detailed, I point out that §89(3) of the Freedom of Information Law requires that a request for a record be "reasonable described". The purpose of that requirement is to allow the records access officer to locate the records sought. Therefore, I suggest that your request include as much information as you have which would aid the records access officer in locating the records which you seek.

I hope 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-3701

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

April 12, 1985

Ms. Suzanne Golubski
Reporter
Daily News
City Hall
Room 9
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 Ms. Golubski:

As you are aware, I have received your letter of April 3, as well as the materials attached to it.

In terms of background, two requests for records were directed in March to Lillian Del Seni, records access officer for the New York City Board of Education. The first request concerned records "containing the names of the schools or school districts where assaults and sex offenses have increased during this present school year." The second request involves "records of incidents which have occurred in the New York City public school system during the 1984-85 school year to date" and "the names of the schools where these incidents occurred, the total number in each category of incidents reported and the dates of occurrances if available." In addition, your request described the types of incidents in which you are interested.

In response to your requests, Ms. Del Seni sent to you a copy of a memorandum entitled "Incident Statistics" that provide totals for 1985 through January 31 for each of the incidents used in a statistical report prepared by the Office of School Safety. That memorandum does not include any information pertaining to the schools in which the incidents occurred. Ms. Del Seni wrote that records are not kept that "indicate school districts where assaults and sex offenses have increased during the present school year". She also stated:

> "[T]hat portion of your request for the names of the schools where the incidents have occurred and the total number in each category is hereby denied. The release of that material is exempt under Section 87.2(f) of the Freedom of Information Law as material which 'if disclosed would endanger the life or safety of any person.' The nature of the information requested i.e. the 'ranking' of individual schools by number of incidents in the above-cited categories, is such that its release would jeopardize the safety of both school personnel and students under our charge. Among the effects of identification of particular schools in this manner would be to expose the labelled schools as targets of increased criminal activity while at the same time pinpointing the deployment of our security staff.
>
> "In our view, the public interest in protecting the safety of the teaching staff and the schoolchildren of this city, as well as our statutory responsibilities under various provisions of the Education Law, does not allow us to undermine the school system's efforts to provide and maintain security in the schools. The material is therefore also exempt under Section 87.2(a) as 'specifically exempted from disclosure by state or federal statute.'
>
> "Your request for 'records containing the names of the schools...where assaults and sex offenses have increased during this present school year' is denied for the same reasons cited above."

In your appeal to John Nolan, Secretary to the Board of Ecudation, you again requested records of incidents, including the names of the schools where the incidents occurred and the dates of the incidents. You also indicated that you

are interested in incident reports "even if some of the names of the people involved are redacted", as well as the monthly statistical summaries contained in reports prepared by the Office of School Safety. As such, it is clear that you are not requesting information that identifies students or other persons. On the contrary, it appears you are requesting records that briefly describe various types of incidents occurring in New York City schools or statistics concerning incidents.

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

It is noted initially that the Freedom of Information Law pertains to existing records. As provided in §89(3) of the Freedom of Information Law, as a general rule, an agency is not required to create or prepare a record in response to a request. Consequently, if, for example, statistics have not been prepared concerning increases in the number of incidents in particular schools, the Board of Education would not in my opinion be required to prepare such statistics on your behalf. Nevertheless, assuming that other records can be made available to you, you might have the capacity to tabulate your own statistics.

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, I point out that the introudctory 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. Based upon the quoted language, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, the quoted language in my view imposes a responsibility upon an agency to review records sought in their entirety to determine which portions, if any, might justifiably be withheld.

For instance, the incident report maintained by the Office of School Safety, a blank copy of which is attached to your letter, when completed, contains various items of information regarding victims, witnesses and perpetrators. While those portions of an incident report identifiable to named individuals might justifiably be withheld under various

provisions of law [see i.e., Freedom of Information Law, §87(2)(b) concerning unwarranted invasions of personal privacy; 20 U.S.C. §1232g concerning education records identifiable to students], other aspects of the report contain facts relating to an incident without identifying particular individuals. Some aspects of the report might therefore be accessible, while others might justifiably be withheld. In short, even though portions of a record may be withheld, perhaps by means of deletions, the remained might be accessible.

Fourth, the first basis for withholding offered by Ms. Del Seni is §87(2)(f), which permits an agency to withhold records or portions thereof which "if disclosed would endanger the life or safety of any person." From my perspective, whether the cited provision is appropriately asserted is dependent upon surrounding facts and circumstances. In my view, however, it is unlikely that disclosure of the information sought would result in direct harm to any particular individual or significantly hamper a governmental process. In various advisory opinions, it has been suggested that §87(2)(f) might properly be invoked to withhold records identifying undercover agents employed by a district attorney, records containing radio frequencies used by a police department which might if disclosed enable potential lawbreakers to evade detection, procedures sought by an inmate concerning the use of jail keys at a county jail, and records indicating the locations of persons having alarm systems registered with a police department, as well as certain personal details relative to individuals involved in the check cashing business. In each of those situations, I believe that it was clear that disclosure would have the effect of endangering one or more individuals or compromising their safety. The records that you have sought, however, involve statistics and perhaps portions of incident reports from which identifying details could be deleted. Therefore, I do not feel that disclosure of the records that you are seeking would result in the harmful effects described in earlier opinions.

The only judicial decision of which I am aware that deals expansively with §87(2)(f) is American Broadcasting Companies, Inc. v. Siebert [442 NYS 2d 855 (July 9, 1981)]. That decision involved a request for names and addresses and other personal information concerning directors, stockholders, and officers of check cashing licensees. The Banking Department withheld certain aspects of the information sought, including home addresses of such individuals, on the basis of §87(2)(f). Although the court stressed that the

grounds for denial appearing in the Freedom of Information law should be narrowly construed, it was found that home addresses and certain other personal details would if disclosed create "a serious risk that the information may be used for criminal purposes" (id. at 859). The court also found that:

> "[W]hile there are benefits to be gained from the disclosure of all the answers to approved applications for check cashing businesses, these benefits do not outweigh the concomitant dangers attached to disclosing the location of the homes and families of the principals of those businesses."

In that case, the court upheld the denial due to a finding that disclosure of certain personal details would endanger particular individuals. No personal details are involved with respect to the records that you have requested.

With respect to incident reports, as suggested earlier, I believe that certain aspects of the reports could likely be withheld, such as those portions that identify victims, witnesses or perpetrators. Nevertheless, the remainder of the reports would, in my opinion, be accessible in great measure, if not in toto.

Further, by means of analogy, records, such as police blotters or their equivalents, that merely indicate that events have occurred, and which do not include investigative information, have been found to be available under the Freedom of Information Law [see e.g., Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. In addition, I believe that statistical reports involving the incidence of crime, by percinct, or by police department, are often routinely disclosed.

Fifth, as indicated earlier, Ms. Del Seni contended that if schools can be ranked by the number of incidents that occur, disclosure of such information might jeopardize school personnel and students. She added that disclosure of the information that you seek could expose particular schools as targets of "increased criminal activity" that could enable persons to ascertain where security staff may be deployed. In my opinion, arguments might be offered that disclosure would enhance the ability of security staff to carry out its duties, while concurrently enhancing the safety of teachers and students. If it is known that the

incidence of crime is high in a particular school, students, teachers, and others, by being forewarned, might take steps to protect themselves or be wary of such activities. In addition, if it is known that security staff is present, the effect might be to deter criminal activity.

Sixth, Ms. Del Seni also cited §87(2)(a) of the Freedom of Information Law as a basis for her denial in conjunction with a claim involving the "public interest". The cited provision of the Freedom of Information Law pertains to records that are "specifically exempted from disclosure by state or federal statute." In my view, which is based upon decisions rendered by the state's highest court, a denial based upon a contention that the public interest would be jeopardized, without more, would be inappropriate. As stated in Doolan v. BOCES,

> "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..." [48 NY 2d 341, 347 (1979)].

Therefore, unless records are specifically exempted from disclosure by statute or otherwise deniable under the Freedom of Information Law, I believe that they must be made available, notwithstanding a claim of privilege.

Reference was made earlier to the only statute that I can envision that would exempt records from disclosure in conjunction with §87(2)(a). Specifically, the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g) requires that those portions of "education records" identifiable to a particular student or students must be kept confidential unless the parents of students consent to disclosure. Therefore, if, for example, incident reports are "education records" subject to the federal Act, those portions that identify particular students would in my opinion be exempted from disclosure by statute. However, as you suggested in your correspondence, names could be redacted. After identifying details are deleted, once again, I believe that the remainder of such reports would likely be available.

Other than the Family Educational Rights and Privacy Act, I am unaware of the applicability of some other statute that would exempt the records in question from disclosure.

Lastly, I point out that, after having exhausted one's administrative remedies, an applicant for records who has been denied may initiate a proceeding under Article 78 of the Civil Practice Law and Rules. As a general rule, the burden of proof in an Article 78 proceeding is on a member of the public who must demonstrate that an agency acted unreasonably or failed to perform a duty required to be performed by law. Nevertheless, §89(4)(b) of the Freedom of Information Law states in part that:

> "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 provision of subdivision two."

As such, I believe that the Board of Education would be required to prove that disclosure would indeed endanger life or safety should a denial based upon §87(2)(f) be challenged in 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:ew

cc: John Nolan, Secretary to the Board of Education
Ms. Del Seni, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3702

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

April 18, 1985

Dr. Jonathan [redacted]

Harold M. Shultz, Assistant Commissioner
NYC Department of Housing Preservation
and Development
Division of Evaluation and Compliance
100 Gold Street
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 Dr. Slosser and Assistant Commissioner Shultz:

I have received letters from you, which are dated, respectively, March 30 and April 3. Your correspondence deals with the same issue, rights of access to records maintained by the New York City Department of Housing Preservation and Development (HPD).

By way of background, under Article 7-A of the Real Property Actions and Proceedings Law, certain records are maintained by administrators designated by a court. An administrator is appointed to manage and operate substandard dwellings. Further, according to various materials included with the correspondence sent by Assistant Commissioner Shultz, administrators are generally directed by means of a court order to provide monthly reports to HPD.

As I understand the situation, Dr. Slosser requested and was initially granted access to various reports in possession of HPD. However, it is the contention of Assistant Commissioner Shultz that rights of access to the records in question are limited and may be asserted only by

parties having "a legitimate, enforceable interest in the written accounts". Consequently, the view of HPD as expressed by Assistant Commissioner Shultz is that "the records provided by 7-A administrators to this Department are exempt from disclosure..." based upon the provisions of §779 of the Real Property Actions and Proceedings Law and, therefore, §87(2)(a) of the Freedom of Information Law.

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

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

Second, §86(4) of the 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."

As such, it is my view that the materials in question maintained by HPD constitute "records" subject to rights of access.

Third, as you are aware, I have engaged in numerous conversations with you and various representatives of HPD. The points of view in many instances conflicted. All of the contentions appear to be based upon the interpretation of §779 of the Real Property Actions and Proceedings Law in relation to the Freedom of Information Law.

Section 779 of the Real Property Actions and Proceedings Law states that:

> "[T]he court shall require the keeping of written accounts itemizing the receipts and expenditures under an order issued pursuant to section seven hundred seventy-six or seven hundred seventy-seven of this article, which shall be open to inspection by the owner, any mortgagee or lienor or any other person having an interest in such receipts or expenditures. Upon motion of the court or the administrator or of the owner, any mortgagee or lienor of record of any person having an interest, the court may require a presentation or settlement of the accounts with respect thereto. Notice of a motion for presentation or settlement of such accounts shall be served on the owner, any mortgagee or other lienor of record who appeared in the proceeding and any person having an interest in such receipts or expenditures."

In view of the language quoted above, the question in my view is whether §779 specifically exempts records from disclosure. In my opinion, it does not.

As I understand the situation, administrators designated by a court are required to keep certain records. Those administrators are not generally representatives of government, but rather are members of the public. The records of those individuals would not in my opinion fall within the scope of the Freedom of Information Law, for the records held by administrators do not represent those of an agency of government. From my perspective, it is likely for that reason that §779 provides rights of access to certain records of administrators to certain people having an interest in property. Without those rights conferred by §779, persons with an interest in the property would have no rights of access to records maintained by an administrator.

With respect to the role of HPD, once again, administrators transmit reports to HPD in order that the Department can monitor compliance with the court order. As such, it appears that an administrator may be the primary source of information that must be made available to persons having an interest in the property, and that HPD, a governmental entity, is a secondary source of information.

Although §779 refers to access by those having an "interest", nowhere in that statute is there an indication that records must be kept confidential or that records are "specifically exempted from disclosure...by statute" in conjunction with §87(2)(a) of the Freedom of Information Law. If §779 is not a statute that specifically exempts records from disclosure by statute, I believe that the records that come into the possession of HPD would be subject to whatever rights of access exist under the Freedom of Information Law.

It is noted, too, that an Appellate Division decision dealt with the construction of the Freedom of Information Law in relation to a statute that also appears to grant rights of access to persons having an "interest" in the records [see Scott, Sardano & Pomeranz v. Records Access Officer, City of Syracuse, 480 NYS 2d 634, AD 2d (1984)]. The statute in question was §66-a of the Public Officers Law, which pertains to accident reports kept by police departments. That statute states in part that records of any accident report kept by a police department "shall be open to the inspection of any person having an interest therein, or such person's attorney or agent..." In construing that language in conjunction with the Freedom of Information Law, it was found that:

> "While petitioner, a Syracuse law firm, has not demonstrated that it has the requisite interest to warrant inspection under section 66-a of the Public Officers Law... it is entitled to access to police accident reports under the Freedom of Information Law..." (id.).

As such, while the petitioner in Scott did not have a sufficient "interest" to warrant disclosure under §66-a of the Public Officers Law, the court found in essence that no interest would be needed to gain access to the same records under the provisions of the Freedom of Information Law.

In a somewhat similar situation, a non-resident of a school district sought records from the district. In its denial, the district relied upon the provisions of §2116 of the Education Law, which states that:

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

Despite the district's contentions, the Court stated that:

> "[R]espondent would limit information to qualified voters of the district. The Freedom of Information Law broadens the category of those to whom records are required to be made available beyond the disclosure required by Education Law § 2116. Respondent's reading of § 2116 as a restriction on the Freedom of Information Law is clearly erroneous. Petitioner and her attorney, as well as other persons, whether or not voters or in any way associated with the School District, are intended to be benefitted by Article 6" [see Duncan v. Savino, 90 Misc. 2d 282, 394, NYS 2d 362, 363 (1977)].

Once again, although §2116 of the Education Law includes an apparent limitation regarding rights of access to school district records, that statute was not found to exempt records from disclosure when the records were requested by a person outside of the class described in the statute. On the contrary, the Court determined that the records would be subject to rights of access by any person pursuant to the provisions of the Freedom of Information Law.

In sum, based upon the specific language of §779 of the Real Property Actions and Proceedings Law, which in my opinion does not exempt records from disclosure, as well as judicial interpretations, I believe that the records in question maintained by HPD fall within the scope of rights of access granted by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3703

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

April 18, 1985

Mr. Arthur A. Wannamaker
[redacted]

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

Dear Mr. Wannamaker:

I have received your letter of March 22 in which you requested that the Committee act on your behalf "to insure that all of the provisions of the Freedom of Information Law are fully and immediately complied with".

Your inquiry was precipitated by a letter sent to you by Dorothy E. Johnson, Clerk-Treasurer of the Village of Cherry Valley, who explained that Village officials were informed "that cars are being parked across the sidewalk in front of your Lancaster Street property". In response to that letter, you telephoned Ms. Johnson on February 8 and requested "all information in regards to the above mentioned complaint". On February 15, you received a response to your request which merely cited a provision of the Village Traffic and Parking Ordinance. No records were provided; no reference to your request was made. Subsequently, on February 17, you submitted a request in writing to Ms. Johnson, who also serves as records access officer under the Freedom of Information Law. As of the date of your letter, no additional response to your request had been given.

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

First, it is emphasized that the Committee on Open Government is authorized to provide advice; it has no authority to enforce the provisions of the Law. As such, this office cannot compel the Village of Cherry Valley to grant or deny access to records.

Second, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law and have the force and effect of law (21 NYCRR §1401 et seq.), 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 536, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, a complaint was made by telephone rather than in writing and if no record of the complaint exists, the Village would not in my opinion be required to prepare a record indicating the nature of the complaint on your behalf.

If, on the other hand, a written complaint and/or related materials were prepared, the Freedom of Information Law would be applicable. In terms of rights granted by the 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 (i) of the Law.

One of the grounds for denial permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. In the past, it has been generally advised that the substance of a written complaint is available, but that those portions of a complaint that identify the complainant may be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. From the perspective of the agency, who made the complaint may be irrelevant to its work; what is relevant is whether or not the complaint has merit. As such, if a written complaint exists, to protect against an unwarranted invasion of personal privacy, the Village could likely delete identifying details concerning the complainant prior to granting access to the remainder.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to Ms. Johnson and the Board of Trustees.

I hope that I have 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. Dorothy Johnson
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3704

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

April 22, 1985

Mr. Donald W. Jones
81-A-4894
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. Jones:

I have received your letter of April 3 in which you requested assistance.

You indicated that you have unsuccessfully sought court records pertaining to your case. As such, you have asked how you might use the Freedom of Information Law as a means of obtaining those records.

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) to include:

> "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."

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 court records you seek fall within the scope of rights granted by the Freedom of Information Law.

Second, there are various provisions of law concerning access to court records. For example, enclosed is a copy of §255 of the Judiciary Law, which often grants broad rights of access to records maintained by the clerks of courts.

Under the circumstances, it is suggested that you direct a request to the clerk of the court in which the proceeding was conducted for the purpose of requesting the records. When making a request, it is recommended that you provide as much specificity as possible, such as names, dates, index or docket numbers, or similar information that might enable the appropriate offices to locate the records sought.

Lastly, it is suggested that you confer with an attorney or perhaps a representative of Prisoners' Legal Services, for instance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3705

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

3705

April 22, 1985

Mrs. Pauline M. Salmon
[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. Salmon:

I have received your letter of April 1 in which you requested an advisory opinion.

According to your letter and the attachments, on March 4, you requested all copies of variances granted to the New York Pyrotechnics Products Company, Inc. by the Town of Brookhaven Zoning Board of Appeals. On March 14, you received a letter from the Assistant Town Attorney which indicated that since numerous lawsuits are pending against the Town involving the site to which the records sought pertain, your request was forwarded to "outside counsel", who is handling the matter. The Assistant Town Attorney wrote that she will make a determination regarding the availability of the records on or before April 24. You asked:

> "1) Whether the intent of the Law was to stonewall for 51 days?
>
> 2) Whether the records should be physically kept by the agency responsible, or should they be released to 'outside counsel'?"

In this regard, I offer the following comments.

First, 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. Section 89(3) of the Law requires an agency to respond to a request within five business days of the

receipt of the request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing and state the reasons therefor. In the alternative, the receipt of the request may be acknowledged in writing if more than five days is necessary to review or locate the records and to determine rights of access. If access to records is neither granted nor denied within ten business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed. Thus, the intent of the statute is to make records available as soon as possible, while allowing an agency some flexibility in locating such records.

Second, the Freedom of Information Law does not include any restrictions as to where the records of an agency ought to be kept. The Law simply provides that any record "kept, held, filed, or produced or reproduced by, with or for an agency" is subject to the provisions of the Law. Thus, an individual's right of access to records are not affected by the location of the records. In other words, an agency's records in the possession of outside counsel should be available to an individual to the same extent that they would be available when they are in possession of the agency.

Finally, §30 of the Town Law provides that the town clerk of each town shall have the custody of all books, records and papers of the town. However, if the records in question pertain to pending litigation, it seems that possession of the records by the attorney representing the Town would be reasonable. Nonetheless, as stated above, I belive that the records should be made available under the provisions of the Freedom of Information Law, regardless of where they are presently located.

I hope 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: Annette Eaderesto, Assistant Town Attorney
Brookhaven Town Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1160
FOIL-AO- 3706

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

April 22, 1985

Mr. Richard C. Cahn
Cahn, Wishod, Wishod & Lamb
534 Broadhollow Road-CB 179
Melville, New York 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. Cahn:

I have received your letter of April 4, which is addressed to Mr. Gilbert Smith.

Please note that Ms. Barbara Shack is currently the Committee Chair. In addition, although you referred to a conversation with Mr. Smith, the conversation to which you referred was with me. As indicated above, the staff of the Committee is authorized to advise.

Your letter was precipitated by an advisory opinion written at the request of Ms. Sondra Bachety, a member of the Suffolk County Legislature. Her question involves rights of access to minutes of meetings of the Board of Suffolk County Vanderbilt Museum. In response, I expressed the view that the records are subject to rights granted by the Freedom of Information Law, and that minutes would have to be prepared and made available under the Open Meetings Law. Upon your receipt of a copy of the opinion, you contacted me to express "dismay" with respect to the opinion. You suggested that significant facts were not available to me when I prepared the opinion and that a judicial determination to be sent to me would likely alter my opinion. You also asked that I "recall" the opinion and you wrote in your letter of April 4 that I called Ms. Bachety to advise her that she should not rely upon the letter pending review of your materials. I did not "recall" the opinion, but I did contact Ms. Bachety as you requested for the purpose of informing her of your disagreement as well as your offer to send additional materials for review.

Based upon our conversation, you led me to believe that a determination had been made of which I was unaware involving the Suffolk County Vanderbilt Museum. The materials that you sent included copies of proposed stipulation of settlement as well as a judgment based upon that stipulation. In this regard, it is noted that the Office of Suffolk County Attorney forwarded the same materials to me in an effort to assist in responding to the inquiry from Ms. Bachety. Further, having reviewed those materials again, I do not believe that the opinion written on March 26 should be altered.

Unless I am mistaken, the stipulation of settlement and the ensuing order continue to indicate that the Commission was created by the Suffolk County Legislature, that Suffolk County continues to be "the sole and exclusive owner of the real and personal property, tangible and intenagible, of the Vanderbilt Museum and Planeteriaum including principal and income of any trust fund or trust funds heretofore or herafter to be maintained", and that the Suffolk County Legislature continues to appoint the members of the Board of Trustees of the Commission. If those facts are present, I must reiterate my opinion that the Commission is an "agency" subject to the Freedom of Information Law. As you are aware, §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 initial clause of the language quoted above refers to a "municipal...commmission". Once again, if the members of the Commission are appointed by the Suffolk County Legislature, I believe that the Commission would be an "agency". Further, the language of the definition refers to a governmental entity, such as an entity created by the governing body of the County, performing a governmental or "proprietary function" for one or more municipalities. In this instance, it would appear that the Suffolk County Vanderbilt Museum performs what might be characterized as a proprietary function for a municipality, Suffolk County. If my contentions are accurate, once again, I believe that the records of the Commission would be subject to the Freedom of Information Law.

Further, reference was made in the letter of March 26 sent to Ms. Bachety to Burgher v. Purcell [87 AD 2d 888 (1982)]. In that case, Nassau County was given property by means of a bequest, and the Board of Supervisors of the County was authorized to designate trustees responsible for carrying out the terms of the will. In Burgher, it was found by the Appellate Division that the Trustees constituted a "public body" required to comply with the Open Meetings Law. I believe that the situation of the Suffolk County Vanderbilt Museum is sufficiently similar to that described in Burgher that a like finding would be reached. Moreover, if the Commission is a "public body", it would be required to prepare and make available minutes of its meetings [see Open Meetings Law, §106].

If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sondra Bachety
Martin Ashare
Gregory Hensas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3707
PPPL-AO-17

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

April 23, 1985

Mr. Joseph M. Gnesin
Accident Prevention and
Safety League, Inc.
Suite 905
93 Worth Street
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 Mr. Gnesin:

I have received your letter of April 9 in which you requested an advisory opinion.

According to your letter, your organization, the Accident Prevention and Safety League, Inc., is a policyholder of the State Insurance Fund. As such, you wrote that you "are interested in communicating with other State Insurance Fund policyholders with respect to various legislative and judicial matters concerning the State Insurance Fund, which may effect the terms, conditions and costs; i.e. premiums, of our policies of insurance".

Your question is whether the Freedom of Information Law grants you the right to seek and obtain from the State Insurance Fund a list of policyholders and their addresses.

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 that §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 there is no list of names and addresses of policy holders maintained by the State Insurance Fund, I do not believe that the Fund would be obligated to create such a list on your behalf. If, however, such a list does exist, I believe that it would be subject to rights of access granted by the Freedom of Information Law.

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

Third, it appears that two of the grounds for denial may be relevant. The initial 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)]. Here I point out that §98 of the Workers' Compensation Law states that:

> "[I]nformation as required by the state fund, or its officers or employees, from employers or employees pursuant to this chapter shall not be opened to public inspection, and any officer or employee who, without authority of the commissioners or pursuant to their regulations, or as otherwise required by law, shall disclose the same shall be guilty of a misdemeanor."

From my perspective, the provision quoted above is likely intended to permit the Board of Insurance Fund to protect privacy by ensuring the confidentiality of personal information obtained from employers or employees in conjunction with an accident, a claim for benefits, or other situations involving the lives of specific individuals. In short, it is my view that §98 is intended to ensure that the details of individuals' lives need not be made available to the general public. At the same time, as I understand the duties of the Fund, a "policyholder" is generally not an individual, such as a person who claims benefits, but rather an employer or an entity, such as a firm or corporation. If that is so, the disclosure of the identity of a firm that is a policyholder would not involve personal information regarding an individual. If my assumptions are accurate, I would conjecture that the prohibition against disclosure found within §98 of the Workers' Compensation Law would not be applicable to a list of the names and addresses of policyholders. Further, if §98 is not applicable, I believe that the provisions of the Freedom of Information Law would apply.

The second basis for denial of relevance is §87 (2)(b), which states that an agency may withhold records that:

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

In turn, §89(2)(b) includes examples of unwarranted invasions of personal privacy. The third example, §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 language quoted above represents the only instance in the Freedom of Information Law in which the purpose for which a request is made may bear upon rights of access. In a similar situation in which a list of retired government employees was sought for purposes similar to those described in your letter, it was found that such a list is accessible [see New York Teachers Pension Associations, Inc. v. Teachers' Retirement System of City of New York, 98 Misc. 2d 118, aff'd 71 AD 2d 250 (1979)].

It is possible, too, that the provisions concerning unwarranted invasions of personal privacy are not applicable if those included on the list are not natural persons, but rather entities. As you may be aware, a new statute, the Personal Privacy Protection Law, became effective on September 1, 1984. In brief, that statute seeks to regulate access to and the collection and dissemination of personal information by state agencies. Section 96(1) of the Personal Privacy Protection Law describes the situations in which state agencies may disclose personal information. One of those circumstances involves disclosures made pursuant to the Freedom of Information Law [see §96(1)(c)]. In addition, the Freedom of Information Law was amended with the enactment of the Personal Privacy Protection Law to prohibit an agency from disclosing personal information when such disclosure would constitute an unwarranted invasion of personal privacy. Specifically, §89(2)-a of the Freedom of Information Law states 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."

Once again, the thrust of the Personal Privacy Protection Law involves information concerning persons, who are characterized throughout the statute as "data subjects". Section 92(3) defines "data subject" to mean "any natural person about whom personal information has been collected by an agency". Since the provisions involving privacy in the Freedom of Information and Personal Privacy Protection Laws must in my view be read in conjunction with one another, and since an unwarranted invasion of privacy may be present only with respect to a natural person, rather than a corporation or firm, it would appear in any event that the provisions concerning privacy in the Freedom of Information Law would not be applicable to a list of firms or corporations.

In sum, based upon the expressed purpose for which you seek the list, I believe that it would be available, unless the statutory exemption from disclosure in §98 of the Workers' Compensation Law is determined to be applicable.

As you requested, a copy of this opinion will be sent to Arnold Kideckel, Executive Director of the State Insurance Fund.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Arnold Kideckel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3708

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

April 23, 1985

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 April 8 addressed to Ms. Mugno of this office.

You have requested information concerning rights of access to a report pertaining to an incident that occurred in a "housing development" in Brooklyn at least seven years ago. Apparently you were involved in a dispute with a security guard, who brought the incident to the attention of the management. A report was prepared following the incident, and you have asked whether you are entitled to receive a copy and any determination that might have followed under the Freedom of Information Law.

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

First, it is noted 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 municipalities thereof, except the judiciary or the state legislature."

Therefore, an initial question is whether the report is maintained by an "agency" subject to the Freedom of Information Law. If it is not, rights granted by the Freedom of Information Law would not be applicable. On the other hand, if the report is maintained by an agency, a request could be directed to the "records access officer" at the agency that maintains the records.

Second, assuming that the Freedom of Information Law does apply, §89(3) requires that a request "reasonably describe" the records sought. Consequently, if you submit a request, it is suggested that you include as much detail as possible, such as names, dates, locations, descriptions of events and similar information that might enable agency officials to locate the records.

Third, based upon the comments made in your letter, it would appear that the agency most likely to maintain records regarding the incident is the New York City Housing Authority, which is located at 5 Park Place, New York, New York 10007.

Lastly, if you could provide additional information, perhaps I could offer more appropriate guidance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3709

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

April 23, 1985

Mr. John T. Cataldi
[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. Cataldi:

As you are aware, your letter of March 18 addressed to Commissioner Ambach has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the Freedom of Information Law.

In brief, your inquiry concerns the difficulty encountered regarding your unsuccessful efforts in obtaining copies of various procedures of the Miller Place Union Free School District. The records sought involve "all written High School procedures and policies, including extra curricular activities that affect the lives of [your] children at the High School." Although it appears that you have received responses from School District officials, the records sought had not been made available as of the date of your letter to the Commisssioner.

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

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency, such as a school district, need not create a record in response to a request. Therefore, to the extent that the policies or procedures that you requested do not exist in the form of a record or records, the District would not in my view be obliged to prepare new records on your behalf.

Second, to the extent that the materials in question do exist, I believe that they are subject to rights granted by the Freedom of Information Law. It is noted that the Freedom of Information Law pertains to records of an agency, and that the term "record" is defined in §86(4) to include:

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

As such, if policies or procedures have been prepared, they would constitute "records" that fall within the scope of the Freedom of Information Law.

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

Fourth, if the records sought exist, one of the grounds for denial, §87(2)(g), would in my view apply. However, due to its structure, I believe that such records would be accessible. Section 87(2)(g) states that an agency may withhold records that:

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

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

Fifth, 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. The Committee has don so (21 NYCRR Part 1401). In turn, §87(1) of the Law requires the governing body of a public corporation, in this instance, the School Board, to adopt regulations consistent with the Freedom of Information Law and the Committee's regulations. Enclosed is a copy of the Committee's regulations, which require the designation of a "records access officer", who has the duty to respond to requests within the time limits specified in the Freedom of Information Law [§89(3)] and the regulations [§1401.5, §1401.7]. The Board in its regulations must also designate an appeals officer or body to whom an appeal may be directed in the event of a denial. It is suggested that you attempt to review the Board's regulations in order to determine whether its procedures have been met.

Also enclosed are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Dr. Boyd

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3710

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

April 25, 1985

Mr. Howard Blodgett
82-C-293
Box 216
River Road
Marcy, NY 13043-0216

Dear Mr. Blodgett:

I have received your letter of April 19 in which you appealed an apparent denial of a request for records directed to the Senior Corrections Counselor at the Mid-state Correctional Facility.

Although the facts involving the request are unclear as described in your letter, I would like to offer the following general comments.

First, the Committee is responsible for advising with respect to the Freedom of Information Law. As such, this office does not have the capacity to render a determination on appeal, nor does it have the authority to compel an agency to grant or deny access to records.

Second, with respect to procedure, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law indicate that the person to whom a request should be made at a facility, the designated "records access officer", is the facility superintendent or his designee. It is unclear from your letter whether the Senior Corrections Counselor has been designated to respond to requests made under the Freedom of Information Law. It is suggested that you attempt to determine who is responsible for answering requests made under the Freedom of Information Law at the facility.

With respect to the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law indicates that the appeal should be directed to the head or governing body of the agency or whomever is designated by the head or governing body to make such determinations. In the case of the Department of Correctional Services, an appeal following a denial of access to records may be directed to Counsel to the Department at the Department's central offices 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

cc: Mr. Raneiri

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3711

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

April 25, 1985

Mr. Lawrence Westfall
82-C-342
Box 216
River Road
Marcy, NY 13403-0216

Dear Mr. Westfall:

I have received your letter of April 19, which represents your appeal regarding a denial of access to records.

According to your letter, on November 13, you requested various materials concerning yourself from the Cortland Credit Service, Inc. Since there was no response to your request, you have considered the request to have been denied. As such, you requested that the Committee "direct the Cortland Credit Service...to forward said information..." to you.

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

First, although the Committee on Open Government is authorized to advise, an appeal is required to be sent to the head or governing body of the agency that maintains the records. The Committee does not render determinations on appeal, nor does it have the authority to compel an agency to grant or deny access to records.

Second, the scope of the Freedom of Information Law is determined in part by the term "agency", which is defined in §86(3) to include:

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

Based upon the language quoted above, the Freedom of Information Law in my view is generally applicable to entities of state and local government. The entity to which you sent the request, the Cortland Credit Service, Inc., would not in my opinion be an "agency" subject to the Freedom of Information Law. If that is so, the provisions of the Freedom of Information Law do not apply to records of that corporation.

Third, there are provisions of law comprising the "Fair Credit Reporting Act". Although I am not an expert with respect to that law, I believe that the New York Civil Liberties Union has published a brochure explaining rights under the Fair Credit Reporting Act. Consequently, it is suggested that you request a copy of the guide from the New York Civil Liberties Union at 132 West 43rd Street, New York, NY 10036. I believe that the fee for the guide is twenty-five cents.

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-3712

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

April 26, 1985

Mr. James Rupert
82-C-174
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. Rupert:

I received your letter requesting assistance on March 28. As you requested, I have enclosed copies of the original Freedom of Information Law as enacted in 1974, the current Law and the regulations promulgated thereunder. In addition, I have been in contact with the Department of Correctional Services regarding your request for access and subsequent denial of the Department's Employees' Manual.

On your behalf, I spoke with a representative of the Department's Office of Counsel. He indicated, as you explained, that the Department considers the Employees' Manual to be a "security document" in that disclosure could endanger the life or safety of both inmates and staff. On that basis, the Department routinely denies access to the Manual under §87(2)(f) of the Freedom of Information Law.

I am familiar with the Employees' Manual, which generally includes employee rules of conduct, procedures for disciplinary control and supervision of inmates in various areas of a facility, employee dress codes, and personnel policies, programs and benefits. While much of the Manual directly relates to the control and supervision of inmates and visitors and involves security procedures, other portions of the Manual concern personnel policies and benefits which would not appear to endanger the life or safety of any person, if disclosed.

In my opinion, the Freedom of Information Law requires an agency to review a requested record in its entirety and to make available those portions of the record which cannot properly be withheld under the statutory grounds for withholding. I believe that those portions of the Employees' Manual which do not involve security procedures, such as those which generally involve employee conduct and activities and personnel policies, programs and benefits, should be made available. Such portions of the Manual, in my view, would not endanger the life or safety of any person if disclosed nor do they fall within any other ground for withholding listed in §87 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Encs.

cc: Counsel's Office, Department of Correctional Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1163
FOIL-AO-3713

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

April 30, 1985

Mr. Charles J. Tiano
[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. Tiano:

I have received your letter of April 15, in which you lodged a "protest" concerning notice of a meeting held by the Woodstock Town Board. In addition, you sought clarification regarding the adequacy of motions for entry into executive sessions and rights of access to records.

Specifically, in your initial area of inquiry, you wrote that motions to enter into executive sessions often refer to "code words", such as "personnel" and "litigation". You have asked how much information should be included in a motion in order to comply with the Open Meetings Law.

First, as you are aware, §105(1) of the Open Meetings Law prescribes a procedure that must be accomplished by a public body during an open meeting before it may enter into an executive session. The cited provision states in relevant part that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Second, from my perspective, some discussions regarding litigation and personnel may be discussed during executive sessions. However, there may be issues involving "litigation" or "personnel" that do not necessarily fall within the grounds for entry into executive session.

With respect to litigation, §105(1)(d) of the Open Meetings Law permits a public body to enter into an executive session to discuss "proposed, pending, or current litigation". It has been held in this regard that the purpose of the exception is to enable a public body to discuss its litigation strategy in private, without baring its strategy to its adversary [see Weatherwax v. Town of Stony Point, App. Div., 468 NYS 2d 914 (1983)]. Further, in the case of pending litigation, it has been held that a motion to enter into an executive session to discuss "litigation" without additional specificity is inadequate. In Daily Gazette v. Town Board, Town of Cobleskill, [444 NYS 2d 44 (1981)], the court held that a "regurgitation" of the statutory language is insufficient and that the motion must identify "the" litigation that is being considered.

With regard to personnel matters, §105(1)(f) permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

As such, an executive session may appropriately be held to consider a "particular person" in conjunction with one or more of the topics listed in §105(1)(f). Further, in 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], it was found that a motion identifying the subject to be discussed as "personnel" without more would fail to comply with the Law. In both cases, it was held that a motion to enter into executive session in conjunction with §105(1)(f) should make reference to the fact that the issue concerns a "particular person", and that it involves a topic or topics described in the cited provision.

Therefore, while a motion to discuss "personnel" would, based upon the case law, be insufficient, a motion to discuss "the employment history of a particular person", for example, would be proper.

The remaining area of inquiry concerns rights of access to letters addressed to the Town Board.

Here I point out that the Freedom of Information Law is applicable to records of an agency, such as a town,, and that §86(4) of the Law defines "record" to include:

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

Based upon the language quoted above, I believe that letters maintained by the Town Board are "records" subject to rights 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law. Therefore, as a general matter, the correspondence between the public and Town would in my view be accessible under the Freedom of Information Law. However, the nature and content of the correspondence also have an impact upon rights of access and the capacity to withhold records. For instance, if a complaint is sent to the Town Board, it is possible that identifying details may be deleted on the ground that disclosure would constitute an "unwarranted invasion of personal privacy" prior to release of the remainder of the document [see Freedom of Information Law, §87(2)(b)].

In short, while letters are subject to rights of access, their specific contents must be reviewed by the agency to determine the extent, if any, to which one or more of the grounds for denial may appropriately be asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Town Board, Town of Woodstock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3[redacted]4

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

April 30, 1985

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:

I have received your letter of April 9, as well as the correspondence attached to it.

You wrote that you have been trying to obtain copies of complaints sent to the New York State Commission on Cable Television made against Schenectady Cablevision, Inc.

Although it is your belief that the complaints and the identities of complainants should be revealed under the Freedom of Information Law, to date, the Commission has provided only statistical breakdowns concerning the nature of complaints made against Schenectady Cablevision.

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

It is noted at the outset that I have contacted William F. Huff, Administrative Officer of the Commission, to discuss the matter. Having reviewed the provisions of the Freedom of Information Law with Mr. Huff, I believe that a compromise can be reached consistent with 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 (i) of the Law.

Second, in the case of complaints, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b), §89(2)(b)]. I point out that the Freedom of Information Law in §89(2)(b) contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "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."

From my perspective, what is relevant to the work of an agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency. Consequently, it is suggested that the complaints may be made available for copying, upon payment of the appropriate fees for photocopying, after identifying details have been deleted.

Although Mr. Huff referred to various provisions of federal law that prohibit the disclosure of personal information regarding cable television subscribers, I am not familiar with those provisions of law. If indeed a federal statute prohibits the disclosure of identifying details, those aspects of complaints might be considered "specifically exempted from disclosure by...federal statute" in conjunction with §87(2) of the Freedom of Information Law. Therefore, if there is a federal statute that prohibits the disclosure of identifying details, once again, the complaints could likely be released after having deleted identifying details. It is noted, too, that Mr. Huff indicated that the Commission would make available copies of complaints following the deletion of identifying details.

Lastly, §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Since the Commission has received complaints for several years, it is suggested that, when submitting a request, you should indicate that you are interested in complaints concerning a particular operator for a specific period, such as a calendar year or months within a calendar year.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William F. Huff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3715

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

April 30, 1985

Mr. Barshai Allah
77-A-3772
P.O. Box B
Dannemora, NY 12929

Dear Mr. Allah:

I have received your letter of April 23 addressed to Alexandreena Dixon of the Committee on Public Access to Records. Please be advised that no person by that name has ever served on the Committee and the designation of this office is now the Committee on Open Government.

Your letter consists of a complaint concerning the deletion of various portions of records maintained by the Department of Correctional Services, as well as what appears to be a request that the Committee provide you with certain guides and blank forms.

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

First, the Committee on Open Government is authorized to advise 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.

Second, when records are denied, the applicant may appeal the denial under §89(4)(a) of the Freedom of Information Law, which 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."

It is noted, too, that the person designated to render determinations on appeal at the Department of Correctional Services is Counsel to the Department.

Enclosed for your consideration is 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-3716

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

April 30, 1985

Ms. Joyce N. Pattengill
[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. Pattengill:

I have received your letter of April 11, which again deals with a restriction on the time within which records are made available for inspection by the South New Berlin Central School District.

The responses to your requests for records indicate that the District will make records available for review from 3 to 4 p.m. on business days. As stated in an opinion dated March 19, the regulations promulgated by the Committee require that records be made available during regular business hours [21 NYCRR 1401.4(a)].

There is little that I can add to the previous opinion. However, it is emphasized that §87(1) of the Freedom of Information Law specifies that the regulations of a board of education must be adopted "pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article..." I note that the regulations promulgated by the Committee have the force and effect of law. Further, in terms of the intent of the Freedom of Information, §84, the legislative declaration, states in part that "it is incumbent upon the state and its localities to extend public accountablity wherever and whenever feasible". From my perspective, in view of the legislative declaration and the Committee's regulations, if a school district maintains regular business hours, it is required to permit inspection and copying of records during those hours.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerald R. Griffith, Records Access Officer,
South New Berlin Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3717

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

April 30, 1985

Ms. Cailin C. Brown
Staff Reporter
The Times Record
501 Broadway
Troy, NY 12181

The staff of the Committee on 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. Brown:

I have received your letter of April 10 in which you seek an advisory opinion under the Freedom of Information Law.

Attached to your letter is a copy of an application directed to the records access officer of the Town of Colonie in which you requested:

> "Sick time statistics, including names of police officers and number of days sick, during 1984; this would include all ranks employed by police department from chief to patrolmen; same statistics for 1982 and 1980."

The request was denied for three reasons marked on the form, each of which will be discussed in the ensuing paragraphs.

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

In my opinion, two of the three exceptions to rights of access cited in the denial would not be applicable. I believe that the application of the third is questionable and is dependent upon conditions that have not been made known in the materials that you sent.

One of the grounds for denial cited by the Town pertains to "Interagency or intra-agency materials." Here I direct your attention to §87(2)(g) of the Freedom of Information Law, which permits an agency, such as the Town, to withhold records that:

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

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

Under the circumstances, I would agree that the records sought constitute "intra-agency materials". However, it would appear that the materials in question consist solely of "statistical or factual tabulations or data" accessible under §87(2)(g)(i). If that is so, I do not believe that a denial based upon §87(2)(g) could be justified.

A second basis for denial marked on the application form concerns "Unwarranted invasion of personal privacy". In this regard, the issue of privacy in relation to sick time used by police officers was considered most recently in Supreme Court, Albany County, in Capital Newspapers v. Burns, in which an initial decision rendered on May 15, 1984, was followed by a supplemental decision on June 9, 1984. The request in that case involved sick time records concerning a single police officer. In its discussion of the issue, the Court in Capital Newspapers stated that:

"[S]ection 87(2)(b) of the Public Officers Law permits an agency to withhold records or portions thereof if disclosure would result in 'an unwarranted invasion of personal privacy.' The intervenor respondent Officer James Tuffy claims that his personal privacy will be invaded in an unwarranted fashion should petitioners be afforded the relief requested in these proceedings. Public employees, however, enjoy a lesser degree of privacy than others and 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, and disclosure in such instances would result in a permissible, rather than an unwarranted, invasion of personal privacy. (See e.g., United Federation of Teachers v. New York City Health, Hospitals' Corporation, 104 Misc. 2d 623; Farrell v. Village Board of Trustees, 83 Misc. 2d 125; Gannett Co. v. County of Monroe, 59 AD2d 309, aff'd 45 NY2d 954.)

"Under the circumstances presented here, it appears to this court that the information requested by the petitioners, would not constitute an unwarranted invasion of the personal privacy of Police Officer James Tuffy if it were only to include statistical or factual data regarding the days and dates Officer Tuffy may have been absent from scheduled employment. If, however, an explanation of why sick time was taken by Officer Tuffy is sought (for example, a description of an illness or medical problem), such information should, in this court's view, be withheld or deleted for disclosure as the personal details of a person's health would constitute an unwarranted invasion of personal privacy and would not be

> in and of itself, relevant to the performance of the officer's duties. It is the opinion of this court, therefore, that §87(2)(b) of the Public Officers Law cannot be asserted to withhold merely statistical or factual data concerning sick days taken on the grounds that there is an unwarranted invasion of personal privacy."

Based upon the opinion quoted above, I do not believe that disclosure of the records sought would result in an "unwarranted invasion of personal privacy."

The remaining ground for denial cited by the Town involves a contention that the records are "Exempted by statute other than Freedom of Information." Although no specific statute was cited, it is assumed that tacit reference was made to §50-a of the Civil Rights Law. That statute pertains to personnel records involving police and correction officers. In brief, §50-a of the Civil Rights Law requires confidentiality with respect to police officers' personnel records that are "used to evaluate performance toward continued employment or promotion."

As inferred earlier, the materials do not indicate whether the records sought are indeed used to evaluate performance toward continued employment or promotion. If, for example, a collective bargaining agreement indicates that attendance or use of sick leave are factors that relate to promotion or discipline, "personnel records" containing the information sought would likely be confidential under §50-a of the Civil Rights Law and, therefore,"specifically exempted from disclosure by...statute" when read in conjunction with §87(2)(a) of the Freedom of Information Law. On the other hand, if the records sought are considered "personnel records", but are not used in the manner described in §50-a of the Civil Rights Law, that statute could not in my opinion be cited to deny access.

It is possible, too, that the information sought might be kept in documents characterized as "personnel records", which might be deemed confidential under §50-a of the Civil Rights Law, as well as other records that do not fall within the ambit of "personnel records". Here I point out that the May 15 opinion in Capital Newspapers, supra, sought to distinguish "personnel records" subject to confidentiality under §50-a as opposed to others. The Court stressed that:

> "the request made by petitioner does not limit itself to personnel records only. It asks for all records which contain statistical or factual tabulations or data of number of days and dates absent from scheduled employment for James Tuffy. Section 50-a of the Civil Rights Law would not govern nor limit access to statistical reports or data compilations existing separate and apart from the exempt personnel records of Officer Tuffy. (See Matter of Gannett v. James, supra, at p 872.)
>
> "The question of what records, if any, are discoverable despite §50-a of the Civil Rights Law and which would also be described by the request petitioner has made, presents the real issue to be decided. Section 50-a applies to 'personnel records used to evaluate performance' of police officers 'toward continued employment or promotion.' However, petitioner's request, as hereinbefore recited, does not restrict itself to 'personnel records,' and pursuant to the reasoning of Matter of Gannett Co. v. James, supra, records other than personnel records which may provide some of the same information as the exempt records would not be protected by §50-a."

Further, in the supplemental decision, which followed an in camera inspection of records, it was held that:

> "In the opinion of this court, this document is not a personnel record within the meaning of §50-a of the Civil Rights Law, although it may contain some of the same information which may be found in a personnel record. In accordance with the reasoning of this court's decision of April 12, 1984, it is the decision of this court that the said 'Police Department, City of Albany Lost Time Report' referred to, shall be disclosed to petitioners..."

In sum, in accordance with the preceding discussion, if the records sought are not confidential pursuant to §50-a of the Civil Rights Law, I believe that they should be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Susan Tatro, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3718

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

May 1, 1985

Ms. Rose Rothschild
Chairperson
NYC Community School Board No. 4
86-22 Broadway - 2nd Floor
Elmhurst, New York 11373

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

Dear Mr. Rothschild:

I have received your letter of April 8, as well as the correspondence attached to it.

In terms of background, you serve as Chairperson of Community Board No. 4, and your inquiry concerns a denial of access to certain information by the New York City Community Development Agency. Specifically, on March 21, you requested the names and addresses of members of an "Area Policy Board" in your community. With the exception of persons appointed to an Area Policy Board, you wrote that "APB members are voted into office at a public election by CDA". You added that a "majority of APB members are publicly elected representatives of the poor and function as an official arm of CDA".

It is your view that the public is entitled to the information for the following reasons:

> "1. The addresses of persons running and elected to public office should be a matter of public record.
>
> 2. We believe an elected public official must disclose his/her residence when it is an absolute requirement that they live in a very specific designated area to be eligible

> to hold such office. This disclosure must be made public, especially if one should challenge the residential eligibility of an APB member.
>
> 3. It appears to be a unilateral decision on the part of CDA not to release addresses. Upon information and belief, APB members were not asked if their addresses could be released."

Nevertheless, in response to your request, the Commissioner of the New York City Community Development Agency, Roger P. Alvarez, wrote that home addresses of members who are representatives of the poor would be withheld, "since this would be an invasion of their privacy".

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, one of the grounds for denial appearing in the Law, §87(2)(b), permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". From my perspective, the quoted language indicates that there is a distinction between an invasion of privacy, which often may be minimal or permissible, as opposed to an "unwarranted" invasion of privacy, which, in my opinion, generally deals with intimate details of people's lives. In short, it is my belief that even though disclosure of some personal information might result in an invasion of privacy, disclosure would not in each of those instances constitute an unwarranted invasion of privacy.

Third, I point out that §89(7) of the Freedom of Information Law 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..."

Consequently, as a general matter, I do not believe that an agency is required to disclose home addresses of its officers or employees. It is unclear whether APB members are officers or employees of an agency.

Nevertheless, even if they are "officers", I believe that a review of the federal enabling legislation that led to the creation of Area Policy Boards, as well as materials published by the Community Development Agency, indicate that the home addresses of elected policy board members must be made available.

Although the terms of federal law are not precise with respect to the manner in which members of such boards are chosen, Public Law 97-35, enacted on August 13, 1981, in §675(3)(B) requires that public members must be "persons chosen in accordance with democratic selection procedures adequate to assure that they are representatives of the poor in the area served".

The means by which the Community Development Agency has chosen to ensure that a democratic selection procedure is guaranteed is described in its publication entitled "Plan for the Conduct of Neighborhood Development Area Elections". According to the guide, although a certain percentage of the members of Area Policy Boards must represent the poor, Section V of the guide entitled "Eligibility Requirements for Candidates" states that:

> "1. Candidates for Area Policy Boards and the Community Action Board need not be poor or low-income."

As such, the representative of the poor would not necessarily be poor. Therefore, the apparent assumption made by the Commissioner that representatives of the poor are indeed poor may be inaccurate.

In addition, page 28 of the guide describes "Petition Procedures" and indicates that nominating petitions must include "The candidate's full name and home address". Page 33 of the guide concering "Pre-election Challenge Procedures" states that a candidate's petition may be challenged and reviewed. Therefore, based upon the procedures for election adopted by the Community Development Agency, the names and home addresses of candidates must be made available in conjunction with a challenge prior to an election. If that is so, I believe that the procedures require that the home addresses of all candidates be publicly made available. Consequently, notwithstanding the provisions of the Freedom of Information Law, I believe that the governing provisions of federal law, as well as procedures adopted by the Community Development Agency, by implication, require that the names and home addresses be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert P. Alvarez, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1164
FOIL-AO-3719

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

May 1, 1985

Ms. Rosemary O'Hara
Albany Times Union
6 Milton 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 Ms. O'Hara:

I have received your letter of April 15 in which you requested an advisory opinion concerning "the application of the Freedom of Information and Open Meetings Laws to the Saratoga Economic Development Corporation (SEDC)."

According to your letter and the enclosed copy of its certificate of incorporation, the SEDC is a local development corporation pursuant to §1411 of the Not-for-Profit Corporation Law. You indicated that the County Board of Supervisors in 1978 adopted a resolution "approving the concept of forming a not-for-profit corporation in Saratoga County to promote industry", and authorizing an appropriation of $40,000 to the SEDC. In addition, according to your letter, the SEDC "is described as the 'sales arm' of the county" and "its staff work closely with the Saratoga County Industrial Development Agency".

For the reasons discussed in the ensuing paragraphs, meetings of the SEDC 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 SEDC 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 corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In view of the language quoted above, the 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 SEDC may be characterized as a "local development corporation". The cited provision describes the purposes of local development corporations and states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Therefore, due to its status as a not-for-profit corporation, it is not clear that the SEDC 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 partners with or extensions of government that carry out their duties in conjunction with government. In my opinion, the SEDC, as you have described its relationships with government, 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 Newspapers v. Kimball [50 NYS 2d 575 (1980)], the Court of Appeals found that volunteer fire companies, which are not-for-profit corporations, are subject to the Freedom of Information Law. In so holding, the Court stated that:

> "[W]e begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government, relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True the Legislature, in separately delineating the pwers 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 responsibile 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 SEDC and various entities of government, it is possible that similar reasoning might be applied with respect to the SEDC as was described in the decision cited above rendered by the Court of Appeals. If such a rationale is applicable, the SEDC would be subject to the requirements of the Freedom of Information Law.

Assuming that the SEDC is subject to the Freedom of Information Law, its records would be accessible to the same extent as any agency covered by the Law. If it is not subject to the Freedom of Information Law, its relationships with government would likely require the transmission of various SEDC records to agencies. Those records, once maintained by an agency, would in any case fall within the scope of rights of access.

Notwithstanding the lack of clarity regarding the status of the SEDC under the Freedom of Information Law, I believe that meetings of the Board of the SEDC 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 §102(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 cor-

> poration as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

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

In conjunction with your questions, if it is assumed that the Board of the SEDC is subject to the Open Meetings Laws, I believe that it would be required to provide notice of its meetings pursuant to §104 of that statute. In brief §104 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. Meetings subject to the Open Meetings Law must be convened open to the public and remain open except to the extent that grounds for entry into an executive session may appropriately be asserted. It is noted, too, that §106 of the Open Meetings Law requires that minutes be prepared and made available 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: Saratoga Economic Development Corporation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3720

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

May 2, 1985

Mr. Robert J. Bavisotto
82-C-712
135 State Street
Auburn, New York 13024-9000

Dear Mr. Bavisotto:

I have received your letter of April 15, as well as a letter of appeal, which was sent due to a failure to respond to your initial communication within five business days of its receipt.

In this regard, having reviewed your first letter, it was my impression that you were seeking advice, rather than requesting records. Further, it is emphasized that the authority of the Committee involves providing advice with respect to the Freedom of Information Law. As such, this office does not maintain records generally, such as those in which you are interested, nor does it have the authority to compel an agency to grant or deny access to records.

The records that you seek involve search warrants and applications for the warrants that various representatives of the New York State Police executed upon your residence and yourself in 1975 and 1976. Apparently, you submitted a request to the Steuben County District Attorney for the records, but you did not receive any response.

As noted earlier, the Committee does not maintain the records in question. Further, under the Freedom of Information Law, a request should be directed to the records access officer at the agency that maintains the records. Consequently, if you believe that the records sought are maintained by the District Attorney and/or the Division of State Police, requests should be sent to those agencies.

It is noted, too, that §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 in order to enable agency officials to locate the records.

Please accept my apologies for the confusion and resultant delay. I would like to reiterate that I did not consider your letter of April 15 to constitute a request for records; on the contrary, my interpretation of the letter was that it was a request for advice regarding the use of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Larry D. Bates, Steuben County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3721

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

May 3, 1985

Mr. Jan Dijkstra
83-A-8180
Box 140
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. Dijkstra:

I have received your letter of April 11 in which you requested advice regarding the Freedom of Information Law.

You asked whether you can use the Freedom of Information Law to "find out the name of two workers that were employed at the South Beach Clinic in Brooklyn, N.Y." You explained that it is a clinic for the public and that it is not private. You wrote that you need the workers to appear as witnesses for you. In this regard, I offer the following comments.

First, the Freedom of Information Law provides rights of access to records maintained by an agency. Section 86 (3) defines agency to include:

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

Thus, if the South Beach Clinic is a government health facility, I believe that its records would be available in accordance with the provisions of the Law. However, if the clinic is a privately owned facility, its records would not be subject to the Freedom of Information Law, even though it provides services to the public.

Second, if the clinic does fall within the scope of the Freedom of Information Law, its records, or portions thereof, may be properly withheld under one or more of the grounds for withholding provided in §87(2)(a) through (i) of the Law. For example, you may be able to obtain a record of the present employees or past employees of the clinic, but the home addresses of such employees may properly be withheld, for the Law does not require their disclosure [see Freedom of Information Law, §89(7)].

Third, it is noted that §87(3)(b) of the Freedom of Information Law requires that each agency maintain:

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

Perhaps a review of a payroll listing made available under the Freedom of Information Law would enable you to locate or to identify its employees.

In sum, I emphasize that the records of the clinic would be subject to the Freedom of Information Law only if the clinic is indeed a state or municipal health facility. Again, if the clinic is a private facility, you would not be able to use the Freedom of Information Law to obtain the clinic's 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

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-3922

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

May 3, 1985

Mr. Anthony Romandette
#84-A-1849
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. Romandette;

I have received your letters of April 8 and 9 in which you requested advisory opinions.

According to your letter, you requested a copy of the "duty roster" of all police officers and detectives on duty on April 16 and 17 and October 25 and 26 in 1983 for the Town of Colonie Police Department. Chief of Police, James Flater, denied your request on the grounds that the record constitutes "inter or intra-agency material". The Town Attorney, Susan Marie Tatro, upheld the denial for the same reason.

In your other letter, you explained that you requested copies of your arrest fingerprint cards submitted to the Division of Criminal Justice Services by the Colonie Police Department. Your request was denied by Commissioner Richard J. Condon because the fingerprints are "identification records" and are not "components of criminal history records" which are covered by the record review process outlined in 9 NYCRR 6050.1. You would like to know whether the requested records may be withheld under the Freedom of Information Law.

In this regard, I offer the following comments.

First, with respect to the availability of the duty rosters, §87(2)(g) permits an agency to deny access to records or portions thereof 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..."

In other words, to the extent that inter- or intra-agency materials contain suggestions, advice, opinions or recommendations, such records or portions thereof may be properly withheld. In my opinion, however, a record of police officers and detectives on duty during specific days contains factual information rather than opinions or recommendations. Thus, I believe that the requested duty records may not be withheld on the basis of §87(2)(g) of the Freedom of Information Law. Moreover, I do not believe that a duty roster requested after the performance of police officers' duties may be properly withheld under any of the other grounds for withholding provided by §87(2) of the Law.

Second, with respect to the availability of your fingerprint cards, while the Division may not consider them to be a part of the criminal history records subject to its record review process, I believe that the fingerprints are available under the Freedom of Information Law.

In my view, the Division of Criminal Justice Services is an agency as defined by the Freedom of Information Law and thus is required to comply with the provisions of the Law. Section 86(4) defines "records" which are to be made available in accordance with 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, dr ings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As such, fingerprint cards kept by the Division, in my opinion, fall within the rights of access granted by the Freedom of Information Law.

Finally, since the fingerprint cards have been requested by the subject of the records, I believe that they should be made available upon presentation of proof of identity [see Freedom of Information Law, §89(2)(e)]. Moreover, in Kotler v. Suffolk County Police Department, Supreme Court, Suffolk County, April 7, 1983, the Court indicated that the subject of such records may obtain copies.

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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

cc: Richard J. Condon, Commissioner
Susan Marie Tatro, Colonie Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3923

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

May 6, 1985

Mr. Martin Minkowitz
Deputy Superintendent
and General Counsel
State of New York
Insurance Department
160 West Broadway
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 Mr. Minkowitz:

I have received your letter of April 16 in which you requested clarification of an advisory opinion written by me to Ms. Eva M. Parziale on April 4, 1985.

In your letter, you point out two statements in the advisory opinion which, on their face, may be misleading. Initially, you noted that my opinion "that an agency which makes records available more than fifteen business days after receipt of a request has violated the provisions of the Freedom of Information Law" may be unfounded under certain circumstances. In addition, you questioned my opinion that a policy which restricts the number of records to be made available to five per day is improper under the Freedom of Information Law. You have asked that my opinion of April 4 to Ms. Parziale be modified with respect to those statements.

First, the time limitations set forth under the Freedom of Information Law and the regulations promulgated thereunder by the Committee on Open Government are intended to make records promptly available while allowing an agency flexibility in locating and reviewing the records. As you know, an agency may properly respond to a request for records by acknowledging, in writing, the receipt of such request within five business days of its receipt. The Committee's regulations provide further that:

> "If access to records is neither granted nor denied within ten business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed" [see 21 NYCRR 1401.5(d)].

Thus, if records are neither made available nor denied within fifteen business days after receipt of a request, the requestor may consider the request to have been denied and appeal such denial, regardless of whether the agency intended to make the records available beyond the fifteen business day period.

On the other hand, while a right to appeal exists, I agree with you that circumstances may be such that an agency's failure to grant or deny records within the fifteen business day period may not constitute a violation of the provisions of the Freedom of Information Law. As you have observed, it may take an agency which diligently searches for requested records more than fifteen business days to locate the records and make them available, especially, for example, where the records are in storage. If the agency has acted reasonably and in good faith to locate the records as quickly as possible, I do not believe it violates the letter or spirit of the Law if it acts beyond the time limitations. However, an agency which abuses the time limitations, i.e., by ignoring them or by unnecessarily utilizing the entire fifteen business days permitted or going beyond that time to make records available, would, in my opinion, violate the spirit and/or letter of the Law.

Second, with respect to the policy of limiting the number of records to be made available to five per day, again, as we discussed, I believe that reasonableness should control. In the case of an agency which is faced with voluminous requests for records each day, it may be reasonable to make only five records or files available to any one requestor per day. However, to adopt a rigid policy of limiting the availability of records to five per day, without considering the agency's ability to produce more records on any given day, would, in my view, fly in the face of the intent of the Freedom of Information Law. For example, one file may be voluminous, thereby necessitating a lengthy review; others, however, may be brief, enabling agency officials to determine rights of access to more than five files daily.

In sum, I emphasize that the Freedom of Information Law requires agencies to act within certain time limitations. However, the Law does not seek to impose an unreasonable burden upon agencies. I hope that this letter helps to clarify any statements which you found misleading in my opinion of April 4. If you have any further questions, 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: Ms. Eva Parziale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3724

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

May 6, 1985

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 note of April 12 in which you requested an advisory opinion regarding rights of access to various materials maintained by the Middle Island Central School District.

The first item in question involves what is generally known as a "subject matter list". Here I direct your attention 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."

The language quoted above represents one of the few instances in which the Freedom of Information Law requires that an agency create a record. It is noted that it has been suggested in the past that municipal agencies might review the State Education Department's schedules for the retention and disposal of records as a basis for the preparation of a subject matter list.

The second aspect of your inquiry concerns "all litigation records or files" maintained by the School District or its attorneys concerning lawsuits in which the District, the Board of Education or a superintendent were named as respondents. In brief, I believe that litigation materials consisting of attorney work product or material prepared for

litigation would be confidential under the Civil Practice Law and Rules, §3101(c) and (d) and, therefore, §87(2)(a) of the Freedom of Information Law, if they have not been made available either to a court or an adversary. Conversely, to the extent that such materials have been filed with a court or made available to an adversary, I believe that they would be accessible to the public.

Item three of your letter is related, for it concerns access to a notice of claim served upon the District. 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. In my opinion, none of the grounds for withholding could be cited to deny access to a notice of claim. Access to related materials involving the claim would be determined on the basis of comments made in the preceding paragraph.

The fourth area of inquiry involves policy adopted by the District or the Board "concerning the use of office telephones by employees during the time period" of a particular individual's tenure as superintendent. If the policies have been changed, you also requested their current versions. In my view, the policies could be characterized as intra-agency materials [see Freedom of Information Law, §87(2)(g)]. Nevertheless, §87(2)(g)(iii) requires that final agency policies found within intra-agency materials must be made available.

The last aspect of your request concerns "All letters or memoranda of complaint from staff or the public contained within the files of District or School Board officials, and all related correspondence indicating the actions taken thereon."

The language of your request is open-ended and does not indicate any period of time concerning the submission of complaints. Here I point out that §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". If, for example, your request involves complaints made since the creation of the School District, it is possible that the request might not have "reasonably described" the records sought. It is suggested that you might narrow the scope of your request by indicating a particular time period regarding the submission of complaints.

With respect to rights of access, I agree that, in the case of complaints submitted by members of the public, as a general rule, the substance of such complaints may be available.

However, identifying details concerning the complainants might justifiably be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)]. It is noted, too, that the nature of a complaint might have an impact upon rights of access. For instance, if the complaint is made by the parent of a student and refers throughout its contents to problems involving the student, it is possible that the complaint in its entirety might be considered confidential in conjunction with the provisions of the Family Educational Rights and Privacy Act (20 USC §1232g). As you may be aware, that federal Act generally requires that records identifiable to a particular student or students be kept confidential, unless the parents of the students consent to disclosure.

Complaints made by staff might fall within a different category of deniable records. Specifically, reference was made earlier to §87(2)(g) concerning intra-agency materials. From my perspective, a complaint made by a member of staff would constitute an "intra-agency material". Consequently, rights of access to those records might be determined not only on the basis of §87(2)(b) concerning unwarranted invasions of personal privacy, but also §87(2)(g).

Lastly, since your request also involves related correspondence indicating the actions taken following the complaints, there is no clear response that can be offered. Once again, if a complaint pertains to a student, the response might be confidential under the federal Act to which reference was made earlier; in addition, it is possible that other privacy considerations might also be present. Access to responses to staff complaints would also in my view be determined on the basis of §87(2)(g), as well as §87(2)(b) concerning privacy.

It is emphasized that the preceding comments pertaining to responses to complaints are quite general and that they should not be construed as a specific guide to rights of access to such records. In short, due to the variety of the types of complaints that there may be, as well as the nature of responses to those complaints, it is all but impossible in my view to provide clear and concise guidance concerning rights of access to those 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: Lori D'Amico, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3925

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

May 7, 1985

Mr. Guy C. 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:

As you know, your letter of April 26 addressed to the Attorney General has been forwarded to this office. The Committee on Open Government provides advisory opinions concerning the Freedom of Information and Open Meetings Laws.

According to your letter, the Northumberland Town Board passed a resolution on March 4 requiring the Town Supervisor to have the Town's bookkeeper bring the Town's financial records to the Town Clerk's office on March 5 by 8 p.m. You explained that the Town's financial records are presently maintained in the bookkeeper's home. To date, you wrote, these books and records have not yet been made available by the bookkeeper or by the Town Supervisor. You requested assistance in resolving this problem without initiating an Article 78 proceeding. In this regard, I 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, "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 Northumberland Town Board is an agency subject to the provisions of the Freedom of Information Law.

Third, §87(1)(a) requires the governing body of each public corporation to promulgate uniform regulations for all agencies in such public corporation pursuant to the provisions of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government. The regulations must include, at a minimum, the times and places records are available, the persons from whom such records may be obtained and the fees for copies of records [see Freedom of Information Law, §87(1)(b)(i) through(iii)]. Therefore, the Town's financial records should be made available pursuant to the regulations adopted by the Town Board.

In accordance with the Freedom of Information Law, the Board should have designated an individual as the records access officer. The records access officer is responsible for making the Town's records available even if the records are in the possession of another individual.

Moreover, §29(4) of the Town Law provides that the town supervisor shall keep an accurate account of the receipt and disbursement of all moneys transferred by virtue of the supervisor's office. Section 29(4) further provides that the account books:

> "shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, an opinion of the State Comptroller indicates that there is no authority for a bookkeeper to keep a town's financial records in his or her home, if it is possible for the records to be located in a public building (1980 op St. Compt. File #78).

Finally, to avoid an Article 78 proceeding, you may wish to bring this matter to the attention of the Town Board. In addition, I will forward a copy of this advisory opinion to the Town Supervisor and hopefully, any misunderstandings will be resolved.

I hope 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: Town Supervisor
Town Board
Town Bookkeeper

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3726

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

May 8, 1985

Mr. O. Shelly
[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. Shelly:

I have received your letter of April 8 in which you requested an advisory opinion.

According to your letter, you have been advised by the Department of Civil Service that you will be permitted to listen to a "briefing tape". You asked whether the agency could properly allow you to hear the tape but refuse to provide a transcript of the recording. In this regard, I offer the following comments.

First, §87(2) of the Freedom of Information Law provides that "Each agency...shall make available for public inspection and copying all records", except to the extent that records or portions thereof may be withheld under one or more of the grounds listed in §87(2)(a) through (i) of the Law. Therefore, it is clear that any record available for inspection under the Law must be copied upon an individual's request and offer to pay for such copy.

Second, it appears that you are interested in a transcript of the "briefing tape" rather than a copy of it. In this regard, I point out that the Freedom of Information Law does not require an agency to create a record which does not already exist (see §89(3) of the Freedom of Information Law). In my view, preparing a transcript of a tape recording would constitute the creation of a new record which would not be required of an agency

under the Law. On the other hand, the agency would be required, if you so requested, to provide you with a copy of the tape recording if you agreed to pay the cost of reproducing the tape. If the Department agreed to have the "briefing tape" transcribed, I believe it could charge you the actual cost of such a transcription.

In sum, it is my view that the Department need not provide you with a transcript of the tape unless it already maintains such a transcript. A copy of the tape should be made available, however, upon your offer to pay the cost of its 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Ms. Kathy Bennett, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3727

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

May 8, 1985

Mr. Gary Grossman
The Daily Star
102 Chestnut Street
Oneonta, NY 13820-0250

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

Dear Mr. Grossman:

I have received your letter of April 17 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and the materials attached to it, the Daily Star has unsuccessfully requested records from the Oneonta City Prosecutor, Walter L. Terry III. As I understand the situation, the City Prosecutor is an appointee of the Mayor and serves in a capacity analogous to that of district attorney. The request made by your staff involved "records pertaining to the city code violation complaints directed to..." the Office of the City Prosecutor. In response, the City Prosecutor indicated that the provisions of the Freedom of Information Law "do not apply to this situation, or office".

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

First, the Freedom of Information Law is applicable to records of an "agency", a term 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, since the Office of the City Prosecutor is not a court or its equivalent, nor is it part of the State Legislature, I believe that it is clearly an "agency" subject to the Freedom of Information Law. As a consequence, its records must in my opinion be made available in accordance with the Freedom of Information Law.

It is noted that, in a related area, it has been held on various occasions that the office of a district attorney is an "agency" required to comply with the Freedom of Information Law [see e.g., Westchester Rockland Newspapers v. Vergari, 85 AD 2d 672, Dillon v. Cahn, 79 Misc. 2d 300, 259 NYS 2d 981 (1974), New York Public Interest Research Group, Inc. v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979].

Second, with respect to the records sought, Mr. Terry wrote that, since those materials deal with "pending cases" involving "active litigation", his office would not "comment". As I understand the situation, you have requested records that indicate that the City Code Enforcement Agency has found code violations. Those records have apparently been forwarded to the City Prosecutor, who, in turn, seeks to ensure that violators comply with the Code or pay appropriate fines, for example, by initiating suit. If my assumptions are accurate, the records in question might pertain to possible or pending litigation. Nevertheless, that factor alone would not in my view constitute a basis for a denial of access. Further, based upon the materials that you sent, you did not seek "comment" from the prosecutor; rather, you requested records.

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

If the records in which you are interested represent findings by the Code Enforcement Agency that the Code has been violated, those records would in my opinion be available to the public under the Freedom of Information Law and perhaps a different statute, by implication.

In one of the first decisions rendered under the original Freedom of Information Law, which was not as expansive in terms of rights of access as the current law, it was found that the files of a building code enforcement agency, including records indicating code violations were accessible [see Young v. Town of Huntington, 388 NYS 2d 978 (1976)]. The findings of violations by the code enforcement agency, even though forwarded to the City Prosecutor, would in my view remain accessible. One of the grounds for denial, due to its structure, often grants broad rights of access. 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 policy or determinations must be made available.

Under the circumstances, I believe that findings that violations have been committed would constitute "final agency...determinations" accessible under §87(2)(g)(iii), even though an additional step, in this instance, enforcement by the City Prosecutor, may be necessary [see Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied (1979)].

Another statute may be relevant, although its application is dependent upon the types of residences that have been cited for violations. Section 307 of the Multiple Residence Law, which refers to records of a building department, 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."

If records of violations must be made available from a building department or its equivalent, such as the Code Enforcement Agency, I believe that the same records would be equally available when they are forwarded to the City Prosecutor.

In sum, it is my opinion that the Office of the City Prosecutor is an "agency" required to comply with the Freedom of Information Law, and that the records in question, as I understand the situation, 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: Walter L. Terry III, City Prosecutor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3128

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

May 8, 1985

Ms. Bette German-Smith
[redacted]

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

Dear Ms. German-Smith:

I have received your letter of April 17 in which you requested an advisory opinion.

You wrote that, in order "to obtain a copy from a file from the Surrogate's Court, Orange County", you "had to pay $1.00 (one dollar) for one page." The question is whether the fee is "legal".

In my opinion, the fee was likely appropriate for the following reasons.

First, the Freedom of Information Law is applicable to records of an "agency", a term 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, the Freedom of Information Law does not apply to the courts or court records.

Second, under a variety of statutes, clerks of courts are required to charge fees for certain services. The provisions concerning fees in surrogate's courts are found in §2402 of the Surrogate's Court Procedure Act. Other statutes involving fees are §255 of the Judiciary Law, and §8020 of the Civil Practice Law and Rules.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3729

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

May 8, 1985

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 April 18 in which you requested an advisory opinion.

According to your letter, a hearing was held on your application for review of the assessment of your property. At the hearing, the hearing officer possessed a record prepared for him by the Real Property Assessment Bureau which included information concerning comparable properties and the property card for your home. You wrote that you requested permission to examine that record during the hearing, but that your request was denied. Thereafter, you requested a copy of the same record from the New York City Tax Commission. You believe that the reply from Counsel's Office was a denial of your request. You asked whether this record may be properly withheld. In this regard, I offer the following comments.

First, as you know, the Freedom of Information Law makes all records of an agency available unless such records may be properly withheld under one or more of the grounds listed in §87(2)(a) through (i). In my opinion, the records which you describe should be made available for they do not appear to fall within any of the grounds for withholding set forth under the Law.

Second, I do not believe that Mr. Borin's letter of April 10 denies access to the records that you seek. To the contrary, Mr. Borin explained to you that your request for the records should be addressed to the Department of Finance which maintains those records unless they become part of a Tax Commission hearing. In other words, now that your hearing has been completed, the records have been returned to the Department of Finance.

Finally, it appears that Mr. Borin has forwarded a copy of your request to the Queens office of the Real Property Assessment Bureau. You may wish to contact that office to review or to obtain copies of the records that you seek.

I hope 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. Glenn Borin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3130

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

May 9, 1985

Mr. Donald P. McNamara
[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. McNamara:

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

According to your letter, at the March 18 meeting of the Board of Education of the Colton-Pierreport School District, a petition signed by a group of citizens was served upon the Board of Education. You wrote that the petition concerns "the services of aninstructional staff" and expressed the belief that the petitioners requested that a named individual should "not be granted tenure". Information pertaining to the petition was not disclosed at the meeting and, thereafter, you requested the petition under the Freedom of Information Law. Your request was denied both initially by the records access officer and later on appeal by the Superintendent, Richard F. Kelly. In his denial, the Superintendent named the individual who is the subject of the petition and based the denial upon a contention that disclosure would result in an "unwarranted invasion of personal privacy".

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, as suggested by the Superintendent, the only ground for denial that is apparently relevant is §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute an unwarranted invasion of personal privacy.

From my perspective, there may be privacy considerations present with respect to both those who signed the petition and the subject of the petition.

With respect to those who signed the petition, it is my opinion that their identities would not, if disclosed, result in an unwarranted invasion of personal privacy. The petition was submitted to the Board of Education during an open meeting, and there may have been an expectation if not a desire on the part of those who signed the petition, that their names would be disclosed. In the past, it has been suggested that the submission of a petition generally represents an indication that the signatories have essentially waived the protection of privacy that they might otherwise enjoy. In short, it is my view that, as a general matter, a petition signed by citizens is intended to publicly inform an entity of government as well as the public at large that a group of named individuals seeks to express a point of view relative to a particular subject.

With regard to the privacy of the member of staff who is the subject of the petition, as indicated earlier, the Superintendent disclosed the identity of that person to you in his denial of your request. However, in my view, rights of access to statements or allegations made with respect to that person would be dependent upon the nature and content of those statements and allegations. For instance, if the petition merely recommended that a person not be granted tenure, I believe that such a statement would be accessible under the Freedom of Information Law. If, on the other hand, it is alleged in the petition that the individual has a medical problem, is an alcoholic or a child abuser, for example, I would agree that those portions of the petition containing those types of unproven allegations would if disclosed result in an unwarranted invasion of personal privacy. To that extent, portions of the petition might justifiably be deleted, while the remainder would likely be available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Richard F. Kelly, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3731

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

May 9, 1985

Ms. Tena 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 Ms. Brown:

I have received your letter of April 1, which reached this office on April 22.

You described a series of difficulties and incidents concerning a particular high school student who is apparently the son of a friend and asked that I inquire with respect to those incidents.

In this regard, it is noted at the outset that the duties of the Committee involve providing advice under the Freedom of Information and Open Meetings Laws. As such, this office does not have the authority or the resources to conduct an investigation. Further, in terms of the issues that you raised, the Committee has no authority to compel school officials to take action. Nevertheless, I would like to offer the following comments and suggestions.

First, to learn more about the incidents and the student's activities, it is suggested that the student's parent request records pursuant to the federal Family Educational Rights and Privacy Act (20 USC §1232g). In brief, that Act grants rights of access to "education records" identifiable to a particular student to the parents of the student. The Act also requires that education records be kept confidential, unless a parent consents to disclosure. In addition, the Act permits a parent to attempt to correct or amend an education record about a student if the contents are inaccurate. To enable you to become familiar with rights granted by the Family Educational Rights and Privacy Act, I have enclosed the regulations adopted by the U.S. Department of Education under the Act. The regulations provide substantial guidance in terms of rights of parents and the duties of an educational agency.

Second, it is recommended that a request be made under the New York Freedom of Information Law for existing policies involving the discipline of students as well as other related matters. Section 87(2)(g)(iii) of the Freedom of Information Law requires that "final agency policy" be made available to the public. Enclosed is an explanatory brochure that describes the Freedom of Information Law and contains a sample letter of request.

Lastly, it is suggested that the parent of the student discuss the situation with a guidance counselor or perhaps bring the matter to the attention of the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3932

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

May 10, 1985

Mr. Charles E. Van Valkenburg
[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. Van Valkenburg:

I have received your letters of April 22 and May 6.

In brief, according to the correspondence, you applied for a job at the Children's Home of Kingston at the end of March. Apparently, you were directed to the Children's Home by the New York State Job Service. It appears that the interviewer questioned your references and the reasons for which you terminated your previous employment. Attached to your letter are various references, all of which are favorable. As of the date of your letters, you have received no response to your requests for a position.

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

First, the Freedom of Information Law is applicable to records of an "agency", the term defined in §86(3) to include:

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

As such, as a general matter, the Freedom of Information Law pertains to records maintained by state and local government.

Therefore, if the Children's Home is a private facility rather than a governmental agency, its records would not be covered by the Freedom of Information Law. If that is so, the Children's Home would be under no obligation to grant access to records to you. On the other hand, if the Children's Home is an "agency", its records would be subject to rights granted by the Freedom of Information Law. If you are interested in requesting records, a request should be made in writing and sent to the "records access officer" of the agency. I have enclosed an explanatory brochure that describes the Freedom of Information Law and contains a sample letter of request.

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Stated differently, it is not an access to information law that requires government officials to respond to questions, but rather a vehicle by which members of the public may request existing records. Further, §89(3) of the Law states in part that an agency is not required to create or prepare a record in response to a request.

Third, if you were referred by the New York State Job Service as a result of unemployment, it is possible that some records may be made available by the Job Service to you. Although the Labor Law generally prohibits the disclosure of information involving claims of unemployment insurance benefits or placement of individuals in jobs, §537(1) of the Labor Law states in part that:

> "Information acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law. Such information insofar as it is material

> to the making and determination of a claim for benefits shall be available to the parties affected and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement."

Based upon the foregoing, it is suggested that you discuss the matter with a representative of the New York State Job Service in Kingston.

I hope that 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-3733

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

May 10, 1985

Mr. Robert J. Bavisotto
#82-C-712
135 State Street
Auburn, NY 13024-9000

Dear Mr. Bavisotto:

I have received your letter of May 6, in which you expressed your "crystal clear intent" regarding an inquiry made previously to this office.

Specifically, you have asked that this office provide you with certain documents concerning events that you described in some detail. In this regard, I point out that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. 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. In short, this office does not maintain the records that you seek.

Under the Freedom of Information Law, a request should be directed to the "records access officer" at the agency that maintains the records sought. Consequently, it is suggested that you submit requests to the agencies which you believe possess the records that you are seeking.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3034

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

May 10, 1985

Mr. William D. LaRue
Poughkeepsie Journal
P.O. Box 1231
85 Civic Center Plaza
Poughkeepsie, NY 12602

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, except as otherwise indicated.

Dear Mr. LaRue:

I have received your letter of April 23, as well as the materials attached to it.

Your inquiry pertains to requests for two "audio tapes". The first tape concerns a conversation between William J. Herrman and Orange County fire control in which Mr. Herrman reported a fire. The second tape involves "a call to Dutchess County Fire Bureau from Orange County fire control." You added that, "[F]or some reason yet not explained, Herrman's call ended up in Orange County even though the fire was in Dutchess County. So after he called in, Orange County dispatchers telephone Dutchess County to relay the information. Dutchess County then dispatched firefighters to the scene". The materials also indicate that Mr. Herrman died in the fire.

Based upon our recent conversation, it appears that the tapes are currently in possession of the State Police, which is investigating the incident. Although you informed me by phone that the parents of the deceased were able to listen to the tapes, both your initial request and the ensuing appeal resulted in denials of access. The determination on appeal, which was sent to this office by J.J. Strojnowksi, Chairman of the Division of the State Police FOI Appeal Board, stated that:

> "your appeal has been denied on the grounds that your request is for records which are inter agency material held by the Division solely for law enforcement purposes which, if disclosed, would interfere with ongoing criminal investigations."

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

First, it appears that there may be two types of investigations to which the tapes are related. One might deal with the actions of the two fire agencies involved, their policies, procedures and responses of their personnel to the fire call. The other might deal with the origin of the fire and whether there may have been arson. Although I am obviously unaware of the contents of the tapes, it is possible that the records prepared or maintained in conjunction with an arson investigation may have little relationship, if any, to the tapes. In short, while the event may be under investigation as an arson, the contents of the tapes may be incidental or tangential to that inquiry.

Second, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Moreover, the introductory language of §87(2) refers to the capacity to withhold records "or portions thereof" that fall within one or more of the grounds for denial. As such, I believe that the Legislature envisioned situations in which one record might be both accessible and deniable in part. Further, as a consequence, an agency in my opinion is required to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, the denial on appeal by the State Police alludes to two of the grounds for denial. Reference is made to the tapes as "inter agency material". As I understand the facts, only one of the tapes falls within the scope of the exception concerning inter-agency materials.

Specifically, the tape of the initial call, which was made by the deceased to Orange County fire control could not in my view be characterized as "inter-agency" materials, for the deceased did not represent, serve or act on behalf of an "agency", a term defined in §86(3) of the Freedom of Information Law to include entities of state and local government. On the contrary, the first tape involves a communication between a member of the public and an agency. Although the tape was forwarded by a fire agency to the State Police, that factor would not in my opinion alter the character or contents of the record and transform it into an inter-agency communication; it remains a communication between a member of the public and an agency. If that is so, the exception concerning inter-agency materials would not in my view be applicable to the first tape.

The second tape, however, could likely be characterized as "inter-agency" material, for it involves a communication from one fire agency to another. The exception to rights of access concerning such materials is found in §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. Therefore, even though the second tape might consist of "inter-agency" material, its specific contents would determine the extent to which §87(2)(g) would permit a denial or perhaps require disclosure. For example, if the tape consists only of factual information, i.e., that a fire has been reported at a particular location, it is unlikely that §87(2)(g) could be cited as a basis for withholding. However, to the extent that the tape contains advice or an opinion, it could likely be withheld [see Ingram v. Axelrod, App. Div., 90 AD 2d 508 (1982)].

The other ground for denial to which the determination on appeal appears to allude is §87(2)(e), for the denial refers to material "held by the Division held solely for law enforcement purposes, which, if disclosed, would interfere with ongoing criminal investigations.

It is noted that the statement indicates that the materials are "held" by the Division. Nevertheless, the specific language of §87(2)(e) of the Freedom of Information Law pertains to records "compiled" for law enforcement purposes. The cited provision stated in full that an agency may withhold records that:

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

It is possible that recordings involving the fire call might not be characterized as records "compiled" for law enforcement purposes, even though they may relate to one or more investigations. Contrarily, it might be contended that the tapes of the fire calls were prepared in the ordinary course of business. You suggested in your letter that:

> "These incoming calls are routinely recorded to provide fire agencies with a record that allows them to immediately replay the conversation if they don't catch all the information the first time. It also provides a permanent record of dispatchers' response to an emergency."

If that is so, it might be difficult in my view to characterize the tapes as having been compiled for law enforcement purposes, for they are apparently routinely prepared in the ordinary course of business. If the records in question were not compiled for law enforcement purposes, I do not believe that §87(2)(e) could be cited as a basis for denial.

Further, by means of analogy, it might be contended that the tapes of fire calls are similar to the contents of police blotters. In an early decision rendered under the Freedom of Information Law, it was found that a police blotter is a log or diary in which any event reported by or to a policy department is recorded. Moreover, it was determined that a police blotter, as described by the court, contains no investigative information but rather merely a summary of events or occurrences. As such, it was determined that police blotters are accessible [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. In this instance, it is questionable whether the fire agencies perform a law enforcement function or, again, whether the tapes could be characterized as records compiled for law enforcement purposes. Moreover, the contents of the tapes might be viewed as similar to the contents of police blotters, which as noted earlier, have been found to be accessible.

If the tapes are determined to have been "compiled for law enforcement purposes", the remaining language of §87(2)(e) indicates that records so characterized may be withheld only under certain circumstances, which are based in great measure upon potentially harmful effects of disclosure. As suggested at the outset, if the fire is being investigated as an arson, the records prepared in conjunction with such an investigation could likely be withheld at this juncture on the basis of §87(2)(e)(i), for premature disclosure would likely interfere with an investigation. However, those records might be viewed as separate from the tapes representing the initial calls concerning the fire.

I point out that a recent decision indicates that records generally considered to be public that were forwarded to a district attorney because they related to an investigation remain public (King v. Dillon, Supreme Court, Nassau County, December 19, 1984). Specifically, the case involved a request for minutes of meetings of a village board of trustees that were maintained, temporarily, by

the District Attorney, pursuant to a grand jury subpoena. The court found that minutes of meetings are "public records" subject to inspection under the Freedom of Information Law, and that the issuance of a grand jury subpoena does not "create an automatic and absolute bar on further disclosure", nor does it "by itself, eradicate records otherwise public in nature (cf Jones v. State, 62 AD 2d 44)." The court also noted that the records "were not compiled for law enforcement purposes" and could not be withheld on that basis.

Without knowledge of the contents of the tapes or the nature of the investigation now being conducted, it is impossible to advise with certainty as to rights of access. Nevertheless, based upon the preceding analysis, it is possible that the tapes should be made available in their entirety or perhaps in part, depending upon their contents, for the bases for withholding offered by the State Police are, in my view, questionable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: J.J. Strojnowski

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

May 10, 1985

Mr. Albert Link, Jr.
Vice Chairman
Somers Association for
Affordable Quality Education
RD 2
Box 85
Granite Springs, NY 10527

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

Dear Mr. Link:

I have received your letter of April 18 in which you described a series of difficulties encountered in your efforts to obtain records from the Somers Central School District.

According to your letter, the School Board approved a chonge in the life insurance program for school administrators. As a consequence, you sought to obtain copies of both the old and new policies in order to compare benefits. Attached to your letter is a request directed to John Spang, Treasurer of the District, as well as Mr. Spang's response to you. Mr. Spang on February 28 informed you that he had not yet obtained the new policy. Further, with respect to old policies, he made available to you copies of materials given to him by the insuarance carriers. He added "While it is true that they are not'policies' in the purest sense of the word, they are all that I have..." You maintain that you have been denied access and asked what further action can be taken.

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

First, the Freedom of Information Law pertains to existing records, and the term "record" is defined 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, drewings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

It is emphasized that the definition quoted above refers to information "kept, held, filed, produced or reproduced by, with or for an agency..." Therefore, if, for example, the policies in question are kept in a school district office or by the District's attorney at his office, I believe that they would constitute "records" subject to the Law.

Second, to the extent that such records are maintained by the School District or its staff, I believe that they would be available. In brief, insurance policies are in my view the equivalent of contracts, which have always been accessible to the public.

Third, Mr. Spang indicated that he does not maintain possession of the specific documents that you seek. He added that the Freedom of Information Law does not require an agency to create a record. It is noted that Mr. Spang's contention is accurate, for §89(3) of the Law states in part that an agency is not obligated to prepare or create a record in response to a request. While that may be so, it may be in the best interests of the School District to have in its possession the insurance policies in which you are interested. Perhaps it could be suggested to District officials that the policies in question should be maintained by the District as originals or copies.

You asked whether there are penalties that may be instituted "to prevent public law from being abused in the future." In this regard, although you have not obtained the records you seek, it does not appear that the Law has been "abused". Nevertheless, in the event that a request for a record maintained by the District is denied, you have the right to appeal the denial in accordance with §89(4)(a) of the Law. 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..."

Further, if a record is denied on appeal, §89(4)(b) indicates that an applicant may initiate a proceeding under Article 78 of the Civil Practice Law and Rules. In such a proceeding, if the petitioner substantially prevails, a court may, under certain circumstances described in §89(4)(c), award attorney's fees to the applicant.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

cc; Mr. Spang

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3136

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

May 10, 1985

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 communications of April 23 and 25, as well as the enclosed materials.

According to the correspondence, you transmitted a request on March 28 under the Freedom of Information Law for records maintained by the Westchester County Medical Center. The records pertain to previous hospitalization. Although you received an acknowledgment of the receipt of your request, as of the date of your letter to this office, no additional response has been made.

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

First, having reviewed the materials attached to your letter, I point out that the federal Freedom of Information and Privacy Acts do not in my view apply to the records in question, for the records are maintained by a county hospital. Those acts pertain only to records of federal agencies.

The statute which in my opinion is applicable is the Freedom of Information Law, which pertains to rights of access to records of units of state and local government in New York.

Second, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the law (21 NYCRR §1401), 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 the 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)].

Further, unless I am mistaken, the person to whom an appeal should be directed with respect to agencies of Westchester County government is the County Attorney.

Third, it is noted that the Freedom of Information Law is applicable to existing records. Stated differently, it is not a vehicle under which a person may obtain information that does not exist in the form of a record or records. Further, §89(3) of the Law states that an agency is not required to create or prepare a record in response to a request.

Lastly, §17 of the Public Health Law pertains specifically to medical records. While that provision does not grant a patient direct rights of access to medical records pertaining to him or her, it states that a competent patient may designate a physician who in turn may request and obtain medical records on behalf of that 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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3737

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

May 13, 1985

Mr. Joseph P. Smith
85-C-145
Wende Correctional Facility
P.O. Box 187
Alden, New York 14004-0187

The staff of the Committee on Open 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:

I have received your letter of May 7 in which you requested various materials and sought an advisory opinion concerning medical records.

Enclosed are copies of the Committee's latest annual report, which contains an updated index to advisory opinions, and the opinions that you identified.

With regard to your question, it is noted initially that the Freedom of Information Law is applicable to records of an "agency", a term 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 generally applies to records of governmental entities in New York. It would not apply to records of a private hospital or physician, for example.

Perhaps the best way to obtain medical records involves the use of §17 of the Public Health Law. That statute does not grant direct rights of access to medical records by a patient. However, a physician designated by a competent patient may request and obtain medical records on behalf of the patient from another physician or hospital. Therefore, it is suggested that you confer with the physician of your choice, who may be able to obtain the medical records on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3238

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

May 13, 1985

Mr. Steven Kessler
Assistant District Attorney
Information Access Officer
Office of the District
Attorney
Kings County
Municipal Building
Brooklyn, NY 11201

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

Dear Mr. Kessler:

I have received your thoughtful letter of April 26 and appreciate your interest in complying with the Freedom of Information Law.

In your capacity as Assistant District Attorney and Information Access Officer, you wrote that:

> "[T]he Kings County District Attorney's Office maintains a Citizen's Action Center where individuals can report possible crimes. The Center also serves to answer questions about the criminal justice system and refer individuals to the appropriate government agency to help them with their problems. The Office has no specific policy on whether the inquiries and complaints are made in confidence."

You added that you recently received a request under the Freedom of Information Law from the subject of another person's criminal complaint. You stated that you are unsure as to whether the subject of that complaint should be granted access to it, particularly since it was determined that the District Attorney did not have jurisdiction.

You have asked for an opinion regarding rights of access to similar records of complaints and whether reports of the Citizens Action Center "are exempt under FOIL." The reports "generally include a description of the complaint or inquiry, a record of the investigatory actions taken, and the disposition of the case."

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, 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. Due to the quoted language, I believe that the Legislature envisioned situations in which a single record or report might be both accessible and deniable in part. The language in my opinion also imposes an obligation that an agency review a record sought in its entirety to determine which portions, if any, may justifiably be withheld.

Third, with respect to letters of complaint, it has generally been advised that the names or other identifying details concerning the person who made the complaint may be deleted on the ground that disclosure would constitute an "unwarranted invasion of personal privacy" pursuant to §§87(2)(b) and 89(2)(b). In dealing with the protection of personal privacy, several courts have based their determinations upon the relevance of identifying details, for example, to the work of an agency. If, for instance, a person enters a restaurant and believes that it is dirty and later transmits a complaint to the local health department, the health department in reviewing the complaint in all likelihood does not base its action on who the complainant might be. On the contrary, its concern is whether the complaint is valid, i.e., whether the restaurant was indeed dirty. Moreover, I would conjecture that often complaints are investigated even if they are submitted anonymously. If that is so, the identity of a complainant is often irrelevant to the work of an agency.

In short, in many instances, the substance of a complaint might be made available after identifying details have been deleted in order to protect privacy. If the deletion of identifying details would not alone protect the privacy of the complainant, it is possible that the entire complaint might justifiably be withheld under §87(2)(b).

As you suggested, another ground for denial might also be relevant. Specifically, §89(2)(e) permits an agency to withhold records that:

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

If a complaint constitutes a record compiled for law enforcement purposes, it is possible that its contents might be withheld in whole or in part, depending upon the nature of the record, under §87(2)(e)(i) if disclosure would interfere with the investigation, or §87(2)(e)(iii), if disclosure would identify a "confidential source" or reveal "confidential information" pertaining to a criminal investigation.

It is conceivable that another ground for denial might also be invoked with respect to complainants. Section 87(2)(f) permits an agency to withhold records or portions thereof when disclosure would "endanger the life or safety of any person." The application of §87(2)(f) would in my opinion be largely dependent upon specific circumstances. As such, it is difficult to provide direction concerning the propriety of a denial made on the basis of that provision.

There is also a judicial determination that may be useful in terms of its thrust, even though it involved facts different from those described in your letter. Specifically, in Hawkins v. Kurlander, the Court compared the New York Freedom of Information Law to the federal Freedom of Information Act in terms of the "law enforcement purposes" exception and stated that:

> "'...a major purpose of the exemption is to encourage private citizens to furnish controversial information to government agencies by assuring confidentiality under certain circumstances' (Pope v. United States, supra, p. 1387; see, also, Aspin v. Department of Defense, 491 F.2d 24 (D.C. 1973). To the same effect is Frankel v. Securities and Exchange Commission, 460 F.2d 813, 817 (2nd Cir. 1972) cert. den. 409 U.S. 889, 93 S.Ct. 125, 34 L.Ed.2d 146 wherein the Court of Appeals for the Second Circuit noted that '[I]f an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered" [98 AD 2d 14, 469 NYS 2d 820, 822 (1983)].

The court added that:

> "For a court to hold that a promise of confidentiality can be breached merely because the investigation did not lead to criminal charges would raise a red flag for future witnesses who might well decline to reveal confidences to the District Attorney because of the risk of public disclosure." (id.)

With regard to the reports developed by the Citizen's Action Center, once again, I believe that rights of access would be dependent upon their contents as well as the disposition of the case.

The reports might be characterized as records compiled for law enforcement purposes which might be deniable, in whole or in part, under §87(2)(e), which was quoted in full earlier. In addition, the report might also be considered "intra-agency material". Such materials are dealt with in §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, if no other ground for denial applies. However, those portions of intra-agency materials reflective of advice, recommendations, or opinion, for example, could in my view be withheld.

In terms of the disposition of the case, if a complaint leads to a conviction, the report as well as other related records might be available from a court as well as the office of the District Attorney. On the other hand, if the charges against an accused are dismissed in favor of the accused, the records pertaining to the charges are often sealed pursuant to §160.50 of the Criminal Procedure Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3739

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

May 14, 1985

Mr. Stephen J. Marvin
[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. Marvin:

I have received your letter of April 27.

According to your letter, having received no response to a request for records directed to the Town of Richmondville, you appealed the constructive denial of your request on April 10. In response to the appeal, you received a letter dated April 20 referring you to an agency in Albany. Despite the referral, you wrote that the "information is in Richmondville". You asked whether this office is "responsible for the prosecution of such violators" and, if it is not, who may enforce the law.

In this regard, I offer the following comments.

First, having reviewed appeals sent to this office for the month of April, the Town of Richmondville did not apparently forward a copy of the appeal as required by §89 (4)(a) of the Freedom of Information Law.

Second, in terms of the legal responsibilities of the Town, I believe that it is responsible for granting or denying access to records in its possession, even though the records sought may be maintained by another agency. The Freedom of Information Law defines the term "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, even though duplicates of the documents in question may be kept by a different agency, they are "records" subject to rights of access if they are kept by the Town.

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.

Third, the Committee on Open Government has the authority to advise; neither this office nor any other state agency has the capacity to compel the Town to make records available or otherwise comply with the Freedom of Information Law.

Section 89(4)(b) of the Law indicates that a person denied access on appeal may initiate a lawsuit. The cited provision states in part 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."

In addition, §89(4)(c) provides that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

I 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

cc: Town Board, Town of Richmondville

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3740

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

May 15, 1985

Mr. Daniel L. DeCarlo
[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. DeCarlo:

I have received your letter of May 1 in which you raised questions concerning the "legal procedure on how to redeem documents" from variuos government agencies, as well as hospitals, in the City of Yonkers.

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

First the Freedom of Information Law applies to records of agencies, and the term "agency" 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."

Therefore, the Law includes within its scope records of units of state and local government, such as the City of Yonkers and Westchester County. Since you referred to hospitals, as you may be aware, some hospitals are government facilities, while others may be private. The records of a private hospital would not in my opinion fall within the requirements of the Freedom of Information Law.

Second, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations governing the procedural aspects of the Law. In turn, each agency is required to adopt its own regulations consistent with the Freedom of Information Law and the Committee's regulations. The regulations of the City of Yonkers must include the name and address of one or more "records access officers" who are responsible for dealing with requests made under the Freedom of Information Law. Since I do not have the name or address of the records access officer for the City of Yonkers, it is suggested that you contact the City Clerk at 964-3000 for the purpose of obtaining that information.

Third, the Freedom of Information Law requires that a request "reasonably describe" the records in which you are interested. Therefore, when making a request, it is recommended that you include names, dates, descriptions of events, identification numbers and similar details that might enable agency staff to locate the records sought.

Lastly, enclosed is a copy of "Your Right to Know", which explains the provisions of the Freedom of Information and Open Meetings Laws and contains a sample letter of request.

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:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3741

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

May 15, 1985

Mr. Richard Saravay
[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. Saravay:

I have received a copy of your letter of April 29 to Ms. Lois Mitchell, Supervisor of the Town of New Castle. You forwarded the letter as a request for a second advisory opinion concerning the availability of a list of names and addresses of nonresident parking permit holders.

In your letter to Ms. Mitchell, you emphasized that you have no intention of using the list of names and addresses for "commercial or fund-raising purposes" and that, therefore, you should not be denied access on the ground that disclosure would constitute an unwarranted invasion of personal privacy. You further explained that you intend to continue to oppose the parking restriction and that "[t]his opposition might take the form of political action, research, letter writing, meeting attendance and arm bending, none of which [requires you] to seek funds." In light of your stated purposes, you are requesting a second advisory opinion regarding the availability of the list.

In this regard, I offer the following comments.

First, in my letter to you and Mrs. Hunter on March 21, I wrote that the only relevant basis for withholding the list of nonresident parking permits is §87(2)(b) of the Freedom of Information Law. As I explained, examples of unwarranted invasions of personal privacy are provided in §89(2) of the Law, one of which is disclosure of a list of names and addresses if such list would be used for com-

mercial or fund-raising purposes [see §89(2)(b) of the Freedom of Information Law]. I also noted that, although §89(2) provides examples of disclosures which would constitute unwarranted invasions of personal privacy, the examples are not exclusive and do not foreclose the possibility that other types of disclosures might constitute unwarranted invasions of personal privacy.

Second, in view of your stated purposes, I do not believe that the Town of New Castle may properly deny access to the list based upon §89(2)(b) of the Freedom of Information Law. However, the initial determination of whether disclosure of the list would otherwise constitute an unwarranted invasion of personal privacy remains within the discretion of the records access officer and the appeals officer of an agency. While the Committee is authorized to advise, it cannot compel an agency to grant or deny access to records. A court may ultimately make the determination if an Article 78 proceeding is commenced.

Third, I point out that in the area of personal privacy, reasonable people have varying opinions about what constitutes an unwarranted invasion of personal privacy. In this case, for example, some of the nonresident parking permit holders may believe that disclosure of their names and addresses to someone who will solicit their support to oppose the new parking restriction is an unwarranted invasion of their personal privacy. On the other hand, it is possible that other nonresident permit holders would welcome disclosure under these circumstances. Furthermore, under the Freedom of Information Law, the only instance in which an individual's purpose for requesting a record is relevant and may be questioned is where a list of names and addresses other than a payroll list of public employees and their business addresses, is requested [see Freedom of Information Law, §89(3)(b)]. Therefore, a determination which affects all of the individuals on the list requires a careful balancing of interests.

In my opinion, disclosure of the names and addresses of the nonresident parking permit holders would not constitute an unwarranted invasion of personal privacy in this situation. Permits and licenses issued by governmental entities are generally made available to the public, for dis-

closure allows the public to know who is qualified to engage in certain regulated activities. At the same time, however, the Legislature has determined that disclosure of lists of the names and addresses of licensees and permitees for commercial or fund-raising purposes is an unwarranted invasion of personal privacy. In balancing the interests, the Legislature has, in effect, found that the interests of fund-raisers are subordinate to the interests of individuals to be free from commercial solicitation.

While your intended use of the nonresident parking permit list might be characterized as a form of solicitation, I believe that it is sufficiently distinguishable from commercial solicitation so as to tip the balance in favor of disclosure. You wrote that you intend to inform the parking permitees of the new parking policy and of the action which might be taken collectively to oppose and reverse the policy. The use of a list of names and addresses to educate individuals regarding governmental action and participation is, in my view, more important and acceptable than the use of the list for purely commercial purposes, unrelated to the function of government. Moreover, the purpose of the requested disclosure directly relates to the purpose for which the information was originally collected, e.g., the issuance of parking permits for nonresidents. Therefore, I believe that disclosure of the names and addresses would 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

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-3742

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

May 15, 1985

Mr. Frank Gennuso
#85-C-127
Wende Correctional Facility
Wende Road
P.O. Box 187
Alden, NY 14004

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

Dear Mr. Gennuso:

I have received your letter of April 29 as well as the correspondence attached to it.

Your inquiry concerns a request that was initially sent to the Commission of Correction for "the name, address, and title of all employees of the Otisville Correctional Facility during February 1982." The Director of the Commission indicated that his office does not maintain the information sought and that he forwarded your request to James Flateau, Public Information Officer for the Department of Correctional Services. As of the date of your letter to this office, you had received no response. As such, you raised questions concerning your capacity to initiate an Article 78 proceeding, which court would have "jurisdiction", and your "eligibility" to receive an award of attorney's fees should you prevail while acting pro se.

In this regard, I offer the following comments.

First, the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services indicate that requests for records maintained at a correctional facility should be directed to the facility superintendent or his designee; for records maintained at the Department's Albany Offices, a request should be directed to the Deputy Commissioner for Administration, Building 2, State Campus, Albany, NY 12226.

Second, since the information in which you are interested pertains to 1982, it is possible that it no longer exists. If that is so, the agency would not be required to create a record in response to your request [see Freedom of Information Law, §89(3)].

Third, assuming that such a list continues to exist, I point out that §89(7) of the Freedom of Information Law states that nothing in that statute requires the disclosure of the home address of a current or former public employee. If a payroll listing that includes employees' public office address is maintained, I believe that it would be accessible.

Fourth, if a request is denied either in writing or by means of a failure to respond in a timely manner, the applicant has the right to appeal and, in fact, must appeal in order to exhaust his or her administrative remedies prior to the initiation of a judicial proceeding. 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 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..."

It is noted that an appeal following a denial of access to records of the Department of Correctional Services may be directed to Counsel to the Department in Albany.

With respect to issues involving venue, it is suggested that you confer with an attorney or review Article 78 of the Civil Practice Law and Rules.

Lastly, I am unaware of any judicial determinations rendered under the New York Freedom of Information Law that pertain to an award of attorney's fees to a petitioner acting pro se.

I hope that 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-3743

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

May 17, 1985

William P. Miller
Chief of Police
City of Troy
Department of Police
55 State 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, except as otherwise indicated.

Dear Chief Miller:

I have received your thoughtful letter of May 10. You referred to an opinion prepared on April 4 addressed to Kathleen Condon of the Troy Record and suggested that her allegations regarding the implementation of the Freedom of Information Law by the Troy Police Department are untrue. "To set the record straight", you requested that I review the Department's practices and policies described in your letter for the purpose of providing a second opinion.

In brief, you wrote that the Police Department has not imposed a "blanket restriction" on the disclosure of records maintained by the Police Department, nor has it engaged in any "news blackout". Contrarily, you indicated that either you or Assistant Chief West review incident reports on a case by case basis and deny access only when you believe there are "legitimate reasons" for so doing under the Freedom of Information Law. You wrote further that you have based decisions to withhold reports on a variety of factors. One factor is whether the release of information would "endanger the safety or property of the victim or any witness". A second is whether disclosure

would "warn the perpetrator or help him or her elude the police". You added that "if a suspect learns he or she is a suspect, this investigative process would be impossible". The third factor is whether a report contains "specific evidence or a detailed description or narrative of the modus operandi and how the crime was committed". The final factor described in your letter is whether release of a report would involve the dissemination of "unsubstantiated or uncorroborated hearsay, revealing police procedures in pursuit of the perpetrator, or the police opinion as to the approach to be taken or the solvability of any particular case."

Based upon those factors and the contents of my earlier opinion, you added that the City of Troy "is prepared to release all incident reports, but redact that information exempt under the Freedom of Information Law", and that you would use the criteria that you described in your letter. In this regard, you requested that I review the criteria and answer the following question:

> "Assuming the City of Troy continues to make the police blotter fully accessible; assuming the City of Troy does not have a blanket policy of withholding information, but gives careful consideration to each case on itw own merits; assuming the criteria for exemption are clearly and consistently applied as set forth; and assuming the City of Troy releases all incident reports, but redacts only that information legitimately and justifiable exempt under the law - Will the City of Troy's practice and policy with regard to police information be proper under the Freedom of Information Law?"

At this juncture, I would like to offer the following comments.

First, having reviewed my opinion of April 4, notwithstanding the allegations made by Ms. Condon, I believe that the opinion contains an analysis of the Freedom of Information Law as it pertains to records maintained by the Police Department relative to incidents or investigations. It was emphasized in the opinion that the Freedom of Infor-

mation Law is based upon a presumption of access and that records or portions thereof may be withheld only in conjunction with one or more of the grounds for denial. As such, if the practice of the Department is to review records sought on a case by case basis for the purpose of determining which portions of those records, if any, may justifiably be withheld in accordance with the Freedom of Information Law, I would concur with that policy, for that is what the Law requires.

I do not believe that the opinion of April 4 suggests that all police records must be made available. On the contrary, it is my view that the Law, although it grants significant rights of access, provides government, including law enforcement agencies, with the capacity to withhold records when disclosure would be harmful to an individual or damaging to the work of government.

It has often been advised that the Freedom of Information Law is a statutory statement reflective of what might be characterized as common sense in relation to the disclosure of government information. As suggested in the earlier letter, many of the grounds for denial are based upon potentially harmful effects of disclosure with respect to individuals or governmental processes. Without referring to specific provisions, the criteria that you described are in my opinion largely based upon the standards present in the Freedom of Information Law. For instance, §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". Section 87(2)(e) enables an agency to withhold records compiled for law enforcement purposes under certain circumstances that are specified in the Law. The criteria that you described give implicit recognition to those standards, which are based upon intereference with an investigation, the disclosure of confidential sources or the revelation of non-routine criminal investigative techniques and procedures. Another ground for denial to which you made tacit reference is §87(2)(f), which permits an agency to withhold records or portions of records when disclosure would "endanger the life or safety of any person". An additional reference was made to opinions referred by Police Department officials which if disclosed would indicate an approach to be taken or the Department's view of a particular case. While such records might be appropriately denied under §87(2)(e)(i) on the ground that disclosure would interfere with an investigation, such records might also be characterized as intra-agency materials deniable under §87(2)(g) to the extent that they contain opinion, advice, or recommendation, for instance.

In sum, it appears that the facts and criteria that you presented are generally consistent with the thrust of the grounds for withholding appearing in the Freedom of Information Law. However, it is suggested that the criteria described in the Law are the legal and most appropriate guides concerning both the requirement that records be disclosed as well as the capacity on the part of an agency to withhold records in whole or in part, depending upon their contents, and that those criteria should serve as the factors upon which the Department bases its determinations in response to requests.

Lastly, with respect to the questions raised at the end of your letter, which includes a series of assumptions quoted in full earlier, if those assumptions are put into practice and if information is withheld only to the extent authorized by the Freedom of Information Law, certainly I would agree that the practice and policy of the Department would be proper under the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen Condon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3744

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

May 17, 1985

Mr. Winston McDonald
84-A-6198 B6-33
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. McDonald:

I have received your letters of April 29 and May 1 in which you requested assistance from this office.

In your first letter, you asked how to obtain certain information from the Mount Vernon Daily Argus. You explained that the newspaper published the story of your arrest and that you would like to find out the name of the police officer or officers responsible for relating the story to the reporter. In your subsequent letter, you asked several questions regarding the proceedings relating to your arrest and trial. In this regard, I offer the following comments.

First, the Freedom of Information Law grants rights of access to the records of governmental agencies. Its provisions, however, do not exten to the records of private entities such as a local newspaper. Thus, there is no right granted by statute which requires the Daily Argus to disclose its records or to answer your questions. Although the newspaper need not disclose the source for the article about your arrest, it is quite possible that much of the article was based upon police reports relating to the incident which were prepared by the arresting police officers. Such police reports, if they exist, would be subject to availability under the provisions of the Freedom of Information Law. You may wish to request all police

reports concerning your arrest. If so, your request should include all dates, places and names which would identify the records and should be forwarded to the records access officer of the police department which processed your arrest.

Second, the Committee on Open Government is authorized to advise only with respect to the Freedom of Information and Open Meetings Laws. Therefore, I cannot comment on the questions you asked regarding your criminal proceedings. You may wish to contact an attorney with Prisoners' Legal Services about those matters.

Finally, at your request, I have enclosed a copy of our pamphlet, "Your Right to Know", which describes the scope 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:jm

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3745

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

May 20, 1985

Mr. Neil S. Weiner
Gerstenzang, Weiner &
Gerstenzang
Attorneys and Counselors
at Law
41 State Street
Albany, NY 12207-2835

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

Dear Mr. Weiner:

I have received your letter of May 10 and the correspondence attached to it.

In brief, on March 12, acting on behalf of a client, you sent a request under the Freedom of Information Law for various records of the Town of Cherry Valley. Having recieved no response, you appealed to the Town Board on April 18. As of the date of your letter to this office, no Town official has responded 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 (i) of the Law. From my perspective, to the extent that the records sought exist, they should be made available, for no ground for denial could apparently be cited to withhold such records.

Second, by way of background, §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 Town Board, to adopt regulations in conformity with the Law and consistent with the Committee's regulations.

It is noted that both 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 dyas 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, I point out that §89(4)(b) indicates that, in a judicial proceeding commenced under the Freedom of Information Law, the agency has the burden of proof. Further, §89(4)(c) permits a court to award attorney's fees, under certain circumstances, to a petitioner who has substantially prevailed in such a proceeding.

In an effort to attempt to enhance compliance by the Town, copies of this opinion will be sent to the Town Supervisor and the Town Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Robert C. Loucks, Supervisor
Town Board, Town of Cherry Valley

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3742

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

May 20, 1985

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 various letters recently from you. It is noted that I attempted to contact you by phone on several occasions. In each instance, either the line was busy or there was no answer.

With respect to the issues that you raised, as indicated in previous correspondence, it is my view that the Task Force in question designated by the Suffolk County Executive is a "public body" subject to the Open Meetings Law. Whether or not the County Attorney concurs, he did act to ensure that you would receive notice of meetings of the Task Force and that those meetings would be open to you. Under the circumstances, I am not sure what the issue might be to which you are referring.

With regard to records related to your arrest, the ground for denial offered by the Chief of Police of the Town of Southold is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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, those portions consisting of opinion, advice, recommendation, and the like might justifiably be withheld.

Therefore, if the memorandum in question is reflecive solely of advice or opinion, for instance, it appears that a denial under the Freedom of Information Law is justified. On the other hand, if it is a reiteration of a rule or policy of the Police Department, it would in my opinion be available under §87(2)(g)(iii).

As you know, you have the right to appeal an initial denial of access under §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body, 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..."

Further, if you are represented by counsel, it is suggested that you discuss the matter with him or her. Since you did not describe the nature of the charge or charges, it is unknown whether criminal discovery may be available to you. If it is, you may be able to obtain records in excess of those accessible as of right under the Freedom of Information Law.

Lastly, although the Department of State is involved in local government and municipal law, its functions with respect to municipal police departments are not completely familiar to me. It is suggested that you might want to write to the Division of Local Government Services at the Department of State. In addition, there is a Division of Municipal Police at the Division of Criminal Justice Services, which is located at Stuyvesant Plaza, Executive Park Tower, Albany, NY 12203.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: H. Daniel Winters, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3748

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

May 21, 1985

Mr. Hank Purcell, Jr.
#84-C-357
Great Meadow Correctional
Facility
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. Purcell:

I have received your letter of May 6 in which you requested assistance in obtaining records from various agencies.

First, you want to know how to review the master index of the Department of Corrections. As you are aware, the regulations of the Department (see 7 NYCRR §5.13) require each custodian of records to maintain an up-to-date subject matter list of all records in his possession. In addition, the records access officer must maintain a master index of all records maintained by the department. The master index includes the lists kept by all custodians as well as a list of records maintained at the department's central office. An up-to-date index is included on the first page of the subject matter list which is available for inspection and copying. Thus, you may wish to review the list maintained by the custodian of records in your facility.

With respect to fees, §5.36 of the Department's regulations provides that the custodian of records may, in his discretion, waive all or any portion of the fees authorized by this section for any departmental record. There is, however, no statute which requires an agency to waive the fees for copying records when they are requested by an indigent individual.

Second, you would like to know how to compel Counsel for the Department and the Division of Parole to reply to your appeals under the Freedom of Information Law. As you are aware, you may appeal a denial of access to a record within thirty days of such denial to the person designated as appeals officer. The appeal must be in writing and should identify the date and location of a request, the records that were denied and the name and address of the appellant.

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)].

Third, you asked for the names of the individuals responsible for granting access to the records of the New York Select Committee on Crime and the New York City Police Department. The following individuals are records access officers to whom you may forward requests for records.

New York Select Committee on Crime
Crime and Corrections Committee
ATT: Jeremiah McKenna, General Counsel
Room 1001
270 Broadway
New York, NY 10007

New York City Police Department
Pulbic Inquiry Section
ATT: Eneta McAlister, Office Associate
1 Police Plaza
New York, NY 10038-1497

State Commission of Investigation
ATT: Charles Segal, Executive Counsel
26th Floor
270 Broadway
New York, NY 10007

Finally, I have enclosed a copy of the regulations promulgated by the Division of Parole with respect to the availability of parole case files (9 NYCRR §8000.5).

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-3749

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

May 24, 1985

Mr. John F. Murry, Jr.
The New York State Society of
Independent Accountants
33 Willoughby Path
East Northport, NY 11731

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

Dear Mr. Murry:

I have received your letter of May 17, as well as the materials attached to it. You have requested an advisory opinion regarding a denial of access to records by Robert D. Stone, Counsel and Deputy Commissioner for Legal Affairs at the State Education Department.

In a letter of April 26 addressed to Mr. Stone, you wrote that you attended that day a meeting of the Board of Public Accountancy, which is a unit of the State Education Department. You indicated to Mr. Stone that "It was stated at the meeting that the Board had requested and received from you a legal opinion on Compilations and Reviews as they apply to the statutes". At the conclusion of the letter, you requested a copy of an opinion. Mr. Stone responded on May 13, stating that:

> "The memorandum to which you refer was an opinion from myself to the former assistant commissioner for the professions which was subsequently shared with one or more members of the State Board for Public Accountancy. The opinion

> was not intended for general distribution and is internal correspondence which does not constitute a final determination and is not available to the public under the Freedom of Information Law."

You wrote to this office that you "do not believe that [your] request is in any way an unreasonable one, since the information was distributed and discussed at a meeting open to the public".

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

First, the type of record that you are seeking may in my view generally be withheld under the Freedom of Information Law. While the Law provides broad rights of access, §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. However, §87(2)(g) enables an agency to withhold those aspects of inter-agency or intra-agency materials reflective of advice, opinion, recommendation and the like. As such, I believe that a memorandum consisting of an opinion of counsel sent to a unit of the agency could generally be withheld.

Second, you wrote that "the information was distributed and discussed" at an open meeting. It is not entirely clear whether the memorandum in question was distributed to persons in attendance other than members of the Board. If that was the case, it may represent a fact unknown to Mr. Stone when he responded to your request. Under the circumstances, assuming that Mr. Stone's

opinion was disclosed to members of the public present at the meeting, it is suggested that you communicate that to Mr. Stone in order that he made reconsider your request in light of an additional fact of which he may have been unaware.

I hope that I have 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. Stone, Counsel and Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1172
FOIL-AO - 3250

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

May 28, 1985

Ms. Bette German-Smith
[redacted]

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

Dear Ms. German-Smith:

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

Your comments appear on an article that was published approximately a year ago in the Newburgh Evening News. The article contains a statement by the Town Supervisor of the Town of Newburgh to the effect that the Town would experience significant economic growth in the foreseeable future. He also stated that "the Newburgh Town Board has formed a seven-member committee" which will seek to serve as liaison between the Town and commercial interests that may seek to operate businesses in the Town.

You have indicated that Town officials have not disclosed the identities of persons who serve on that Committee, which is characterized as the "Crossroads Committee". In addition, you asked whether the meetings of the "Crossroads Committee" should be conducted in accordance with the Open Meetings Law.

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

First, with respect to the identities of persons who serve on the Crossroads Committee, assuming that a record identifying the members exists, I believe that it would be accessible under the Freedom of Information Law.

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

Under the circumstances, I do not believe that any of the grounds for denial could justifiably be cited to withhold the names of those who serve on the Committee. Moreover, since the Committee was created by the Town Board, reference identifying those designated by the Town Board should, in my opinion, be included within minutes required to be prepared and made available pursuant to §106 of the Open Meetings Law.

Second, I believe that the "Crossroads Committee" is a "public body" subject to the Open Meetings Law. Section 102(2) of the Law defines "public body" to include:

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

From my perspective, each of the conditions present in the definition of "public body" can be met by the Crossroads Committee.

The Committee is an entity that consists of more than two members. Based upon the description of its duties, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the Town of Newburgh. Further, even though a resolution or other act creating the Committee might not have referred to any quorum requirement, §41 of the General Construction Law has long required that any group of three or more persons or public officers charged with any public duty to be performed or exercised by them jointly, as a body, may do so only by means of a quorum. In addition, I point out that the definition of "public body" makes specific reference to committees and subcommittees, such as those created by a town board.

Assuming that the Crossroads Committee is indeed a "public body" required to comply with the Open Meetings Law, I believe that notice of the time and place of its meetings must be given prior to all meetings and that every meeting of the Committee must be convened open to the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Kirkpatrick, Town Supervisor

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

May 29, 1985

Mr. Jan Dijkstra
83-A-8180
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. Dijkstra:

I have received your letter of May 19 in which you raised a question concerning access to hospital records. You also inquired relative to the manner in which you may submit a request under the Freedom of Information Law.

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

With respect to hospital records, it is emphasized that the Freedom of Information Law is applicable only to records of governmental entities. As such, rights granted by the Freedom of Information Law would not apply to records of a private hospital, for example.

Perhaps the best method of obtaining hospital records involves §17 of the Public Health Law. That statute does not give a patient direct rights of access to medical records pertaining to him or her. Nevertheless, it states that a competent patient may designate the physician of his or her choice, who may seek and obtain medical records about that patient from either a hospital or another physician. Consequently, if you are interested in obtaining hospital records, it is suggested that you contact a physician, who may request the records on your behalf.

In terms of making a request under the Freedom of Information Law, as a general matter, each agency is required to have designated one or more "records access officers". A records access officer has the duty of coordinating an agency's response to requests for records. Therefore, a request should generally be directed to the records access officer of the agency that you believe maintains records in which you are interested.

The Freedom of Information Law requires an applicant to submit a request for records "reasonably described". As such, when making a request, it is suggested that you include as much detail as possible, such as names, dates, file designations, identification numbers and similar details that will enable agency officials to locate the records sought.

Lastly, you indicated that you are a "prisoner". Here I point out that inmates enjoy the same rights of access under the Freedom of Information Law as the public generally.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1173
FOIL-AO- 3752

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

May 29, 1985

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 May 14 in which you requested an advisory opinion.

In your letter, you asked several questions regarding the Freedom of Information and Open Meetings Laws. In this regard, I offer the following comments.

First, many of your questions relate to the availability of records involving school district personnel. The relevant provisions of the Freedom of Information Law are §87(2)(b) or §89(2)(b) which permit an agency to withhold records or portions thereof when disclosure would result in an unwarranted invasion of personal privacy. Section 89(2)(b)(i) provides 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].

In my opinion, records which merely indicate the amount of sick time or personal leave taken by a public employee would be relevant to that employee's official duties. On the other hand, those portions of a record which explain why the time was taken, i.e., that nature of an illness or the reason for the use of personal leave, may properly be withheld based upon the privacy considerations discussed above. It is noted, however, that one court has held that disclosure of records indicating the number of sick time hours accumulated by particular city employees would constitute an unwarranted invasion of personal privacy [see Bahlman v. Brier, 462 NYS 2d 381 (1983)], while another court reach the opposite conclusion [Capital Newspapers v. Burns, Sup. Ct., Albany Cty., May 5, 1984, Supplemental decision, June 9, 1984].

With respect to records which indicate the total number of over-time hours worked, I believe that such records should be made available. Such records are relevant to the performance of a public employee's official duties and do not generally involve the personal details of the employee's life.

Likewise, I believe that the employment contract between the school district and the Superintendent of Schools should be available under the Freedom of Information Law. Such a record directly relates to the Superintendent's responsibilities and compensation for official duties performed on behalf of the district.

Second, you asked about the availability of "records from a physician advising custodians of an infectious disease and advice for innoculation". A number of circumstances affect a determination of the availability of such records. The purpose of preparing the letter, the type of information and advice included therein, and the location where the records are maintained are factors affecting their availability. Without such details, I am unable to advise with respect to access to those records under the Freedom of Information Law.

Third, with respect to injury reports prepared for a school district on a particular day, again, I believe that various factors affect the availability of such records. The identity of the injured individuals, the nature of the injury and the purpose of preparing such a report are a few of the details which must be considered before such records are disclosed or withheld. Beyond the question of whether disclosure would result in an unwarranted invasion of personal privacy under §87(2)(b) of the Law, the federal Family Educational Rights and Privacy Act may further limit the availability of an injury report. The federal Act limits disclosure of records maintained by an educational agency and related to a student where such records contain information which would make the student's identity easily traceable (see 20 USC §1232g). Thus, the availability of a record consisting of a daily report of injuries would depend on the extent of personal information contained in such record, and the persons to whom the reports pertain.

Fourth, in responding to a request for the records described in the preceding paragraphs, a records access officer must, within five business days, grant access to the records or deny the request, in whole or in part, by explaining, in writing, the basis of the denial. If the records access officer cannot locate or review the records within five business days of receiving the request, he or she must, within those five business days, acknowledge receipt of the request in writing and state the approximate date when such request will be granted or denied [see §89(3) of the Freedom of Information Law].

With respect to disclosure of records which would constitute an unwarranted invasion of personal privacy, §89(2)(c) of the Freedom of Information Law provides that:

> "...disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:
>
> i. when identifying details are deleted..."

Thus, a records access officer should, if possible, delete the identifying features of a record and make it available, rather than deny the record in its entirety. In my view, such a deletion should be considered at the time the records access officer reviews a request for records.

Fifth, you asked several questions regarding school board's meetings in executive session. In this regard, I point out that an executive session, a meeting closed to the public, may only be conducted for the purpose of discussing one or more of the subject areas enumerated in §105(1) of the Open Meetings Law. For example, §105(1)(f) of the Law permits a public body to hold an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Based upon the language quoted above, I believe that a school board may properly conduct an executive session for the purpose of directing one of its employees to undergo a medical evaluation.

Furthermore, a school board may discuss the appointment of a particular person as "school medical inspector" or a "district assigned physician" in executive session for that subject matter also falls within §105(1)(f) quoted above. However, I point out that §1708(3) of the Education Law has been interpreted as generally prohibiting a school board from taking action during an executive session. Action may be taken during a closed session of a school board only when such is permitted or required by statute [see Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Thus, the school board must in my opinion vote on the appointment of the physician at an open meeting.

Sixth, with respect to the procedure for conducting an executive session, I note that such a session is part of an open meeting. Section 105(1) of the Open Meetings Law provides 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..."

Thus a school board may not properly hold an executive session before an open meeting. Rather the board must begin with an open meeting and vote to enter into executive session.

Moreover, the executive session may not be held without notice. Since an executive session takes place within an open meeting, and notice of an open meeting is required to be given under §104 of the Law, the executive session cannot be conducted separate from an open meeting. However, §104 does not require a public body to notify the public in advance of a meeting that it intends to conduct an executive session. For your information, I have included copies of the Freedom of Information and Open Meetings Laws and our pamphlet, "Your Right to Know", which generally describes the scope of those Laws.

Finally, you asked about the relationship between a records access officer for a school district and a Board of Education relative to a request for records. In my view, a records access officer may not only seek the advice of a board in responding to a request, but a board may go further and determine the nature of the response. Generally, a records access officer is designated by a school board, and as such, the responsibilities of an access officer may be defined by a board so long as they are in compliance with the Freedom of Information Law and the regulations promulgated thereunder.

I hope 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

Encs.

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

May 30, 1985

Mr. James R. Johnson
#77-C-312
Great Meadow Correctional
Facility
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 opinions is based solely upon the facts presented in your correspondence.

Dear Mr. Johnson:

I have received your letter of May 24 in which you requested advice regarding the availability of your medical records.

According to your letter, you are trying to obtain your medical records to "show the court the wrong that has been committed to [you]". You explained that you sent written requests for the records to the counselor at the Great Meadow Correctional Facility on April 22 and 30. However, you received no reply. In this regard, I offer the following comments.

First, under the Freedom of Information Law, I believe that medical records maintained by a state or municipal hospital or facility are available to the individuals to whom the records relate to the extent that the records contain statistical or factual information. On the other hand, those portions of the records which include evaluations, diagnostic opinions, or recommendations could, in my view, be withheld [see Freedom of Information Law, §87 (2)(g)]. I point out, however, that the provisions of the Freedom of Information Law do not apply to records maintained by private hospitals or physicians.

Second, §17 of the Public Health Law provides a limited right of access to medical records. That section requires a physician or hospital to make a patient's medical records available to another physician or hospital on behalf of the patient. However, §17 does not grant an individual the right to directly obtain his or her medical records. You may wish to contact a physician with whom you are familiar to obtain, on your behalf, records which are not maintained by a governmental facility.

Finally, I have included a copy of our pamphlet, Your Right to Know, which generally describes the scope of the Freedom of Information and Open Meetings Laws. That pamphlet also includes a sample letter for requesting records. Your request should be directed to the records access officer at Great Meadow Correctional Facility, who according to regulations promulgated by the Department of Correctional Services, is 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

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-3754

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

May 30, 1985

Mr. Larry May
#80-A-638
Box 618
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. May:

I have received your letter of May 23 in which you requested assistance from this office.

In your letter, you explained that you are seeking access to records maintained by the New York City Department of Correctional Services. Specifically, you would like to obtain a copy of the entries in the Department's log book which would reflect the names of inmates "produced...to the Supreme Court", Kings County on November 26, 1979. You would like to know whether your codefendant, Peter Charles, was brought to testify at your trial on that day. To date, you have received no response to your request for such records. In this regard, I offer the following advice.

You wrote that your request was directed to the Deputy Commissioner and your appeal was made to the Commissioner of the Department. My records, however, indicate that the records access officer of the Department is:

Mr. Ed Hershey
Room 1509
100 Centre Street
New York, NY 10013

You may wish to direct your request to that address. In addition, your appeal, if necessary, should be directed to:

Mr. Robert Daly, Esq.
Special Counsel to the Commissioner
100 Centre Street
New York, NY 10013

For your information, I have enclosed a copy of our pamphlet, Your Right to Know, which generally describes the scope of the Freedom of Information Law. Included in the pamphlet are sample letters of request and appeals.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-3255

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

May 31, 1985

Mr. Billy Joe Dicker
80-A-1295
A-Block L-338
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. Dicker:

I have received your recent letter in which you wrote that your presentence report contains an erroneous statement and that you would like to obtain the report in order to correct it.

Please be advised that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, the Committee does not maintain possession of records generally, such as presentence reports, nor does it have the authority to compel an agency to grant or deny access to records.

Further, although the Freedom of Information Law grants broad rights of access to records, rights of access to presentence reports are dealt with specifically in §390.50 of the Criminal Procedure Law. Although a presentence report may be available to a defendant, I believe that it can be made available only by a court. Consequently, to request or obtain a copy of your presentence report, it is suggested that you contact the court in which your conviction occurred.

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

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

June 3, 1985

Joseph M. Belth
Editor
Insurance Formum
P.O. Box 245
Ellettsville, IN 47429

Dear Mr. Belth:

I have tried unsuccessfully to reach you relative to your request directed to the State Insurance Department.

In brief, you have requested from the Insurance Department "IRIS material". That information involves the financial condition of insurance companies, and, according to a copy of the Insurance Forum, which you publish, "IRIS" information is provided to the state Insurance Departments nationwide on a confidential basis.

As promised, I have discussed the matter with Joseph Glaser, Records Access Officer for the State Insurance Department. Mr. Glaser's response to your request involved a denial based upon §87(2)(d) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

Mr. Glaser does not apparently contend that the records in question constitute "trade secrets", but rather that the records consist of information maintained for the regulation of commercial enterprise which if disclosed would significantly and adversely affect the competitive position of various insurance companies. If that is so, the denial may be appropriate.

Further, according to my discussion with Mr. Glaser, it is unlikely that the Department will disclose the information sought. It appears, therefore, that the only means of attempting to obtain the information from the State Insurance Department would involve the initiation of a judicial proceeding challenging the denial.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3757

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

June 10, 1985

Mr. Glenn R. Taylor
[redacted]

Dear Mr. Taylor:

I have received your recent letter, as well as various requests sent under separate cover involving records that you are seeking from several entities.

For purposes of clarification, I would like to offer the following comments.

First, the function of the Committee on Open Government is to provide advice regarding the New York Freedom of Information Law. This offices does not maintain records generally, nor does it have the authority to compel an agency to grant or deny access to records.

Second, the requests that you sent to this office appear to be originals rather than copies. Since the Committee cannot respond to requests for records kept by a different agency, the requests should be sent directly to the agencies that you believe maintain records in which you are interested. Based upon the assumption that the requests are originals, I am returning those requests to you so that you may send them directly to the appropriate agencies.

Third, I point out that there is a New York Freedom of Information Law, as well as a federal Freedom of Information Act. The two statutes are similar; however, the federal Act is applicable only to records maintained by federal agencies.

Fourth, the scope of the New York 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."

As such, rights granted by the Freedom of Information Law pertain generally to records maintained by entities of state and local government. In this regard, I point out that one of your requests was directed to a hospital. If it is a private hospital rather than a governmental entity, I do not believe that the Freedom of Information Law would be applicable.

Lastly, 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 names, dates, 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3758

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

June 11, 1985

Mr. Matthew J. Karek
[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. Karek:

I have received your letter of June 6 and the correspondence attached to it.

You wrote that the Polish Community Center of Buffalo has denied your request for records, including those contained in your personnel file. In this regard, I would like to offer the following comments.

Please note that the Freedom of Information Law is applicable to records of an "agency", a term which is defined in §86(3) of the Law to include:

> "any state or municipal department, board, bureau, division, commission, committee, publich 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 generally applicable to records maintained by entities of state and local government.

If the Polish Community Center is a not-for-profit corporation and not a governmental entity, rights grnated by the Freedom of Information Law would not be applicable to records in its possession. Consequently, I do not believe that the Polish Community Center is required to grant public access to its records. Further, there would be no requirement that it grant the right to appeal a denial of access to records.

I point out that records pertaining to the Polish Community Center might be maintained by agencies subject to the Freedom of Information Law. For instance, according to one item of correspondence attached to your letter, you submitted a request for records pertaining to grant applications made by the Polish Community Center that are maintained by the Community Development Department of the City of Buffalo. To the extent that such records are maintained by the City of Buffalo, I believe that they would be subject to 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3759

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

June 12, 1985

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, unless otherwise indicated.

Dear Mr. Reninger:

I have received your letter of June 2 and the correspondence attached to it, which concern your request for a copy of "legal bill" incurred by the Greenburgh Central School District.

The correspondence indicates that you were denied access to the information sought other than the amount billed to the District. You apparently appealed the denial on May 16 and, as of the date of your letter to this office, you received no response to your appeal.

In this regard, it is noted that I received a letter dated June 3 from Elizabeth Weinberg, District Clerk, as well as several items of correspondence, including a response to your appeal rendered by Charles Bronz, President of the Board of Education. Mr. Bronz affirmed the denial, stating that:

> "You are entitled to receive and you did receive portions of the bill showing the payee, the date, the subject involved and the amount. The remainder contained statements by the school attorneys on matters in litigation and in my opinion it qualifies as confidential in accordance with the law..."

As you are aware, it has been advised that, while a school board may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. It has also been suggested, however, that if 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 statutue" (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.

Mr. Bronz addressed an additional issue concerning the degree to which you must identify the records sought when making a request. Section 89(3) of the Freedom of Information Law states in part that an applicant is required to "reasonably describe" the records sought. That requirement is met if the agency can locate the records that have been requested [see e.g., M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. In my view, often an agency's filing or recordkeeping system determines whether or not records can be located. According to Mr. Bronz, District bills are not kept "by groups of payees". He suggested that "identification of at least the subject matter and dates will be needed to locate the bills sought" and added that you "contact the Clerk and furnish her with descriptions of the individual bills you are interested in."

While I do not believe that you must identify specific dates or individual bills, for there may be no way of learning of that specific type of information, it is suggested that you confer with the Clerk in order to determine the means by which you can request records "reasonably described" in a manner that the bills you seek can be located.

I hope that I have 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 Bronz, President, Board of Education
Elizabeth Weinberg, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3760

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

June 12, 1985

Mr. H. Carl Koch
[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. Koch:

I have received your letter of May 22 in which you requested an advisory opinion.

With your letter, you enclosed your correspondence with the New York City Human Resources Administration from which you requested certain information. Specifically, you requested disclosure of "all information encoded" on the two black magnetic strips located on the Administration's "Electronic Payment File Transfer Photo Identification Cards". Your initial request and appeal were denied on the grounds that the information constituted inter or intra-agency materials and computer access codes pursuant to §87(2), subdivisions (g) and (i) of the Freedom of Information Law. You asked whether the material sought was properly denied under the Law.

In this regard, I offer the following comments.

In order to learn more about the Electronic Payment File Transfer Photo Identifications Cards, I contacted Mr. Al Giove, the EPFT coordinator for the Administration. He explained to me that the magnetic strips located on the identification cards contain numerical data which, when read by the central computer, permits authorization of payment of benefits to the public assistance recipient who holds the card. The numerical data recorded on the magnetic strips basically identifies and signals the central computer to authorize the proper amount of benefits for the recipient.

Based upon the information provided by Mr. Giove, I believe that your request may properly be denied pursuant to the Freedom of Information Law. First, the numerical data clearly includes computer access codes which may be withheld under §87(2)(i) of the Freedom of Information Law. Moreover, the security of these access codes is imperative for disclosure of the codes could result in the unauthorized issuance of public assistance benefits.

Second, the information contained on the magnetic strips also includes identifying details regarding the public assistance recipient and permits the central computer to disclose the amount of benefits received by a recipient. Such information is confidential pursuant to the Social Services Law and, in any event, disclosure would, in my opinion, constitute an unwarranted invasion of personal privacy. Thus, I believe that access to such information may be properly withheld under §87(2), subdivisions (a) and (b), respectively.

Finally, I point out that a denial of access based upon §87(2)(g), inter or intra-agency, would likely be inappropriate in this situation. That provision allows and agency to withhold inter or intra-agency materials which constitute opinion, recommendation, suggestions or advice. Apparently, the magnetic strips do not contain any such information. On the contrary, the magnetic strips contain factual data which, as inter or intra-agency materials, would be available. However, as discussed earlier, it appears that there are at least three other appropriate grounds for denying access to the information you have requested.

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

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOIL-AO-3761

June 13, 1985

Ms. Lynne A. Davis
[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. Davis:

I have received your letter of June 3 concerning your difficulty in obtaining records from the Town of East Greenbush.

According to your letter, some time ago, you requested "copies of letters written to [you] by the Building Inspector of East Greenbush, Thomas Jenkins". Since Mr. Jenkins refused to provide the records, you submitted a request for the records under the Freedom of Information Law in November to the Town Clerk. Although some of the correspondence was made available to you, many other items were denied. Further, you wrote that the records in question were subpoenaed, but that the subpoena was not honored.

You have asked that I "help to facilitate this matter". In this regard, I would like to offer the following comments.

First, I point out that §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 Freedom of Information Law. In turn, §87(1) requires that the governing body of a public corporation, such as a town board, adopt regulations in conformity with the Law and consistent with the Committee's regulations.

One aspect of the regulations involves the designation of a "records access officer". The records access officer has the duty of responding to requests. If, for example, Mr. Jenkins is not the records access officer, I do not believe that he would have either the responsibility or the capacity to withhold records requested under the Freedom of Information Law; that authority would in my view be in the designated records access officer.

Further, in most cases, the records access officer for a town is the town clerk, for the clerk under §30(1) of the Town Law "Shall have the custody of all records, books and papers of the town". As such, even though records might be in the physical custody of a different town official, such as a building inspector, I believe that they remain in the legal custody of the town clerk.

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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law. Under the circumstances, since you indicated that you requested copies of letters written to you, it does not appear that any of the grounds for denial could appropriately be asserted. On the contrary, I believe that the records should be made available to you.

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for responding 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 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)].

In order to attempt to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the Town Clerk and the Building Inspector.

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: Verna McFarland, Town Clerk
Thomas Jenkins, Building Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 3762

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

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ROBERT J. FREEMAN

June 17, 1985

Ms. Sandra A. Kron
[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. Kron:

I have received your letter of June 6, as well as the correspondence attached to it.

Your inquiry concerns a request for records directed to the Elmira Psychiatric Center. The records pertain to the "expertise and qualifications" of a child psychiatrist whose skills in the use of the English language may be lacking, for English is apparently her second language. According to a copy of an appeal addressed to Mr. Bert Pyle, Jr., Appeals Officer for the Elmira Psychiatric Center, you were denied access to:

> "- copies of Dr. Manzeno's license
>
> - a copy of Dr. Manzeno's board certification
>
> - a copy of all the evaluations done at E.P.C. in the last 2 years
>
> - her credentials in child psychiatry
>
> - copy of documents or evaluations done regarding her work with severely disturbed children
>
> - a copy of documents or evaluation which establish her fluency & proficiency in the English language (both written & oral)".

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.

Second, it is noted that the introductory language of §87(2) pertains to the capacity to withhold "records or portions thereof" that fall within one or more among the grounds for denial that follow. The quoted language in my opinion represents a recognition on the part of the Legislature that a single record might be both accessible and deniable in part. In addition, I believe that the quoted language imposes a requirement that agency officials review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, under the circumstances, it appears that there may be two grounds for denial of relevance.

One of the grounds 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 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. Concurrently, §87(2)(g) permits an agency to withhold those portions of inter-agency or intra-agency materials which are reflective of advice, suggestion, opinion, recommendation and the like.

In the context of your request, records in the nature of evaluations would in my opinion constitute "intra-agency" materials. Further, it is likely that those records are reflective of opinion relative to the work of the individual in question. If that is so, I believe that the evaluations could likely be withheld under the Freedom of Information Law.

The other ground for denial of significance is §87 (2)(b), which permits an agency to withhold records or portions of records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

As you are aware, it has been advised in the past that records pertaining to individuals that indicate a person's licensure or certification should be made available. While disclosure of those materials might result in an invasion of privacy if disclosed, I do not believe that disclosure would necessarily constitute an "unwarranted" invasion of privacy. Further, there are several judicial determinations indicating that various records which are relevant to the performance of a public employee's official duties are available, for disclosure in those 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, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978): and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Contrarily, it has been held that records pertaining to public employees that are not relevant to the performance of their official duties may be withheld as 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].

In the context of your request, I believe that some of the records, such as a license or a board certification, must be made available, for they are reflective of determinations that an individual is qualified to engage in a particular avocation. Further, as a general matter, I believe that the purpose of a license is to enable the public to know that an individual has met the minimum requirements for practice in a particular profession or endeavor.

Related documents, such as those involving "credentials in child psychiatry" may or may not be available, depending upon their contents, of which I am unaware. For instance, where an individual may have been educated, or the number of years of service with a previous employer, might justifiably be withheld as an unwarranted invasion of personal privacy [see Freedom of Information Law, §89(2)(b)(i)]. In short, without additional knowledge of the nature of credentials or the means by which those credentials might be attained, the extent to which such records might be available or deniable is questionable. Nevertheless, as indicated earlier, I believe that other records, such as those involving licensure and certification, should be made available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bert Pyle, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3763

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

June 17, 1985

Mr. George Arce
74-A-2003
Box B
Stormville, NY 12582

Dear Mr. Arce:

I have received your letter of June 14 in which you requested information about the means by which you may seek and obtain records from a district attorney, the Department of Law and the Department of Correctional Services.

In this regard, enclosed are copies of the Freedom of Information Law, general regulations promulgated by the Committee on Open Government that deal with the procedural aspects of the Law, an explanatory pamphlet, and the regulations adopted under the Freedom of Information Law by the Department of Correctional Services.

To provide further information, I would like to offer the following comments.

First, one of the provisions of the regulations promulgated by the Committee involves the designation of a "records access officer" by the head or governing body of an agency. The records access officer has the duty of responding to requests made under the Freedom of Information Law. As such, a request should generally be sent to the records access officer at the agency that you believe maintains records in which you are interested.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" 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, identification 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3764

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

June 18, 1985

Ms. Patricia M. Kennedy
Staff Attorney
Prisoners' Legal Services
of New York
102 West State Street
Ithaca, New York 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, except as otherwise indicated.

Dear Ms. Kennedy:

As you are aware, I have received your letter of June 3, as well as various materials attached to it. You have requested an advisory opinion with respect to several denials of requests made by Prisoners' Legal Services of New York for records maintained by the Department of Correctional Services.

By way of background, "REQUEST NUMBER 1" involved an unsuccessful attempt made in November of 1984 to obtain copies of an Unusual Incident Report and a Use of Force Report from the Clinton Correctional Facility involving a client of Prisoners' Legal Services. The request was denied on the ground that the release of "certain portions" would constitute an unwarranted invasion of personal privacy. The remainder was denied on the ground that the contents consist of "inter-agency or intra-agency materials which are not final agency policy or determinations". The denial was later affirmed on appeal. Requests Number 2 and 3 dealt with similar records that were denied on the same grounds.

Request Number 4 deals with different subject matter, for it pertains to a request made by John Gresham, Associate Director of Prisoners' Legal Services, regarding documents indicating "the number of inmates in different pay grades". Attached to his request was a "sample statis-

tical printout which included the information requested". Having received no response to his request, he appealed to Judith LaPook, Counsel to the Department, who also did not respond. In this regard, I have discussed Mr. Gresham's request with Ms. LaPook, who informed me that, if such records exist and can be located, Mr. Gresham's request would be honored. With respect to the remaining materials, I would like to offer the following comments.

First, included in the package of materials that you sent is a directive used by the Department of Correctional Services that includes "guidelines for the reporting of unusual incidents including the use of force and the use of chemical agents". Part of the directive involves filing instructions and "Unusual Incident Report Forms". Various aspects of the contents of Unusual Incident Reports are prepared by means of codes, and appendix B identifies various codes. The codes pertain to the identity of facilities where incidents may have occurred, locations within facilities where incidents took place, the nature of weapons used, the type of force used, the type of incident, and whether or not a weapon was used by an inmate and, if so, the type of weapon. Other aspects of the form involve descriptions of the incident, events leading to or causing the incident, action taken to control the incident, medical information and other types of related data. You also included a sample of a Use of Force Form, which contains information regarding the location, time and date of a situation in which force was used, a description of the incident leading to the application of force, indications of the type of force used, medical information, and a review and evaluation by the superintendent.

In my opinion, for the following reasons, I do not believe that the blanket denials of access to requests rendered by the Department of Correctional Services are appropriate. This is not to suggest that the records in question should be made available in their entirety, but rather that the records are likely accessible in part and deniable in part, depending upon their contents.

Second, at this juncture, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Third, it is emphasized that the introductory language of §87(2) refers to the capacity of an agency to withhold records "or portions thereof" that fall within one or more of the ensuing grounds for withholding. From my perspective, the quoted language indicates a recognition on the part of the Legislature that a single record might be both accessible and deniable in part. I believe that it also imposes a requirement that agency officials review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

The two grounds for denial to which Department officials alluded are §§87(2)(b) and 87(2)(g).

Section 87(2)(b) permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Assuming that no other ground for denial is applicable, I do not believe that a request made by the subject of a request for records pertaining to him, or by his representative who has obtained a release, could be denied on the basis of §87(2)(b). As stated in §89(2)(c) of the Freedom of Information Law:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...
>
> ii. when the person to whom a record pertains consents in writing to disclosure;
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

To the extent that persons other than the applicant for records are identified in the records, there may be privacy considerations that arise relative to those individuals. In such situations, perhaps identifying details or certain portions of records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy with respect to those third parties.

The other ground for denial, §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. Concurrently, to the extent that inter-agency or intra-agency materials contain advice, recommendation, opinion, suggestion and the like, I believe that they may be withheld.

Under the circumstances, the reports in question could in my view be characterized as "intra-agency" materials. Nevertheless, having reviewed the samples of the reports that you enclosed, it appears that significant portions of the reports are reflective of factual information. To that extent, if no other ground for denial is applicable, I believe that the reports must be made available. As indicated earlier, various aspects of the reports are completed on the basis of codes that enable those who fill out the forms to mark their responses in boxes. From my perspective, due to the format of the reports and the types of responses that are given in conjunction with codes, those portions of the forms would appear to consist of factual information. Some aspects of the reports might in some instances involve factual descriptions of events or related factual data that would likely be accessible; others may indicate opinions, impressions or evaluations made by staff of a facility. To that extent, the reports could likely be withheld.

As suggested earlier, I believe that intra-agency materials should be reviewed in their entirety for the purpose of determining which aspects are available or deniable, depending upon the specific contents of the materials. To bolster that contention, it is noted that the Appellate Division, Third Department, in Ingram v. Axelrod, in its discussion of §87(2)(g) found that:

> "The policy behind this exemption from disclosure is encouragement of the open exchange of ideas among government policymakers, while still maintaining broad public access to agency records (Matter of Dunlea v Goldmark, 54 AD2d 446, 448-449, affd 43 NY2d 754). However, it exempts as intra-agency materials only opinions and recommendations, not 'statistical or factual tabulations or data' (Public Officers Law, §87, subd 2, par [g], cl i). 'Factual tabulation' is further defined by respondent DOH as 'a collection of statements of objective information logically arranged and reflecting objective reality, actual existence or an actual occurrence' as distinguished from '[o]pinions, policy options and recommendations' (10 NYCRR 50.2[b]). Petitioner here claims that she should be granted access to the entire report on the basis that it is factual data. 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. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2 [b]). Additionally, pages 7-11

> (ambulance records, list of interviews, and reports of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181, mot for lv to app den 48 NY2d 706). 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" [App. Div., 90 AD 2d 568, 569 (1982)].

Lastly, it is recognized that reviews of individual records or reports might impose something of a burden upon Department officials. Nevertheless, to comply fully with the Law, I believe that, due to the contents of the reports, which differ from one report to the next, such reviews are necessary.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Judith LaPook, Counsel
John Gresham, Associate Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3765

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

June 20, 1985

[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 recent letter, which again concerns your attempt to obtain information from the Greece Central School District pertaining to your son's efforts to become a member of the National Honor Society. You have asked that I review the attached correspondence to advise whether the provisions of the Buckley Amendment have been met by the District. You also requested information regarding the enforcement of the Buckley Amendment.

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

First, having reviewed your request of January 19, you sought various types of information from the District relative to your son and other students who were considered for membership in the National Honor Society. Here I point out that several aspects of your request involved information rather than records. To the extent that records exist, they are subject to rights granted by the New York Freedom of Information Law or the federal Family Educational Rights and Privacy Act, the Buckley Amendment, as the case may be. However, if information sought does not exist in the form of a record or records, the School District would not in my opinion be required to create records on your behalf [see Freedom of Information Law, §89(3)]. For instance, you requested "the exact number of students" who were recommended and considered for membership in the National Honor Society; similarly, you requested the "exact breakdown" of scores received from faculty members relative to those students. Once again, if no such figures have been prepared, the District would not in my opinion be obligated to prepare or create such records in response to your request.

Second, I have also reviewed a letter addressed to you by Barbara L. Kerns, Chairman of the National Honor Society Selection Committee. Ms. Kerns granted access to some of the information sought. However, she wrote that she could not provide you with "the breakdown on the other student candidates and the faculty responses" to your son's application.

As indicated to you in earlier correspondence, the Buckley Amendment generally grants access to "education records" pertaining to a student under the age of eighteen to the parents of the student. Concurrently, that Act also requires that education records identifiable to students must be kept confidential to all but the parents of the students, unless the parents consent to disclosure.

As such, information identifiable to students other than your son must in my view be kept confidential. In some circumstances, identifying details can be deleted to protect the privacy of individual students, while the remaining information might be available. However, the standard in the federal regulations concerning what is "personally identifiable" is that information may be withheld if the student's identity is "easily traceable". If, for example, there is a relatively small number of students considered for membership in the National Honor Society, it is possible that deletions of their names or other identifying details would be inadequate as a means of protecting their privacy and, therefore, complying with the Buckley Amendment. If that is so, it is likely that the information in question pertaining to other students could be withheld in their entirety. On the other hand, if deletions of identifying details could be made so that the remaining information would not be "easily traceable" to any particular student, disclosure might not be prohibited by the Buckley Amendment. It is suggested, however, that some of the records could be withheld under the Freedom of Information Law. Section 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 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. Concurrently, §87(2)(g) permits an agency to deny access to those portions of inter-agency or intra-agency materials reflective of opinion, advice, recommendation and the like. Therefore, if a faculty member expressed an opinion in writing about a student other than your son, such a record might justifiably be withheld under §87(2)(g) of the Freedom of Information Law.

With respect to Ms. Kerns' contention that "faculty responses" to your son's application are "confidential", I disagree, assuming that the faculty responses were made in writing. If there is no record, there is no information to be made available. On the other hand, if written responses pertaining to your son were prepared, I believe that such responses constitute "education records" subject to rights of access granted to you as a parent under the Buckley Amendment.

Lastly, the federal office that administers the Buckley Amendment is part of the U.S. Department of Education. The individual who administers, advises and investigates with respect to the Buckley Amendment is Ms. Pat Ballinger, who can be reached by phone at (202) 472-6032. In the alternative, you can write to Ms. Ballinger at the U.S. Department of Education, Room 3017, 400 Maryland Ave., S.W., Washington, DC 20202.

I hope that 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: Barbara L. Kerns

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3766

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

June 20, 1985

Ms. Susan Heitker
[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. Heitker:

I have received your letter of June 12, as well as the correspondence attached to it. Both your letter and the correspondence indicate that you submitted a request to the Director of the Governor's Office of Employee Relations on May 31. As of the date of your letter to this office, you have received no response. You have asked whether there is any way I can provide assistance.

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 involving the procedural aspects of the Law. In turn, §87(1) requires the head or governing body of an agency to adopt regulations consistent with the Law and the Committee's regulations.

Second, one of the aspects of the regulations involves the designation of a "records access officer". In brief, the records access officer has the duty of responding to requests made under the Freedom of Information Law and coordinating the agency's responses to such requests. As such, perhaps your request should have been directed to the records access officer of the agency rather than its director. It is suggested that you call the Public Information Officer at the agency at 473-8766 to determine the identify of designated records access officer or to ask about the status of your request.

Third, 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 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: Thomas F. Hartnett, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3767

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

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 21, 1985

Honorable Norman J. Levy
Member of the Senate
Room 811
Legislative Office Building
Albany, NY 12247

Dear Senator Levy:

I have received your letter of June 18 as well as the correspondence attached to it.

The correspondence consists of a letter sent to you by a constituent concerning Equal Employment Opportunity reports identified as EEO4 and EEO1. The constituent sought your assistance in obtaining or learning about the reports in order to monitor affirmative action.

In this regard, I have contacted the State Division of Human Rights on your behalf. I was informed that the reports in question are not kept by any state agency. If that is so, the New York Freedom of Information Law would not be applicable, for that statute pertains only to records maintained by units of state and local government in New York [see definition of "agency", Public Officers Law, §86(3)].

It is my understanding, based upon information provided by the Division of Human Rights, that the reports that are the subject of the inquiry are maintained by the federal Equal Employment Opportunity Commission (EEOC). I was further informed that information regarding the two reports may be obtained by calling separate offices of the EEOC. With respect to EEO4 reports, information can be gained by calling (202) 634-6922; information regarding EEO1 reports can be acquired by calling (703) 756-6019.

I hope that 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-3768

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

June 21, 1985

Ms. Bella Wolfson
[redacted]

Dear Ms. Wolfson:

I have received your letter of June 11, in which you indicated that funds are being held by the New York State Comptroller under your name. You asked how you might request information regarding records pertaining to you.

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

First, as a general matter, each agency is required to designate a "records access officer", who has the duty of responding to requests made under the Freedom of Information Law. As such, a request for records maintained by the Department of Audit and Control, which is headed by the State Comptroller, may be directed to the records access officer.

Second, the Freedom of Information Law pertains to all records of an 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.

In addition, I point out that a relatively new statute, the Personal Privacy Protection Law, generally grants rights of access to individuals to records pertaining to them. A request made under the Personal Privacy Protection Law may also be directed to the records access officer.

Third, under both statutes, an applicant is required to submit a request for records "reasonably described". As such, when making a request, it is suggested that you include as much detail as possible, such as names, dates, identifi-

cation numbers, and similar information that will enable agency officials to locate the records sought. It is also suggested that you include proof of your identity.

In order to provide additional information, enclosed is "You Should Know", which describes the Personal Privacy Protection Law and contains a sample letter of request.

Fourth, although you did not specify the type of information that is the subject of your inquiry, if the records pertain to abandoned property, I point out that there is a Division of Abandoned Property in the Department of Audit and Control. If your inquiry pertains to abandoned property, it is suggested that you write directly to the director of the Division of Abandoned Property. If you wish to contact that office by phone, the number is (518) 474-4038.

The location of the Office of the State Comptroller is the Alfred E. Smith Office Building, Albany, NY 12236.

I hope that 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-3769

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

June 24, 1985

[redacted]
Box 300
March, NY 13403

The staff of the Committee on 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 June 9 in which you requested assistance in appealing a denial of access to records.

According to your letter, you requested records related to your commitment at Marcy Psychiatric Center. Apparently, you were only provided with a copy of a complaint. You would like to know the procedure for appealing the denial of the other relevant materials. In this regard, I offer the following comments.

Access to clinical records maintained by Marcy Psychiatric Center may be requested from:

Richard Heath
Facility Director
1213 Court Street
Utica, NY 13502

Your request should reasonably describe the records you are seeking. If all or part of your request is denied you may appeal the denial within thirty days [see Freedom of Information Law, §89(4)(a)] to:

Office of Counsel
New York State Office of Mental Health
44 Holland Avenue
Albany, NY 12229

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-3770

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

June 24, 1985

Mr. Robert Paul Molay
Managing Editor
News of the Highlands, Inc.
The Cornwall Local
35 Hasbrouck Avenue
P.O. Box B
Cornwall, NY 12518

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

Dear Mr. Molay:

As you are aware, I have received your letter of June 14 concerning access to records maintained by police departments in the Villages of Highland Falls and Cornwall-on-Hudson, as well as the Town of Cornwall.

According to your letter, "[S]everal problems have arisen lately in connection with a public officer reading from the book without actually giving us access to the document" (emphasis yours). You also wrote that in one of the villages "the recent practice has been for the police chief to 'give' us only items from the blotter that he selects as--in his opinion--likely to be of interest to us."

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, it is emphasized that the Law confers upon the public the right to inspect and copy accessible records. Specifically, §87(2) states that "[E]ach agency shall... make available for inspection and copying all records, except..." those records or portions thereof that may justifiably be withheld in accordance with the grounds for denial.

Third, with regard to police blotters or their equivalent, 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)]. I point out, too, that booking records, the records of an arrest made by the arresting agency, have long been available. Under the Freedom of Information Law as originally enacted in 1974, rights of access to records were limited to particular categories of records designated by the Law as available. That statute granted access to "police blotters and booking records". The current Law, which became effective in 1978, was intended to broaden rights of access and to ensure that disclosure would become the rule rather than the exception. Further, a review of the grounds for denial indicates that many of the exceptions to rights of access are based upon potential harm that would arise as a result of disclosure. In other words, records of a police department cannot be withheld merely because they relate to a crime or an investigation; they can be withheld only in conjunction with the specific terms of the grounds for denial listed in the Law.

Lastly, I do not believe that requests must involve a particular entry in a police blotter or reference to a specific incident. By way of background, the original Freedom of Information Law required 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 existence 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 involves a new standard concerning requests. Section 89(3) of the Freedom of Informa-

tion 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 with specificity. As stated recently by the Court of Appeals, the state's highest court, the Freedom of Information Law "requires only that the records by '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, an applicant is not required to request a specific entry in the police blotter. On the contrary, I believe that a request to inspect 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.

Enclosed is a copy of an article regarding access to police records 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-3771

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

June 25, 1985

Mr. Anthony J. Doren
Oneida County Comissioner
Department of Public Works
Box 400
Airport Road
Oriskany, New York 13424

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

Dear Mr. Doren:

I have received your letter of June 13 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you wrote that recently "a member of the Oneida County Board of Legislators referenced the Freedom of Information Law in a request to obtain copies of correspondence in the Public Works' files that pertained to him". You added that "The correspondence basically consists of letters and memos received from him and the associated replies". The initial question is whether "from a purely technical point of view", the request falls within the scope of the Freedom of Information Law. A second question involves whether copies of the records sought should be made available free of charge, or whether fees for copies should be assessed.

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

First, viewing the Freedom of Information Law from a technical perspective, I believe that the correspondence in question falls within the scope of the Law. The Freedom of Information Law is applicable to all records of an agency, and §86(4) 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."

Based on the breadth of the language quoted above, I believe that the items of correspondence constitute "records" within the framework of the Law.

Second, some aspects of the correspondence might ordinarily be withheld from the public on the ground that they constitute "inter-agency or intra-agency materials" reflective of advice or opinion [see Freedom of Information Law, §87(2)(g)], or perhaps on the ground that disclosure of some aspects of the correspondence would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)]. However, the applicant for records presumably with either the author or the recipient of the records. As such, it appears that they should be made available to him.

Third, with respect to fees, as a general matter, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy when making copies of records available to the public. If, for example, the applicant is requesting the records as a member of the public, fees could in my view be assessed to the same extent as if copies of the records were sought by the public; however, if the applicant is requesting the records as a member of the Board of Legislators and is seeking the records in his capacity as a member of the Board in order to carry out his official duties, it may be inappropriate to assess a fee.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3772

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

June 26, 1985

[redacted]
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 [redacted]:

I have received your letter of June 16 in which you requested assistance concerning access to records.

Specifically, you wrote that you have "unsuccessfully tried to obtain some Mental Health Records here at the Attica Correctional Facility that pertain" to you. You were apparently informed that the records are "exempt from the Freedom of Information Law" and from subpoena.

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

First, with respect to records prepared by the staff of the facility, I direct your attention to §87 (2)(g) of the Freedom of Information Law. The cited provision permits the Department of Correctional Services to withhold "inter-agency or intra-agency materials" that are reflective of advice, opinion, or recommendation, for example. Therefore, such records that involve diagnostic opinion, psychological evaluations, or advice concerning treatment could likely be withheld.

Second, if you are the subject of clinical records prepared by a mental hygiene facility that have been forwarded to the correctional facility, §33.13 of the Mental Hygiene Law would in my view serve to exempt those records from disclosure. In brief, §33.13 requires that

clinical records about patients be kept confidential, except in certain, enumerated circumstances. If such records have been disclosed by a mental hygiene facility to officials of the Department of Correctional Services, I point out that subdivision (f) of §33.13 states in part that "Information so disclosed shall be kept confidential by the party receiving such information and the limitations on disclosure in this section shall apply to such party".

With respect to the capacity to subpoena clinical records subject to §33.13 of the Mental Hygiene Law, subdivision (c)(1) states in part that those records can be disclosed "pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outwiegh the need for confidentiality..."

In sum, it appears that the records in question may generally be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1179
FOIL-AO-3773

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

June 26, 1985

Ms. Agnes E. Green
Community School Board Member
Community School Board #17
476 Prospect Place
Brooklyn, NY 11238

The staff of the Committee on 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. Green:

I have received your letter of June 15 in which you requested an advisory opinion.

Specifically, in your capacity as a member of Community School Board #17, you wrote that you unsuccessfully attempted to obtain copies of "audio tapes" of meetings of the Board, even though you offered to pay the cost of furnishing blank tapes.

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

First, in my opinion, a tape recording of a meeting 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 physicial form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the language quoted above, I believe that a tape recording prepared by or in possession of the Board constitutes a "record". It is noted, too, that the Court of Appeals, the state's highest court, has interpreted the definition of "record" as broadly as its specific language indicates [see Westchester News v. Kimball, 50 NY2d 575 (1980); Washington Post Co. v. New York State Insurance Department, 61 NY2d 557 (1974)].

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

Third, to the extent that your request involves audio tapes of open meetings, under the Open Meetings Law, any person could have been present during those meetings. As such, in my view, no ground for denial could appropriately be offered to deny access to tape recordings of open meetings. 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, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

You inferred that some aspects of the tape recordings in which you are interested might have involved discussions held by the Board during executive sessions. While tape recordings of executive sessions would also in my opinion clearly constitute "records" subject to the Freedom of Information Law, rights of access granted to members of the public under the Freedom of Information Law relative to those tape recordings would be dependent upon the nature and content of the tapes. For instance, if an executive session was held to discuss the performance of a particular teacher, disclosure to the public of the Board's discussion by means of the tape might result in an unwarranted invasion of personal privacy. In such a situation, that portion of the tape recording might justifiably be withheld.

Nevertheless, as a member of the Board, it is questionable in my view whether any aspect of the tape recordings could be withheld if you are acting in your capacity as a member of the Board. In short, I believe that you would likely have as much right to a tape recording of a discussion of Board business as a member who may have

been present during the executive session. Further, if you were present at an executive session that was tape recorded, the information contained on the tape would have been effectively disclosed to you during the course of the executive session.

I point out, too, that §105(2) of the Open Meetings Law states that:

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

Based upon the quoted language, while the public at large may be excluded from a proper executive session, a member of a public body has the right to attend an executive session. As such, even though some aspects of tape recordings of open meetings might not be available to the public under the Freedom of Information Law, it might be contended that you have the right to the tapes as a member of the Board acting in that capacity in order to enable you to carry out your official duties.

Lastly, your letter indicates that minutes of meetings of the Board might not have been produced on a timely basis. Here I point out that §106(3) of the Open Meeitngs Law requires that minutes of open meetings be prepared and made available within two weeks of those meetings. In the event that action is taken during an executive session, a public body is required to prepare minutes reflective of the action taken, the date and vote, and make them available in accordance with the Freedom of Information Law within one week of the executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3724

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

June 27, 1985

Ms. Theresa D'Antonio
[redacted]

I have received your letter, which is dated April 23, but which reached this office on June 3.

According to your letter, a question has arisen concerning "the payment of a military voucher for expenses incurred during [your] annual training tour". You wrote that you requested "copies of vouchers for which other female members in [your] same circumstances were paid so that [you] may compare to [your] own". In response to your request, you were informed by Col. Frank Polis that "other members' vouchers can not be provided".

In this regard, I have contacted Counsel to the Division of Military and Naval Affairs on your behalf; who in turn contacted Col. Polis. It is my understanding that Col. Polis has considered your inquiry and has or soon will provide an appropriate response to 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3775

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

June 28, 1985

Mr. David Cleveland
[redacted]

Dear Mr. Cleveland:

I have received your letter of June 22. As requested, enclosed are copies of "You Should Know" and "Your Right to Know".

The services of the Committee on Open Government are described in both of those brochures. In brief, the Committee provides advice to the public, government and the news media relative to each of the three laws within its jurisdiction, the Freedom of Information, Open Meetings and Personal Privacy Protection Laws.

You indicated that you are particularly interested in how you may obtain copies of legislation as well as related information concerning the legislative process. Here I point out that the general provisions of the Freedom of Information Law are not applicable to the State Legislature. However, §88 of the Freedom of Information Law provides rights of access to certain records of the State Legislature. The records that must be available by the State Legislature are described on pages 8 and 9 of "Your Right to Know", and I believe that the records in which you are interested are generally available. In order to learn of committee reports, the status of legislation and the membership of legislative committees, requests for records may be directed to the designated records access officers of the Senate and the Assembly. In the Assembly, you can address a request to the Public Information Office, Concourse Level, Empire State Plaza, Albany, New York 12248. Inquiries to the Senate can be addressed to the Secretary of the Senate in the Capitol. It is noted, too, that information can often be provided by your Assemblyman or Senator through their district offices.

I hope that I 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-3776

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

June 28, 1985

Mr. Matthew J. Karek
[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. Karek:

I have received your letter of June 14 in which you raised a series of questions regarding rights of access to records.

The first question pertains to your status as a member of the Polish Community Center of Buffalo and your rights, as a member, to records maintained by the Center. Your second question is related, for it concerns your rights as a member and a former employee to the entire contents of your personnel file.

In this regard, as I believe I indicated in previous correspondence, the Freedom of Information Law is applicable to records of an "agency", a term 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 my view that the Freedom of Information Law is generally applicable to records maintained by governmental entities, such as municipalities and state agencies. Concurrently, I believe that the Freedom of Information Law is generally not applicable to the records of a private corporation. It appears that the Polish Community Center of Buffalo is a not-for-profit corporation subject to the requirements of the Not-for-Profit Corporation Law rather than the Freedom of Information Law. If that is so, the Freedom of Information Law would not serve to enable you to review records of the Center. Further, assuming that rights of access granted by the Freedom of Information Law do not pertain to records maintained by the Center, it is suggested that you review the provisions of the Not-for-Profit Corporation Law as well as the by-laws of the Corporation.

In your third question, you wrote that the agency, which is assumed to mean the Polish Community Center, receives funds other than those obtained by means of the "Block Grant fund". You have anticipated that the City of Buffalo will provide access to records regarding the receipt of grants by the Center from the City of Buffalo. Nevertheless, you wrote that there may "still be other funding sources" that would not be identified by means of records made available by the City of Buffalo. You have asked how you might obtain information regarding those other sources.

It is difficult to provide clear direction, for the functions of the Polish Community Center are unknown to me. Consequently, I do not know where other sources of its funding might be. It would appear likely that there may be funding provided be Erie County, the United Way, or other governmental or not-for-profit entities that generate grant monies. In addition, if the Polish Community Center is considered a charitable corporation, it may be required to file an annual report with the Bureau of Charities Registration, which is also a unit of the Department of State. If such a report has been filed, perhaps the contents could be used to identify some of the funding sources of the Polish Community Center of Buffalo.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1180
FOIL-AO-3777

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

June 28, 1985

Mr. Wallace S. Nolen
[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. Nolen:

I have received your letter of June 14, in which you raised issues concerning access to hearings and records pertaining to hearings.

Specifically, you wrote that you have attempted to attend hearings conducted by the New York City Department of Consumer Affairs relating to "process server and/or consumer affairs violations". You have also sought to obtain notices of hearings in order to know when the hearings may be held. Although you have received information following hearings, as well as the decisions rendered in conjunction with hearings, you indicated that you have been denied access to information concerning dates of hearings and that you have been unable to attend the hearings.

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

First, if records are prepared which specify when and where the hearings in question will be held, I believe that they would be subject to rights granted by the Freedom of Information Law. It is noted that the Freedom of Information Law pertains to existing records, and that the term "record" is broadly 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 language quoted above, assuming that the Division of Consumer Affairs prepares notices or other similar materials that indicate when and where hearings will be held, I believe that such documentation would constitute "records" subject to rights of access granted by the Freedom of Information Law.

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

As you have described them, it does not appear that any ground for denial could appropriately be asserted with respect to records that indicate the times and places of scheduled hearings.

Third, with respect to your right to attend a hearing, I cannot provide specific direction. I point out that the Open Meetings Law generally is applicable to "meetings" of a "public body". Assuming that a hearing is conducted by a hearing officer, for example, no public body would be involved [see Open Meetings Law, §102(2)] and the Open Meetings Law would not be applicable. In addition, §108(1) exempts quasi-judicial proceedings from the requirements of that statute. Based upon the subjects considered at the hearings, it is assumed that they are quasi-judicial in nature and that the Open Meetings Law would not apply.

Although I could not conjecture as to public rights of access in this specific circumstance, I point out that in a decision of the Court of Appeals, [Herald Company, Inc. v. Weisenberg, 59 NY 2d 378 (1983)], it was found that administrative proceedings must generally be open to the public and the news media. Whether that decision is applicable to the hearings in which you are interested is unknown to me. Nevertheless, enclosed is a copy of the decision for your consideration.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Office of Counsel,
NYC Division of Consumer Affairs

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3778

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

July 1, 1985

Mr. Anthony J. Doren
[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. Doren:

I have received your letter of June 14 in which you requested guidance concerning the next step you may take relative to a request made under the Freedom of Information Law.

According to your letter, you requested a variety of information under the Freedom of Information Law from the Town Clerk of the Town of Western. Your request, a copy of which is attached to your letter, was made on May 19. However, as of the date of your letter to this office, you have apparently received no response.

The request involves information concerning a lawsuit in which the Town was a party, and you sought for the years 1983 to the present various information, such as the total legal and administrative costs incurred, the cost of land purchased, the total cost of work accomplished associated with an abandoned road and similar related information.

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

First, it is emphasized that the Freedom of Information Law is applicable to existing records and that the Law states in §89(3) that an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, the Town has not prepared

a record indicating "total costs" relative to the areas of expenditure to which you referred, I do not believe that it would be obliged to prepare a new record on your behalf indicating total costs.

Second, I point out that the Freedom of Information Law contains a broad definition of "record". Section 86(4) defines "record" to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folder, 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, separate bills or records indicating expenditures would constitute "records" subject to rights of access granted by the Freedom of Information Law. In the event that records indicating "total costs" do not exist, it is likely that you could review various records or portions of records reflective of Town expenditures for the purpose of preparing your own "totals".

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

As a general matter, I believe that records indicating expenditures by a town must be made available, for they constitute factual information and, therefore, would in my view be accessible under a series of laws, including §87(2)(g)(i) of the Freedom of Information Law, §51 of the General Municipal Law, and §29 of the Town Law.

With respect to legal bills, while a town may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see

e.g., People v. Cook, 372 NYS 2d 10 (1975)]. If, however, portions of the bills in question contain information that is confidential under the attorney-client relationship, those portions could in my view be deleted under §87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute" [see Civil Practice Law and Rules, §4503]. Therefore, while some identifying details in the bills might justifiably be withheld, numbers indicating the amounts expended are in my view accessible under the Freedom of Information Law.

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law [21 NYCRR §1401 et seq.], 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 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)].

In an effort to enhance compliance with the Law, a copy of this opinion will be sent to Mr. Stuart Newey, 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: Stuart Newey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3779

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

July 1, 1985

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 June 19 in which you raised issues concerning a denial of access by the Greenburgh Central School District.

The focal point of the controversy involves a request for a "legal bill" submitted to the School District by its attorney. Apparently only the amount that was billed to the District was disclosed; the remainder was deleted on the ground that it was "confidential". You have contended that various judicial decisions, such as Dillon v. Cahn [79 Misc. 2d 300, 259 NYS 2d 981 (1974)], as well as federal cases involving claims of "executive privilege", preclude the District from asserting confidentiality. You have also contended that although your request for records may have been broad, it was sufficiently detailed to enable School District officials to locate the records.

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

First, it has been consistently advised that a mere assertion of confidentiality or a claim of "executive privilege" or its equivalent is inappropriate and inconsistent with the Freedom of Information Law. In short, based upon decisions rendered by the State's highest court, it has been advised that records must be made available, except to the extent that one or more of the grounds for denial appearing in the Freedom of Information Law may properly be asserted [Doolan v. BOCES, 48 NY 2d 341 (1979)]. If no ground for denial is applicable, no claim of executive privilege or confidentiality would in my opinion serve to enable an agency to withhold records.

Nevertheless, it appears that there may be a ground for denial applicable with respect to certain portions of the "legal bills" that you are seeking. Specifically, §4503 of the Civil Practice Law and Rules invovles communications made in conjunction with an attorney-client relationship and generally renders such communications privileged and "confidential". When a record is considered privileged under §4503 of the Civil Practice Law and Rules, it is "confidential". With respect to the Freedom of Information Law, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". If records or portions of records fall within the scope of the attorney-client privilege, I believe that they would be exempted from disclosure by a state statute. In the context of your inquiry, the School District does not appear to have asserted a claim of confidentiality in a manner analogous to a claim of executive privilege. Rather its claim appears to be based upon a statute that exempts certain information from disclosure; i.e., that information that falls within the scope of the attorney-client privilege.

As I believe I have suggested in the past, figures involving the amount billed to the School District would not fall within the scope of the privilege [see, e.g. People v. Cook, 372 NYS 2d 10 (1975)]. However, those other aspects of the bill that might describe the services rendered by an attorney to a client might, depending upon their content, remain within the scope of the privilege. Without having the capacity to view the bills in question, I could not conjecture as to the sufficiency of the School District's response. Nevertheless, as suggested in the preceding paragraphs, the claim of confidentiality appears to be based upon a statutory exemption from disclosure.

The remaining issue concerns the scope of your request and the School District's duty to respond. As you are aware, an applicant for records is required to request records "reasonably described" [see Freedom of Information Law, §89(3)]. In a fairly recent decision rendered by the Court of Appeals, it was held that an applicant has met the burden of reasonably describing the records sought if the agency can locate the records based upon the terms of the request [see 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: Elizabeth Weinberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3780

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

July 2, 1985

Mr. Joseph A. Glazer
c/o Assemblyman Eliot L. Engel
[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. Glazer:

I have received your letter of June 19 in which you requested an advisory opinion relative to a "hypothetical" situation.

In the hypothetical situation, you referred to an individual who is involved in a matter that may lead to a "legal action". You described the individual as a member of staff of a state legislator and who performs his official duties in the legislator's Albany office. However, the individual is also involved in performing various duties in the district office of the legislator, which is a distance from Albany. Your question is "Can it be proven that the Albany staffer is actually a participant in district activities?"

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

First, as you may be aware, rights of access to records of the State Legislature differ from rights granted with respect to an "agency". The general provisions of the Freedom of Information Law are applicable to records of an "agency", a term 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."

Agency records are presumptively available and may be withheld only in conjunction with one or more grounds for denial listed in §87(2) of the Freedom of Information Law.

With respect to records of the State Legislature, rights of access are limited to those deemed available by means of §88(2) of the Freedom of Information Law. Information that may establish a connection between the Albany office and the district would, as you suggested, include records of travel and telephone communication, and records indicating the receipt or sending of mail. It is questionalbe in my view whether those records must be provided by the State Legislature. I believe that only one of the categories of accessible records is relevant to those types of records. Specifically, §88(2)(f) grants access to:

> "internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law..."

Bills, vouchers and similar documents would in my opinion constitute statistical or factual tabulations that relate to materials that are accessible to the public under other provisions of law. Stated differently, records indicating the expenditures of public employees have long been available in conjunction with various statutes [e.g., Freedom of Information Law, §87(2)(g)(i); General Municipal Law, §51; Education Law, §2116; and Town Law, §29].

Assuming that those types of records are not kept by the State Legislature or are not available from the State Legislature under the Freedom of Information Law, there may be another source of the same information. Specifically, I believe that the NYS Department of Audit and Control main-

tains records indicating expenditures incurred by state legislators and their staffs. For instance, if a member of staff is reimbursed following the submission of a standard voucher involving expenditures for travel, tolls, food or lodging, I believe that such a record would be available from the Department of Audit and Control.

With respect to telephone bills, it may be more difficult to establish a connection because it may be unknown who in fact places or receives a call. As I understand it, the State Legislature does not use the same telephone system as state agencies. As a state agency employee, when I place a long distance call, I must first use a personal six digit code. That code can be used to indicate whether a specific individual placed a call. That may not be so with regard to the State Legislature and its phone system, particularly if it continues to use a "tie-line system". Nevertheless, it may be worthwhile to question an official at the Department of Audit and Control in order to learn more about the system of billing used by the State Legislature.

I hope that I 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-3781

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

July 2, 1985

Mr. Curtis Brown
79-A-2996
Box 51
Comstock, NY 12821-0051

Dear Mr. Brown:

I have received your letter of June 30 in which you requested information pertaining to the Freedom of Information Law.

Specifically, you have asked for the names of the records access officers for the Office of the New York State Inspector General, the Department of Correctional Services and "the Federal Government of New York State and Washington, D.C."

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

First, to the best of my knowledge, there is no single Office of Inspector General for New York State. Various agencies may have offices of inspectors general operating within the agencies. Nevertheless, it is reiterated that there is no Office of Inspector General having general or statewide jurisdiction. Similarly, I do not believe that there is any records access officer who deals with records of the entire federal government or New York State.

With respect to the Department of Correctional Services, for records kept at a correctional facility, a request may be directed to the facility superintendent or his designee. For records kept at the central offices of the Department in Albany, a request may be directed to the Deputy Commissioner for Administration at Building 2, State Campus, Albany, New York 12226.

Second, I point out that, under the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law [21 NYCRR §1401 et seq.], the head or governing body of each agency is required to designate one or more records access officers. Therefore, as suggested earlier, there is no records access officer who deals with requests for records maintained by all of state government. On the contrary, there should be a records access officer designated to deal with requests at each individual agency. Consequently, a request should generally be directed to the records access officer at the agency that you believe maintains records in which you are interested.

Lastly, the New York Freedom of Information Law is applicable to records of state and local government in New York. A separate law, the federal Freedom of Information Act, pertains to records maintained by federal agencies.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3782

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

July 3, 1985

Mr. Larry Gurley
#72-A-1163
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. Gurley:

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

Specifically, you wrote that you have unsuccessfully attempted to gain access to a copy of a "ballistic report" from the New York City Police Department and the Office 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, it appears that two of the grounds for denial may be relevant. However, it is questionable in my view whether they may appropriately be asserted.

The ground for denial that is most often cited with respect to a police investigation 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."

The language quoted above is based upon potentially harmful effects of disclosure. For instance, if an incident is currently being investigated and records prepared in relation to the incident would, if disclosed, interfere with an investigation, §87(2)(e)(i) could likely be cited to withhold the records. Nevertheless, if an investigation has ended, it is possible that §87(2)(e) could no longer be asserted as a basis for withholding, for the harmful effects of disclosure described in that provision might no longer arise.

The other ground for denial of possible significance is §87(2)(g). That provision states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. 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. Concurrently, those portions of inter-agency or intra-agency materials reflective of opinion, advice or recommendations, for instance, could in my view be withheld.

It appears that a ballistics report prepared by a police department could be characterized as "intra-agency" material. However, if the contents of the report are purely factual, §87(2)(g) could not be asserted as a basis for withholding.

In short, if a ballistics report pertains to a case that was closed and that resulted in your conviction, it is difficult to envision that a ground for denial could at this time be appropriately asserted to withhold the report from you.

Third, in terms of procedure, a request may be directed to the "records access officer" at the agency that maintains the records in which you are interested. As such, separate requests might be directed to both the New York City Police Department and the Office of the District Attorney that prosecuted.

Lastly, §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, index and docket numbers and similar information that might enable agency officials to locate the records sought.

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law and which may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL - AO 23
FOIL-AO-3783

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

July 3, 1985

Mr. Robert F. Usselman
[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. Usselman:

I have received your letter of June 24, as well as the materials attached to it.

According to your letter and the correspondence, you submitted a request to the Tioga County Freedom of Information Officer on May 22. As of the date of your letter to this office, you have not received any response from the County. You asked that I review the correspondence in order to advise whether you have "misconstrued" the Law.

You also asked which agency administers the judicial branch that is not a court and how an individual can find out how to appeal verdicts "at our lowest level (JPs)".

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

First, having reviewed your letter to the Tioga County Freedom of Information Officer, you requested records:

> "Under the Freedom of Information Law of New York State, the recently enacted extension of that law pertaining to personal information to individuals, the United States Sunshine laws and Privacy Act of the United States..."

Your request involves a "list of all actions" taken by the County to comply with regulations of the U.S. Treasury Department pursuant to the "Rehabilitation Act provisions of Revenue Sharing", as well as various other materials related to the implementation of that Act.

In this regard, I point out that while the Freedom of Information Law does apply to Tioga County, the Personal Privacy Protection Law does not. Under the Freedom of Information Law, which applies to records of an "agency", the term "agency" is defined to include entities of both state and municipal government [see Freedom of Information Law, §86(3)]. However, §92(1) of the Personal Privacy Protection Law defines "agency" to include governmental entities that perform a government or proprietary function for the State of New York, but the definition specifically excludes "any unit of local government". As such, rights granted by the Personal Privacy Protection Law would not be applicable to records of Tioga County. Similarly, the federal Freedom of Information and Privacy Acts pertain only to records of federal agencies and would not extend to records of Tioga County.

Second, I point out that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, Tioga County has not prepared a "list of all actions" that it has taken to implement a federal Act, no new list would have to be prepared in order to respond to your inquiry. To the extent that your request involves existing records, I believe that the Freedom of Information Law would apply.

Third, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law [21 NYCRR §1401 et seq.], 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 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 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)].

With respect to the agencies to which you alluded that administer the court system, the major agency that is not a court and, therefore, is subject to the Freedom of Information Law is the Office of Court Administration. The Office of Court Administration has general oversight of the court system in New York.

Lastly, you asked how you could find out how to appeal verdicts rendered by justice courts. While I cannot answer that question, it is suggested that you might discuss the matter with an attorney or write to the Office of Court Administration, which is located at Agency Building 4, Empire State Plaza, Albany, New York 12223. I believe that the Office of Court Administration publishes various materials concerning the court system.

I hope that I 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-3784

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

July 3, 1985

Mr. Hank Purcell
84-C-357
Great Meadow Correctional Facility
Box 51
Comstock, New York 12821-0051

Dear Mr. Purcell:

I have received your letter of June 20 in which you requested assistance.

Your inquiry pertains to information in which you are interested maintained by the FBI. You asked who is the "records access officer" at the Albany office of the FBI. In addition, you asked related questions concerning access to records prepared by the FBI.

In this regard, it is emphasized that the Committee on Open Government is responsible for advising with respect to the New York Freedom of Information Law. That statute is applicable to records maintained by agencies of state and local government. Your inquiry, however, would fall outside the scope of the Committee's jurisdiction, for it pertains to records maintained by a federal agency. As such, rights of access to the records would be governed by the federal Freedom of Information Act. While I am unaware of the identity of the person to whom a request should be made at the FBI, it is suggested that you direct an initial inquiry to the Albany office of the FBI at U.S. Post Office and Courthouse, Albany, New York.

It is noted, too, that although the New York Freedom of Information Law and the federal Freedom of Information Act differ in some respects, the standard for making requests is the same in both statutes. The state and

federal statutes require 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, descriptions of events and similar details that might enable agency officials to locate 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-3785

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

July 3, 1985

Mr. Timothy 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 recieved your letter of June 24 in which you received an opinion.

According to your letter, you were recently denied membership in the Canaan Lake Beach Community Club, Inc., which is apparently a not-for-profit "civic association". You added that the Club has received federal community money. Since you were not given a reason for a rejection in your attempt to become a member, and since you believe that the only requirement for membership is residency in the Canaan Lake Community, you have asked whether the Club can withhold from you a copy of its by-laws.

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

First, the Freedom of Information Law is applicable to records of an "agency", a term 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."

Based upon the language quoted above, the Freedom of Information Law is generally applicable to records maintained by entities of state and local government.

Second, if the Club is not an agency, rights granted by the Freedom of Information Law would not be applicable to its records. Stated differently, as a general matter, the public would not enjoy rights of access to records of a private corporation, such as the not-for-profit corporation in question. Therefore, a request for the by-laws would not fall within the scope of the Freedom of Information Law.

It is suggested that perhaps a neighbor who is a member of the Club might be able to obtain and disclose the current by-laws 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3786

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

July 3, 1985

Mr. Sidney G. Sloves
[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. Sloves:

I have received your letter of June 25, as well as the correspondence attached to it.

Based upon a review of the correspondence, requests were made under the Freedom of Information Law early in June to both the Comptroller of the City of Yonkers and the Superintendent of Schools of the City of Yonkers. As of the date of your letter to this office, no response had yet been received.

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

First, the Committee on Open Government is responsible for promulgating general regulations that govern the procedural aspects of the Freedom of Information Law [see attached, Freedom of Information Law, §89(1)(b)(iii)]. In turn, §87(1) of the Law requires that the governing body of a public corporation, such as a city council or a board of education, adopt regulations consistent with those of the Committee and in conformity with the Law.

One of the requirements of the regulations is that the governing body designate one or more "records access officers". Among the duties of the records access officer is to coordinate the agency's response to requests

for records. It is possible that your requests might have been answered more expeditiously had they been directed to the designated records access officers. It is noted, however, that the Committee's regulations also indicate that:

> "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)].

Second, it is noted that the Freedom of Information Law and the Committee's 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 with five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within five business days of receitp of a request or within ten business days of the acknowledgment or 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, in your letter to Dr. Raymond, you requested records as well as an "explanation" concerning an issue relative to asbestos in the schools. Here I point out that the Freedom of Information Law pertains to existing records. Further, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, there is no record that would include an "explanation" of the position of Dr. Raymond, the Freedom of Information Law would not require that such a record be prepared on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Harold Peterson
Dr. John Raymond

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3787

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

July 3, 1985

Ms. Jane Barton
[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. Barton:

I have received your letter of June 24 in which you requested an opinion concerning the scope of the Freedom of Information Law.

Specifically, you wrote that many arts and cultural organizations receive state, municipal and federal grants. However, you added that those organizations are reluctant to release financial and related information. Your question is whether those organizations "come under the Freedom of Information Law in any way?"

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", a term 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, the Freedom of Information Law generally pertains to records of entities of state and local government; it does not, in my opinion, apply to the types of organizations to which you referred, even though those organizations might receive funds from government.

Second, however, all "records" maintained by an agency are subject to rights of access. Further, §86(4) of the Freedom of Information Law defines "record" to include:

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

Due to the breadth of the definition of "record", if an agency maintains a relationship with an organization, records about the organization kept by the agency would fall within the scope of the Freedom of Information Law.

For instance, if the State Council on the Arts or a county arts agency provides grants to cultural organizations, the award of a grant is likely based upon a review of various records submitted to the agency. While the organizations in receipt of grants would not be obliged to honor a request made under the Freedom of Information Law, the agencies that award the grants and maintain records pertaining to the grants would be required to disclose in accordance with the Freedom of Information Law.

As such, to obtain information regarding the recipients of grants, it is suggested that requests be directed to the government agencies that award the grants.

To provide you with additional information concerning the Freedom of Information Law, enclosed is "Your Right to Know", which describes rights and procedures.

I hope that 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-24
FOIL-AO-3788

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

July 8, 1985

Mr. Richard C. Judson
[redacted]

Dear Mr. Judson:

I have received your letter of July 3 in which you requested information concerning sources of information about yourself.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the New York Freedom of Information and Personal Privacy Protection Laws. Separate provisions of law, the federal Freedom of Information and Privacy Acts, apply to records maintained by federal agencies.

The New York Freedom of Information Law pertains to records of entities of state and local government [see attached, Freedom of Information Law, §86(3), definition of "agency"]. The Personal Privacy Protection Law applies to state agencies only, and its definition of "agency" specifically excludes units of local government [see attached, Personal Privacy Protection Law, §92(1), definition of "agency"]. Moreover, rights of access to records conferred by the Personal Privacy Protection Law to individuals who are the subjects of records do not apply to "public safety agency records" [see §92(8)]. Therefore, in view of the types of records in which you are interested, it is unlikely that the Personal Privacy Protection Law is relevant or applicable.

Both the Freedom of Information and Personal Privacy Protection Laws (as well as the federal Freedom of Information Act) require that an applicant request records "reasonably described". Therefore, although you are not required to identify records sought with specificity, it is suggested that a request include as much detail as possible in order to enable agency officials to locate the records in which you are interested.

You asked how an applicant can be sure of knowing all the agencies that maintain certain files about him. In short, I do not believe that there is any way of knowing of every source of information about you. Further, there is no central computer or depository involving records kept about an individual.

Next, you asked whether it is "necessary or preferred that all applications are notarized". There is nothing in the Freedom of Information Law that creates such a requirement. If, however, your request involves personal information that could be withheld from persons other than yourself, it might be appropriate to have your application notarized as a means of establishing proof of identity.

Lastly, you asked whether I can provide names and addresses of "state and/or federal agencies that would possess records on an individual convicted of a felony charge." At this juncture, I am unaware of exactly which agency would maintain those records. Further, the agencies that you identified, such as the Division of Criminal Justice Services, the FBI and the National Crime Information Center, would likely be the best sources of that type of information. With respect to addresses of other agencies that you mentioned, the address for the Department of Social Services is 40 North Pearl Street, Albany, NY 12243; the Office of Mental Health is located at 44 Holland Avenue, Albany, NY 12229.

Enclosed are two publications, "Your Right to Know" and "You Should Know", which may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3789

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

July 8, 1985

Mr. Michael Barrett
#76-A-279
Attica Correctional
Facility
Attica, NY 14011

Dear Mr. Barrett:

I have received your letter of June 30 in which you wrote that you are interested in obtaining records from three particular agencies. You asked whether this office could furnish you with information and forms concerning requests to those agencies.

The three agencies that you identified are all federal agencies. In this regard, it is noted that the authority of the Committee on Open Government pertains to the New York Freedom of Information Law. That statute involves rights of access to records of units of state and local government in New York. As such, this office has no jurisdiction with respect to records of the three agencies in question.

It is noted that, as federal agencies, the three entities that you cited are subject to the federal Freedom of Information Act. Please note that there are no specific forms that must be used for the purpose of making requests under either the state or federal access laws. Both laws, however, require that requests be made in writing that "reasonably describe" the records sought. Therefore, 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 that you are seeking.

Enclosed is a copy of "Your Right to Federal Records", which contains the texts of both the federal Freedom of Information and Privacy Acts, as well as information concerning the use of those Acts.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3790

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

July 9, 1985

Mr. & Mrs. Albert Levy
[redacted]

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

Dear Mr. and Mrs. Levy:

I have received your letter of June 27, as well as a copy of a request for records directed to Richard Cantor, Corporation Counsel of the City of Poughkeepsie.

According to the materials, a request was made on June 12 for "all the files pertaining to 47 So. Hamilton", which you currently own. Although Mr. Cantor is Corporation Counsel, you wrote that he represented a plaintiff "in a private atty capacity" in an action against you as defendants. As of the date of your letter to this office, you had apparently received no response to your request.

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

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not have the capacity to compel an agency to grant or deny access to records.

Second, it appears that Mr. Cantor serves as Corporation Counsel and that he also maintains a private practice. Here I point out that the Freedom of Information Law applies to records of an "agency", a term 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."

Assuming that Mr. Cantor's records relating to his private practice are kept separate and distinct from records relating to his position as Corporation Counsel for the City of Poughkeepsie, the records of his private practice would not likely be records of an "agency". If that is so, the Freedom of Information Law would not be applicable to those records. Nevertheless, records maintained by the City Building Department or other City departments would in my opinion constitute records of an agency subject to rights of access granted by the Freedom of Information Law.

Third, with respect to 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 (21 NYCRR §1401). In turn, §87(1) requires the governing body of the City to adopt regulations in conformity with the Law and consistent with the Committee's regulations. An aspect of the regulations is the requirement that the governing body designate one or more "records access officers". A records access officer has the duty of coordinating an agency's response to requests made under the Freedom of Information Law. It is suggested that you contact Mr. Cantor to ascertain whether he is directly responsible for dealing with a request made under the Freedom of Information Law and to ensure that your request is being handled by the appropriate City official.

Fourth, §89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Although your request might have reasonably described the records in which you are interested, it may be somewhat broad. Once again, to ensure that an appropriate response to your request will be given, it is suggested that you confer with Mr. Cantor or the records access officer responsible for dealing with your request.

Lastly, the Freedom of Information Law and the Committee's 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 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

Robert J. Freeman
Executive Director

RJF:jm
cc: Richard Cantor, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3791

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

COMMITTEE MEMBERS

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GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 9, 1985

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 June 21 and the materials attached to it.

In conjunction with our recent conversation, enclosed are copies of materials sent to this office relating to your appeal of a denial of a request. Additionally, although I could not locate any prior written opinion that deals specifically with the record in question, enclosed is a copy of an opinion pertaining to a similar subject matter.

Your inquiry concerns the propriety of a policy adopted in April by the Southhold Police Department. The policy is as follows:

> "Sector assignments will not be given out to the public while the officer is on duty in an assigned sector. If there is a request made after the officer is OFF DUTY advise the party making the call the information will be given out upon receipt of a 'Application for Public Access to Records.'"

From my perspective, there is but one ground for denial of significance. Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person".

In this regard, I am unaware of the number of officers who are employed by the Police Department, how many "sectors" there are within the Town, or whether all sectors are always covered by police officers. As such, I cannot advise with certainty that records indicating current assignments are accessible or deniable, for I am unaware of the effects of disclosure. Nevertheless, it has been contended that disclosure of that kind of information might enable potential lawbreakers to know where and when police coverage is strong or weak, adequate or inadequate. If such a contention is accurate, disclosure might indeed "endanger the life or safety" of persons present in areas where police coverage is inadequate. It might also be contended that disclosure would "endanger the life or safety" of police officers, particularly if the deployment of the officers is not uniform in each sector.

In sum, if indeed disclosure would jeopardize the public or police officers, it appears that §87(2)(f) could appropriately be asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3792

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

July 9, 1985

Mr. Donn F. Dykstra
School Business Administrator
East Greenbush Central Schools
East Greenbush, NY 12061

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

Dear Mr. Dykstra:

I have received your letter of June 28 and appreciate your interest in complying with the Freedom of Information Law.

You have asked that I "confirm [your] understanding of the Freedom of Information Law" concerning fees for copies of records. By way of background, there are several aspects of the Freedom of Information Law that relate to your question.

First, the introductory language of §87(2) provides that "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records..." except those records or portions thereof that may properly be withheld in conjunction with one or more among the grounds for denial that follow.

Second, §89(3) states in relevant part that in response to a written request for an accessible record, "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record..."

And third, §87(1)(b)(iii) requires the District's 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."

Based upon the provisions described above, an agency may assess a fee of up to twenty-five cents per photocopy when a photocopy is requested. Further, if an applicant requests that photocopies be mailed to him or her, I believe that the cost of mailing the materials may be assessed.

As you requested, enclosed is a package of materials concerning the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3793

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

July 9, 1985

Mr. Michael James
85-A-1212
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

Dear Mr. James:

I have received your letter of June 20, which reached this office on July 2.

According to your letter, you are interested in obtaining information concerning your case. You indicated that you have been told that attorney work product is unobtainable and that, therefore, you would like to use the Freedom of Information Law to obtain such records. The attorneys from whom you want the records are employed by the Kings County Court and the Legal Aid Society. You also alluded to various advisory opinions rendered by this office that may relate to the records in which you are interested.

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

First, the Freedom of Information Law is applicable to records of an agency, a term 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) of the Law 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, the Freedom of Information Law would not apply to records kept either by a court or by an attorney employed by the Legal Aid Society.

When the Freedom of Information Law is used for seeking records of an agency, there is no specific form that must be completed. Any written request that "reasonably describes" the records sought should be sufficient.

Since you referred to "attorney work product", I point out that §3101(c) of the Civil Practice Law and Rules states that "The work product of an attorney shall not be obtainable". In the context of the Freedom of Information Law, if records consisting of attorney work product are maintained by an "agency", I believe that such records could likely be withheld under §87(2)(a), which permits an agency to withhold records that "are specifically exempted from disclosure by state or federal statute".

You also alluded to "pretrial records". As noted earlier, the Freedom of Information Law does not apply to the courts or court records. However, court records are often available under other provisions of law. As such, it is suggested that a request for court records be directed to the court in which the proceeding was conducted. It is also recommended that you confer with an attorney.

Lastly, you asked if there is a "loophole" concerning fees. It is noted that the Freedom of Information Law contains no provision requiring an agency to waive the fees for photocopying.

Enclosed are copies of the advisory opinions that you requested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3794

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 10, 1985

Mr. Kenneth L. Lane
City School District of Oswego
233 West Utica Street
Oswego, New York 13126

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

Dear Mr. Lane:

I have received your letter of July 2 in which you requested an advisory opinion.

Specifically, you have requested verification of an opinion expressed during our conversation of July 2 that "the poll lists signed by the voters in the school district elections at the time they cast their votes is public information and as such, is available for public review."

In this regard, I believe that the "poll lists" are available under the Freedom of Information Law. By means of analogy, the Election Law (§5-602) requires a board of elections to publish a list of registered voters and their addresses. Due to the similarity between a "poll list" and a list of registered voters accessible under the Election Law, it appears that poll lists should be made equally available.

Further, my research indicates that what you have characterized as a "poll list" or its equivalent must be made available pursuant to the Education Law. Section 2606 of the Education Law, entitled "Registration of voters" describes the procedure for the preparation of "registers" of voters in school districts. The registers are apparently based upon lists of those who voted in a prior election and new registrants. The first sentence of subdivision (6) of §2606 states that:

> "The registers prepared as provided in this section shall, immediately upon completion and not less than two weeks prior to the time set for the school election at which they are to be used, be filed in the office of the clerk of the board of education, and thereafter shall at all reasonable time be open to inspection by any qualified voter of the school district."

In view of the foregoing, it is reiterated that a poll list of those who voted in a school district election, in my opinion, is accessible to the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3795

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

COMMITTEE MEMBERS

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WILLIAM T. DUFFY, JR.
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GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 11, 1985

Richard Castellane, Esq.
99 South Main Street
P.O. Box 1089
Liberty, New York 12754

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

Dear Mr. Castellane:

I have received your letter of July 3 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, a representative of your office requested from the Village of Liberty "all rules and regulations as set forth in Public Officers Law §87". You added, however, that the clerk's office "refused to give her information". In addition, attached to your letter are copies of what appear to be rules established by the Police Department of the Village of Liberty in conjunction with the Freedom of Information Law and a "Records Request Form". You wrote further that:

> "the Police Department does not present any records upon request so that they may be examined by the individual seeking information. Rather, the Police Department tells you what they have. It is most important for you to note that the Police Department does not show you a 'blotter' from which you (ie. newspaper reporter) can pick out the specific information you want. Instead the Police Department gives you a report when they choose to do so."

You have asked that I comment regarding the situation and review the materials that you enclosed.

It is noted initially, as you suggested, that §87(1)(a) of the Freedom of Information Law requires the governing body of a public corporation, such as the Board of Trustees of the Village of Liberty, to:

> "promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

Based upon the language quoted above, the Village in my opinion is obligated to adopt the "rules and regulations" that your representative requested. Further, I believe that, if such rules and regulations exist, they are clearly accessible under the Freedom of Information Law, for they represent the policy of the agency [see Freedom of Information Law, §87(2)(g)(iii)].

With respect to the Police Department I offer several observations.

First, assuming that your assertion is accurate, i.e., that the Department does not permit the public to inspect records, but rather "tells you what they have", such a practice would in my view be contrary to the Freedom of Information Law. The introductory language of §87(2) of the Law indicates that an agency is required to make all records available "for inspection and copying", except those records or portions thereof that may properly be withheld in accordance with the grounds for denial appearing in paragraphs (a) through (i) of the cited provision. As such, if a record is accessible under the Law, I believe that it must be made available for inspection and copying, and that an agency must, on request and upon payment of the appropriate fees, make a photocopy of an accessible record [see §89(3)].

Second, I point out that it has been determined judicially that a police blotter is available for inspection and copying under the Freedom of Information Law. Although the phrase "police blotter" is not specifically defined by any provision of a statute, based upon custom

usage, the Appellate Division, Third Department, held that a police blotter is a log or diary in which any event reported by or to a police department is recorded [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. The Court indicated in Sheehan that, since a police blotter merely contains a summary of events or occurrences, rather than investigative information, it is accessible under the Law. Therefore, if the Police Department of the Village of Liberty maintains a "police blotter" or its equivalent, I believe that such a record must be made available.

With regard to other records maintained by the Police Department, the Department is in my view required to review records sought individually to determine rights of access. Section 87(2), as noted earlier, states in part that an agency may withhold "records or portions thereof" that fall within one or more among the grounds for denial that follow. The quoted language in my opinion indicates a recognition on the part of the Legislature that a single record might be both accessible and deniable in part. That language also imposes an obligation upon the agency to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld. Consequently, in response to a request, I do not believe that it would be appropriate for officials of the Police Department to "tell you" about information maintained in its records; on the contrary, if, for example, a copy of a record has been requested, Department officials must in my view make available a copy of those portions of a record that are accessible under the Law.

Third, the document attached to your letter entitled "Records Request" appears to be a procedural guide concerning requests directed to the Police Department under the Freedom of Information Law. As noted earlier, the Village of Liberty is required to promulgate uniform rules and regulations for all agencies operating within the Village. It is unclear what the status of the record attached to your letter might be vis a vis regulations that might have been adopted by the Village. However, since the regulations promulgated by the Committee [21 NYCRR Part 1401.1 (a)] indicate that the governing body of a public corporation may designate one or more records access officers, the Chief of Police could appropriately be designated a records access officer relative to records of the Police Department.

If the paper entitled "Records Request" is a regulation of the Village adopted under the Freedom of Information Law, I believe that it is incomplete. Without specifying various deficiencies, one important omission involves the absence of any statement concerning the right to appeal a denial of access.

In an effort to enhance compliance with the procedural implementation of the Freedom of Information Law, copies of the Committee's regulations and model regulations are enclosed and will be sent to the Board of Trustees and the Police Department of the Village of Liberty. The model regulations are designed to enable an agency to easily comply with the procedural requirements of the Law.

Lastly, a form for requesting records is also attached to your letter. Here I note that the Freedom of Information Law nowhere prescribes that a particular form be completed in order to request records. Section 89(3) of the Law enables an agency to require that a request be made in writing. That provision also requires that an applicant seek records "reasonably described". As such, it has consistently been advised that a failure to complete a form prescribed by an agency cannot constitute a basis for delaying or denying access to records. Concurrently, it has been advised that any written request that reasonably describes the records should suffice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Board of Trustees, Village of Liberty
Edward A. Eisley, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3796

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

July 11, 1985

Mr. Jimmy Guadalupe
80-A-1649
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. Guadalupe:

I have received your letter of July 1, which reached this office today.

You requested from me:

> "the authority to see [your] Freedom of Information Record maintained by the Department of Correctional Services and the Attica Correctional Facility of which [you] requested pursuant to the Freedom of Information for inspection thereof, but, have been denied."

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

First, it is emphasized that the Committee on Open Government has the authority to advise with respect to the Freedom of Information Law. However, the Committee has no authority to require that an agency grant or deny access to its records.

Second, since you indicated that your request was denied, it is noted that a denial of a request for records may be appealed. Specifically, §89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within 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, the regulations of the Department of Correctional Services provide that an appeal may be directed to 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3797

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

July 11, 1985

Hon. John F. Ryan
Mayor
Village of Scotia
4 Ten Broeck Street
Scotia, New York 12302

The staff of the Committee on 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 Ryan:

I have received your letter of July 9, as well as the correspondence attached to it.

According to the materials, a resident of the Village, Mr. Sylvester L. Cornell, has requested under the Freedom of Information Law copies of the "law that covers thoroughfares". You indicated to Mr. Cornell that there is no "local legislation" on the subject of which you are aware. You have asked for guidance.

In this regard, it is noted initially that the Freedom of Information Law pertains to existing records of an agency, such as the Village of Scotia. As such, if the information that Mr. Cornell is seeking is not maintained by the Village, the Freedom of Information Law would not be applicable. I would also like to point out that §89(3) of the Freedom of Information Law states that, as a general rule, an agency is not required to create a new record in response to a request. Therefore, once again, if the Village does not maintain the information sought, there is no obligation to prepare a record on behalf of an applicant.

Further, having discussed the matter with an expert in municipal law and the issue in question, it was suggested that the best and most likely source of an appropriate answer is the Department of Transportation. I realize that Mr. Cornell stated in his correspondence with the Village that he contacted the Department. However, it is suggested that he write or call of the Office of Legal Affairs at the Department of Transportation. The phone number for that office is 457-2411.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Sylvester L. Cornell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3798

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

July 11, 1985

Mr. Tom Rossi
[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. Rossi:

I have received your letter of July 6, in which you raised a question under the Freedom of Information Law.

Your inquiry concerns access to information pertaining to "times and locations utilized by film crews" involved in the production of television programs or movies. You added that the information sought was denied by the Mayor's Office of Film and Broadcasting and that a request sent on June 18 to the Police Department's "Movie - TV Unit" had not been answered as of the date of your letter to this office.

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 maintained by an agency. Further, §89(3) of the Law states in part that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if, for example, an agency does not maintain the records sought, there would be no obligation imposed upon the agency to prepare a new record on your behalf.

Second, if the information in question does exist in the form of a record or records, I believe that rights granted by the Freedom of Information Law would apply [see attached, Freedom of Information Law, §86(4), definition of "record"].

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.

It would appear that one of the grounds for denial would be relevant to the records that you are seeking, assuming that such records exist. However, due to its structure, it also appears that the records should be made available. Specifically §87(2)(g) permits an agency to withhold reocrds that:

> "are inter-agency or intra-agency materials which 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 policies or determinations must be made available. While records prepared by a City agency indicating times and locations of film production could be characterized as "intra-agency materials", they would likely consist of "factual data" accessible under §87(2)(g)(i).

Fourth, pursuant to the general regulations promulgated by the Committee on Open Government (21 NYCRR §1401) and the Uniform Rules adopted by the Mayor for all city agencies, requests should be directed to the "records access officer" of the agency that maintains the records. Enclosed for your information is a copy of "Your Right to Know", which descirbes the Freedom of Information Law and contains sample letters of request and appeal.

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government 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 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 toa 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:ew

cc: Mayor's Office of Film and Broadcasting
Movie-TV Unit, New York City Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3799

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

July 12, 1985

Mr. John Mitchell
[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. Mitchell:

I have received your inquiry via the Department of State Hotline Log.

You indicated that several property owners want to form a property owners association. In order to contact other property owners, you asked whether such a group has the right to obtain a list of names and addresses of other property owners.

In this regard, it is noted initially that the Freedom of Information Law pertains to existing records and that §89(3) of the Law states in part that, as a general rule, an agency is not required to create a record in response to a request. Therefore, if, for example, no list of names and addresses is maintained by the Town, the Town would not be obliged to create or prepare such a list on behalf of an applicant for records.

Second, if it is assumed that a list of names and addresses of property owners or its equivalent has been prepared, by means of an assessment roll, for example, I believe that the list would be available. Although the Freedom of Information Law permits 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)(b)], assessment records identifying property owners, their addresses and other details concerning

the property have long been available. Further, in situations in which the contents of assessment rolls have been transferred to computer tapes, it has been determined that the computer tapes are available under the Freedom of Information Law, even though there may have been an intent to use the information for commercial purposes [see Szikszay v. Buelow, 436 NYS 2d 558, 107 Misc. 2d 886; also Real Estate Data, Inc. v. County of Nassau and Abe Seldin, Chairman, Board of Assessors, Sup. Ct., Nassau Cty., September 18, 1981]. In another case, a request involved disclosure of "names and addresses of property owners on or over whose land a proposed power line will pass". The Appellate Division granted access, stating that:

> "Petitioner's avowed purpose in obtaining such list - to provide all involved owners with relevant information concerning the manner in which the use of high voltage transmission lines may affect the use and enjoyment of the property-is endowed with a public interest and should not be impeded..." [Smigel v. Power Authority, 54 AD 2d 668 (1976)].

In short, it appears that the list of property owners and their addresses would be available.

Your other questions involved the capacity of a property owners association to hold meetings in the town hall, what rights they have and whether there are guidelines for forming such an organization.

In all honesty, those questions fall outside the expertise of the Committee on Open Government, which is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. However, I do not believe that there are any specific guidelines concerning the formation of such organizations, unless they seek to incorporate as a not-for-profit corporation, in which case the Not-for-Profit Corporation Law would apply.

Regarding the use of the Town Hall, although I am unaware of any provision that deals directly with the issue, I point out that §64 of the Town Law deals with the "General powers of Town Boards" and that subdivision (23) of §64

states that a town board "Shall have and exercise all the powers conferred upon the town and such additional powers as shall necessarily be implied therefrom." A determination concerning the use of the Town Hall would apparently rest with the Town Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3800

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

July 12, 1985

Mr. Robert J.C. Lennox
[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. Lennox:

I have received your letter of July 2 and the materials attached to it, which reached this office today.

According to your letter, you believe that the New York City Police Department has failed to comply with the Freedom of Information Law by "holding back" information that you requested. The request and appeal concern:

> "assignment records, log records, reports and any other records dealing with/made by officers and other members of the N.Y.P.D. who assisted Lt. Robert Dunn of the Suffolk County Police Department on the night/early morning of 11/13/74 - 11/14/74 in the attempt to exicute (sic) a search warrent (sic)..."

regarding an individual that you identified by name and address. In response to your appeal, Assistant Deputy Commissioner Flack wrote that "Your appeal does not provide enough information to retrieve and review any relevant material."

You have asked for my assistance in obtaining the information sought. 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 and that §89(3) of the Law states in part that, as a general rule, an agency is not required to create a record in response to a request Therefore, if, for example, the information you seek does not exist or if records concerning the matter were destroyed because the event occurred more than ten years ago, the Department would not be obliged to create or prepare a new record in order to respond to your request.

Second, §89(3) also requires that an applicant must request records "reasonably described". In reviewing the standard that a request "reasonably describe" the records sought, it has been held judicially that the standard is met if the agency, based upon the terms of a request, may locate the records in question [Farbman & Sons v. New York City, 62 NY 2d 75, 83 (1984)].

Under the circumstances, it appears that the response by the Department may have been appropriate, for the information provided in the request might not enable the Department to locate records, if records in fact exist. For instance, since it appears that Suffolk County led the investigation, the degree to which the New York City Police Department may have been involved or assisted is unclear. As such, the nature or extent to which records may have been prepared is also unclear. Although you provided the name and home address of the individual who was the subject of the investigation, the location where the warrant was to be executed is not provided. The result of the investigation is not stated, i.e., whether the individual was arrested, charged or convicted, or by whom.

In short, without additional details, it is possible that the request did not describe the records sought in a manner that permits the Department to locate them.

Lastly, I would like to add that I have contacted the Bureau of Legal Affairs at the Police Department on your behalf in order to try to help you and learn more of the situation. At my request, a "name check" was made to determine whether any person with the name you provided, or a similar name, residing at the address given, was arrested and/or convicted. However, the name check, which was done

by computer, produced no information. Without an arrest report, for example, or other information, I was informed that it would be all but impossible to lcoate records related to the event that you described. Once again, therefore, it appears that the information given in your request was insufficient to enable the Department 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3801

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

July 30, 1985

Mr. and Mrs. Albert Levy
[redacted]

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

Dear Mr. and Mrs. Levy:

I have received your letter of July 11 in which you questioned the authority of the City of Poughkeepsie to withhold certain records from you.

According to your letter and the attachments, you were interested in obtaining access to records maintained by the City pertaining to a building that you now own. Although most of the file was made available to you, two records were withheld. The records were memoranda written between the City Building Inspector and the Corporation Counsel. The records were denied as private communications between an attorney and client and as intra-agency materials under §87(2)(g) of the Freedom of Information Law. Nonetheless, you would like those records to be made available to you.

In this regard, I offer the following comments.

First, as explained to you by Mr. Kaufman in his letter of June 27, communications between an attorney and client, as in this case, between the Corporation Counsel and the City Building Inspector, are confidential under §4503 of the Civil Practice Law and Rules. Thus, such records may be withheld by an agency under §87(2)(a) of the Freedom of Information Law as records specifically exempted from disclosure by state statute.

Second, the memorandum in question may also be withheld as intra-agency materials if they do not consist of factual or statistical data, instructions to staff that affect the public, or final agency policy or determinations. Section 87(2)(g) is intended to permit an agency to withhold pre-decisional material such as opinions, suggestions, advice or recommendations, prepared by an agency employee and directed to another agency employee. This provision applies whether the individuals are from the same agency or from two different agencies.

In sum, based upon your letter and Mr. Kaufman's letter, it appears that the records were withheld from you in accordance with the provisions of the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

cc: Barry Kaufman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3802

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

July 30, 1985

Mr. William H. 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 June 27 in which you requested an advisory opinion.

According to the correspondence attached to your letter, your appeal for access to certain records of the Johnson City Police Department has been denied by Mayor Thomas J. Edwards. Apparently, in 1978, you were the subject of an investigation pertaining to the theft and/or forgery of checks from your insurance account. No formal criminal charges resulted from the investigation. Subsequently, you requested access to the entire file related to the investigation.

Upon your appeal of the records access officer's denial of the request, Mayor Edwards, the Village's Appeals Officer, upheld the denial based upon the following grounds:

1. The request was overbroad and the search for all such information would b an "extremely time consuming process and would impede, seriously, the operation of" the police department.

2. Some of the records include interviews with third party witnesses and disclosure would identify these confidential sources.

3. Disclosure would reveal investigative techniques for establishing the authenticity of forged documents.

4. Disclosure may endanger the life or safety of witnesses or the investigating officers.

You would like to know whether the above grounds for denying the requested records are appropriate under the circumstances.

In this regard, I offer the following comments.

First, with respect to the allegation that your request was overbroad, I note that §89(3) of the Freedom of Information Law requires that the records sought be "reasonably described". The Court of Appeals has stated that records need only be described so that the agency may locate them [see Farbman and Sons v. New York City Health and Hospitals Corporation, 62 NY 2d 75 (1984)]. In my view, your description should enable the Department to locate the records that you seek.

Second, it has been held that the administrative burden of searching for records, whether due to the volume of records requested or their age, does not constitute a basis for denial. Such a reason 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)]. Thus, I believe that a denial of records based upon a shortage of staff to search "dead" files is improper under the Freedom of Information Law.

Third, the requested records were also denied on the grounds that disclosure would reveal confidential sources related to a criminal investigation (see §87(2)(e)(iii) of the Freedom of Information Law). The Appeals Officer wrote that the records include the names of witnesses who were interviewed during the course of the investigation. Moreover, he claimed that the substance of their statements would also identify them so that deletion of their names would not preserve their confidentiality. In my view, §87(2)(e)(iii) permits the Department to withhold or delete those portions of records which would identify confidential sources. However, to the extent that the confidentiality of the witnesses was not maintained or that the records do not identify the confidential sources, those portions of the records should be made available.

Fourth, the Appeals Officer wrote that the records consist of investigative techniques for establishing the authenticity of documents. Section 87(2)(e)(iv) allows an agency to withhold records, or portions thereof, which reveal non-routine criminal investigative techniques or procedures. Thus, the Department may, in my opinion, withhold only those portions of the records which would reveal non-routine procedures for analyzing handwriting.

Fifth, the records were denied to you on the grounds that, if revealed, they would endanger the life or safety of some person (see §87(2)(f) of the Freedom of Information Law). The Appeals Officer explained that "it is difficult to see why [you seek] this information except to determine who gave statements against [you] and the names of investigating officers. Revealing this information may well create a situation wherein they might be harassed and endangered." In my view, an insufficient basis exists for asserting §87(2)(f) as a ground for denial, especially if the identities of confidential sources are withheld.

In sum, it appears that portions of the Department's files may properly be withheld from you to the extent that they identify confidential sources or reveal non-routine investigative procedures. In my opinion, those portions of the file may be deleted and the remainder of the file 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

cc: Mayor Thomas J. Edwards

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3803

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

August 1, 1985

[redacted]
Box 618
Auburn, New York 13024

The staff of the Committee on 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 letters of July 10 and July 28 in which you requested assistance in gaining access to your mental health records.

According to your letter, you have requested access to your mental health records from the Office of Mental Health, Bureau of Forensic Services. Some of the information contained in your records was made available to you. The text of the records, however, was withheld and, in response to a question concerning your purpose for seeking access, you were informed that nothing in the records would address that matter. In addition, you are seeking copies of your daily medication dosage form from the Monroe County Jail.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides that all records of an agency are available unless they fall within one or more of the grounds for withholding listed in §87(2)(a) through (i) of the Law. Section 87 (2)(a) provides that an agency may deny access to records specifically exempted from disclosure by state or federal statute. Relevant to mental health records is §33.13 of the Mental Hygiene Law. That provision states that clinical records of the department's patients are confidential and may be released only under certain circumstances. Nothing in §33.13 grants a patient rights of access to records that concern himself.

I have been informed, however, that the Office of Mental Health has adopted departmental policy concerning access to case records by patients and former patients. As you are aware, the Office permits a physician to disclose records to a patient if, in the physician's judgment, the records would not be harmful to the patient or to other individuals. In other words, disclosure of records to a patient is in the discretion of the physician.

Second, you asked whether you are an "inmate or a patient". Although I am not fully aware of your situation, apparently, you are both an inmate and a patient. You are incarcerated at Auburn Correctional Facility and you are being treated through a satellite unit of the Office of Mental Health. Therefore, with respect to your mental health records, their availability is controlled by the Mental Hygiene Law as discussed above.

Finally, you requested copies of your daily medication dosage form from the Monroe County Jail. You wrote that your request was denied by the County Executive who stated that the information does not constitute a record under the Freedom of Information Law and need not be disclosed under §17 of the Public Health Law. In my view, the medication form is a record as defined under the Freedom of Information Law, since it is (or was) maintained by the County. Moreover, it appears that the form would contain only factual information, i.e., the name of the medication and dosage that was prescribed for you. If any evaluative or diagnostic information is included on the form, I believe that it may be deleted, but the remaining factual information 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm
cc: Barbara Heyne, Office of Mental Health,
Bureau of Forensic Services
Lucien A. Morin, Monroe County Executive

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3804

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

[redacted]

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:

I have received your letter of July 29 in which you referred to an earlier letter to which I failed to respond. Please accept my apologies.

Your inquiry once again concerns a request for certain complaints sent to the Commission on Cable Television. In your letter of May 6, you questioned an opinion sent to you on April 30 in which I suggested that the substance of the records sought could be made available by the Commission in conjunction with what I characterized as a "compromise... consistent with the Freedom of Information Law." In that opinion, it was suggested that the substance of complaints submitted to the Commission could be made available , but that those portions of the records identifying complainants could be deleted on the ground that disclosure would result in an "unwarranted invasion of personal privacy". It is your view that the complaints should be released in their entirety.

Without repeating the detailed comments sent to you on April 30, I believe that those aspects of complaints that identify complainants could likely be withheld pursuant to the provisions of the Freedom of Information Law, while the remainder, the substance of the complaints should be made available. Further, as indicated in that letter, having contacted the Commission on your behalf, the Commission would be willing to disclose the complaints after deleting identi-

fying details. Stated differently, I do not feel that the "compromise" suggested should be construed as an effort by this office or the Commission to evade "the rules of open government." On the contrary, the compromise was intended to ensure compliance with the Freedom of Information Law while concurrently protecting personal privacy in accordance with the Law.

If you are dissatisfied with the response by an agency to a request for records, you have the right to appeal a denial of a request. Specifically, §89(4)(a) of the Freedom of Information Law states in relevant part that:

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

cc: William F. Huff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3805

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

August 2, 1985

Mr. Phil Sloan
Attorney at Law
[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. Sloan:

I have received your inquiry of July 15 in which you requested an advisory opinion under the Freedom of Information Law.

Your question appears on a letter sent to the Director of the "NYS Psychiatric Institute" in which you sought information concerning the role of the Institute "in the restructuring of the psychiatric benefits for New York State employees". You wrote that "Institute researchers and staff were consulted in this matter, and you requested "the names of all such researchers and staff and access to any documents which are in the possession of the Institute and which are in any way related to this matter."

You have asked for my opinion concerning the "merit" of your request.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to records of an "agency", a term 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."

Based upon the language quoted above, if the Institute is not a governmental entity, I do not believe that it would be an "agency". If it is not an agency, rights granted by the Freedom of Information Law would not be applicable.

Second, if the Institute is an agency, I point out with respect to the initial aspect of your request that the Freedom of Information Law pertains to existing records. For instance, if the Institute does not maintain a record that specifically identifies researchers and staff involved in a particular project, the Freedom of Information Law would not require that such a record be prepared in response to a request. Stated differently, §89(3) of the Law states in part that, as a general rule, an agency is not obligated to create a record on behalf of an applicant.

With regard to the remainder of the request, §89(3) also states that an applicant must "reasonably describe" the records sought. Without knowledge of the nature of the records maintained by the Institute or the matter to which the request relates, I could not conjecture as to the sufficiency of the terms of your request.

Lastly, it is reiterated that the Freedom of Information Law pertains to records of an "agency", and that rights accorded by the Law do not apply if the Institute is not 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

Robert J. Freeman
Executive Director

RJF:ew

cc: Herbert Pardes, M.D.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3806

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2515, 2791

August 5, 1985

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 most recent letter. Please accept my apologies for the delay in response, which was due to my absence while on vacation.

First, as you requested, enclosed at no charge are copies of all appeals sent to this office by the Town of Southhold within the past two years.

Second, you asked that I inform you, the Town Board and the Town Attorney that a "public hearing is not a requirement of the appeals process" under the Freedom of Information Law.

I agree that no public hearing is required when a denial of access to records is appealed in accordance with §89(4)(a) of the Freedom of Information Law. The cited provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial of 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 in explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In short, the statutory language makes no reference to a public hearing, and it is reiterated that none, in my view, is required.

Copies of this letter will be forwarded to the Town Board and the 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

Encs.

cc: Town Board
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3807

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

August 5, 1985

Mr. George Arce
74-A-2003
Box 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. Arce:

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

According to your letter and the correspondence attached to it, you submitted separate requests to the offices of district attorneys for records under the Freedom of Information Law. One request involved a so-called "master index"; the other concerned records prepared in conjunction with a complaint that you intiated, such as investigation reports submitted by the State Police and copies of interviews pertaining to the matter. As of the date of your letter to this office, neither office responded to the requests.

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

First, I believe that the office of a district attorney is an "agency" required to comply with the Freedom of Information Law. Section 86(3) of the Freedom of Information Law defines "agency" to include a governmental entity performing a governmental function, and several judicial determinations indicate that the records of an office of a district attorney fall within the scope of the Freedom of Information Law [see e.g., Dillon v. Cahn, 79 Misc. 2d 300, 259 NYS 2d 981 (1974); New York Public Interest Research Group, Inc. v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979; and Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., Aug. 11, 1981, aff'd w/no opinion, 85 AD 2d 672, motion for leave to appeal dismissed, 55 NY 2d 1018 (1982)].

Second, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law [21 NYCRR Part 1401 et seq.], prescribe time limits for responses to requests.

Specifically, §89(3) of the Freedom of Information Law and §1401.4 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)].

As such, under the circumstances, it appears that your requests have been constructively denied and that you may appeal on that basis.

Third, I point out that the phrase "master index" appears in the regulations promulgated by the Department of Correctional Services. The usual reference, however, is to a "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."

Based upon the language quoted above, I believe that each agency is required to prepare a list, by category, of the types of records that it maintains.

Fourth, without knowledge of the nature of your complaint, its status, or the records that may have been compiled in relation to it, I could not conjecture as to rights of access. However, it is noted that the Freedom of Information Law permits an agency to withhold records compiled for law enforcement purposes under certain conditions [see attached, Freedom of Information Law, §87(2)(e)], and when disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

Lastly, you asked about the nature of action that might be taken by this office against an agency. The Committee on Open Government has the authority to advise with respect to the Freedom of Information Law. As such, this office does not have the capacity to compel an agency to grant or deny access to records. Nevertheless, copies of this opinion will be sent to the two offices to which you directed your requests.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: District Attorney, Dutchess County
District Attorney, Rockland County

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3808

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

August 6, 1985

Mr. Harold Fernandez
84-A-1537 F-1-8
Great Meadow Correctional Facility
Box 51
Comstock, New York 12821-0051

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

Dear Mr. Fernandez:

I have received your letter of July 22 in which you sought assistance regarding your request for certain records of the New York City Police Department.

You wrote that your request was denied by the Assistant Commissioner of Legal Matters on June 12. Our office has received a copy of that letter, which states that your request for records concerning the procedure for a particular fingerprint analysis has been denied. You were informed that since the case file in which you are interested is active, the records are being withheld pursuant to §87(2)(e)(i).

In this regard, I offer the following comments.

First, §87(2)(e)(i) of the Freedom of Information Law permits an agency, such as the New York City Police Department, to withhold records compiled for law enforcement purposes which, if disclosed, would interfere with law enforcement investigations or judicial proceedings. Thus, to the extent that the requested records would result in such interference, they may properly be withheld under the Freedom of Information Law. On the other hand, portions of the records may contain information which would not interfere with the investigation or proceedings. For example, the method for comparing fingerprints may be con-

sidered a routine investigative procedure, which, even if disclosed while a case is open, would not interfere with investigations or judicial proceedings. To that extent, I believe such portions of the records should likely be made available to you, if no other ground for denial can be asserted.

Second, with respect to appealing the denial, §89 (4)(a) permits an individual to appeal within thirty days of the denial. If your appeal is rejected as untimely, I suggest that you file another request with Mr. William Flack and proceed from there within the statutory time limitations. Enclosed is "Your Right To Know", which briefly describes the procedures to follow when requesting records under the Freedom of Information Law.

In addition, I have enclosed, at your request, a copy of the Committee's 1984 Report to the Governor and the Legislature. For your information, I have also included a Suffolk County decision which concerns the availability of fingerprinting 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

Encs.

cc: William Flack, Assistant Commissioner of Legal Matters

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3809

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

August 6, 1985

[redacted]
P.O. Box 618
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 [redacted]:

I have received your letter of July 17. Please accept my apologies for the delay in response.

You wrote that you have experienced difficulty in obtaining your "mental hygiene record" from the Central Islip State Hospital.

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

First, although the Freedom of Information Law provides significant rights of access to records, the initial ground for denial in the Law pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute that exempts records from disclosure is §33.13 of the Mental Hygiene Law. In brief, that statute requires that clinical records concerning patients kept by facilities of the Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities must be kept confidential, unless there is an exception to the presumption of confidentiality. Further, I do not believe that the subject of a patient record has a right to obtain such a record under the Mental Hygiene Law. Nevertheless, §33.13(c)(1) states in part that patient records can be released "pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality..."

Second, there are other exceptions permitting disclosure listed in §33.13 that may be applicable to your situation. As such, it is suggested that you seek the services of an attorney, such as a representative of Prisoners' Legal Services.

In sum, in my view, you do not have a right to directly obtain the records that you are seeking. It is reiterated that the services of an attorney may be beneficial to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1190
FOIL-AO-3810

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

August 6, 1985

Ms. Eddee Kolos
c/o SASU
One Columbia Place
Albany, NY 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, except as otherwise indicated.

Dear Ms. Kolos:

I have received your letter of July 15, which you sent to this office on behalf of students at the State University of New York, College at Purchase.

According to your letter, the Purchase College Foundation Board of Trustees has repeatedly denied access to its meeting and records, claiming that, as a "private foundation", it is not subject to open government laws. It is your view that the Foundation is not a separate entity, since members of its Board include various administrators of the College, such as the College President, Vice Presidents, and an aide to the President. Further, based upon a review of the "Absolute Charter of the Purchase College Foundation", which was granted in 1969, and a description of the Goals & Purposes of the College Foundation, both of which are attached to your letter, it is your view that there is no justification that can be offered by the Board to remove it from the requirements of the Freedom of Information or Open Meetings Laws.

You have asked for an advisory opinion relative to the status of the Purchase College Foundation and its Board of Trustees under those statutes.

The Absolute Charter of the Foundation indicates that the Foundation is a not-for-profit educational corporation formed for educational purposes. The Charter describes those purposes in subdivision 2 as follows:

> "a. The promotion of literature, history, the visual and performing arts, science and other departments of knowledge or of education at the State University of New York College at Purchase, a higher eudcational institution organized and existing under the laws of the State of New York, and located in Purchase, New York; and
>
> b. The solicitation, receiving and holding of moneys and property for the purposes herein set forth, including but not limited to providing library aid, classroom, laboratory and other equipment: scholarships, fellowships and professorships and and other financial aid to students and faculty; student and/or faculty activities; cultural and scientific studies, programs and publications; and alumni activities; all in such a manner as best carries out these purposes."

Further, subdivision 6 states that "The Commissioner of Education is designated as the representative of the corporation upon whom process in any action or proceeding against it may be served." Additionally, in the statement of Goals & Purposes attached to your letter, the objectives of the Foundation include:

> "(a) Plan appropriate civic, educational, and benevolent activities and facilitate implementation whenever such activities shall be of benefit to the College;
>
> (b) Enlarge the educational scope of the College through support of teaching, research, school and community activities;
>
> (c) Improve student opportunities for both learning and recreation by providing for concerts, educational projects, lectures, study and work projects;

> (d) Provide financial assistance for worthy students, faculty, and staff who require such aid;
>
> (e) Acquire financial support for construction of buildings or other permanent improvements, for the purchase of books and equipment, for programs of community-related activity, or for other objects which will contribute to the educational facilities and opportunities affored by the College."

That statement also indicates that, by achieving those objectives, the Foundation will provide for:

> "(a) A citizen structure which attracts and enlists the interest and efforts of a widespread group, extending the opportunity for private participation in advancing higher education..."

Based upon the foregoing, 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 the term to include:

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

From my perspective, while the Foundation might perform a governmental function for an agency, the State University of New York, it is questionable whether it is a governmental entity.

However, in a somewhat similar situation in which the Court of Appeals considered the status of a volunteer fire company, also a not-for-profit corporation, it was found that such an entity is an "agency" subject to the Freedom of Information Law. In so holding, the Court found that:

> "[W]e begin by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for the performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and 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'...For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, at 579 (1980)].

If the relationship between the State University of New York and the Foundation in question is similar to that of a volunteer fire company and a municipality, it would appear that the 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 the materials attached to your letter indicate that there is a strong nexus between the Foundation and the State University College at Purchase. In short, it appears that the Foundation carries out its duties for the benefit and on behalf of the College. Its statement of purposes, goals and objectives are, in my view parallel to those of the College.

Second, I attempted without success to locate the Foundation's incorporation papers at the Department of State. In order to attempt to learn the official name of the Foundation, I contacted the Office of the President of the College. The first person with whom I spoke stated that the Foundation is "part of the college". To obtain additional information, I spoke to Jean Heyl, who, according to your letter serves as aide to the President of the College and as Secretary to the Board of Trustees of the Foundation.

It appears that records pertaining to the Foundation and its work are in possession of officials at the College. 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 State University officials at the College at Purchase would in my view constitute a "record" subject to rights of access.

In the decision of the Court of Appeals cited earlier, the Court also discussed the term "record" and stated that:

> "[T]he statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons. The present case provides its own illustration. If we were to assume that a lottery and fire fighting were generically separate and distinct activities, at what point, if at all, do we divorce the impact of the fact that the lottery is sponsored by the fire department 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, through seemingly an extracurricular event, ran afoul of our penal law?" [id. at 581].

Under the circumstances, the situation of the College at Purchase Foundation appears to be somewhat analogous to that described by the Court. Consequently, it is reiterated that records maintained by State University of New York officials concerning the Foundation are in my opinion subject to the Freedom of Information Law, for they are apparently in physical possession of the officials of the College.

With respect to the Open Meetings Law, the issue in my view, is whether the Board of Trustees of the Foundation is a "public body". The term "public body" is defined in §102(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."

From my perspective, it is likely, based upon the materials attached to your letter, that each of the conditions described in the definition of "public body" is met by the Foundation's Board of Trustees.

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

Second, I believe that the Board conducts public business, for the purposes stated in the Charter of the Foundation include the promotion of education at the State University College at Purchase, as well as providing library aid, classroom and library equipment, scholarships, fellowships and professorships, cultural and scientific studies and various other purposes that inure to the benefit of the College. To reiterate some of the objectives, they include enlarging "the educational scope of the College through the support of teaching, research, school and community activities." In short, each of those activities in my opinion is reflective of "public business".

Third, as a not-for-profit corporation, the Board of Trustees can carry out its business only by means of a quorum pursuant to the Not-for-Profit Corporation Law, §608. It is also possible that quorum requirements imposed by §41 of the General Construction Law would be applicable.

Fourth, the Absolute Charter and the statement of Goals & Purposes of the Foundation indicate that the Foundation performs a governmental function for an agency of the State, in this instance, the State University College at Purchase.

If my assumptions and contentions are accurate, the Board of Trustees is a public body required to comply with the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jean Heyl, Aide to the President and
Secretary to the Board, Purchase College
Foundation

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1192
FOIL-AO-3811

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

August 6, 1985

Ms. Ronnie Honigsbaum
[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. Honigsbaum:

I have received your letter of July 18 concerning the status of the board of directors of a cooperative under the "Sunshine" Law.

Specifically, you have asked whether minutes of board meetings and decisions made during executive sessions must be open to the shareholders of the cooperative. In this regard, I would like to offer the following comments.

First, it is emphasized that the statutes that fall within the scope of the so-called "Sunshine Laws" are applicable to government. For instance, the Open Meetings Law is applicable to meetings of a "public body", such as a city council, a town or school board, a village board of trustees, or a zoning board of appeals. The Open Meetings Law would not be applicable to meetings of the board of directors of a private corporation, such as that which is the subject of your inquiry.

Similarly, the Freedom of Information Law pertains to records maintained by entities of government in New York. Consequently, the Freedom of Information Law is not applicable to records maintained by a private corporation.

Second, it is suggested that you obtain and review the by-laws of the corporation or that you consult with an attorney with respect to other relevant provisions of law, such as the Business Corporation Law.

To provide you with additional information regarding the scope of the Sunshine Laws, enclosed are copies of the Freedom of Information and Open Meetings Laws, as well as an explanatory pamphlet that pertains to both.

I hope that I 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-3812

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

August 12, 1985

Mr. Robert W. Meriam
[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. Meriam:

I have received your letter of July 19. Please accept my apologies for the delay in response.

According to your letter and the materials attached to it, you have unsuccessfully attempted to gain access to two inspection reports of the Underwriters Laboratories. The inspections were apparently requested by the Village of Freeport and its Building Department. The Village Clerk wrote that the reports are "not in Village file" and suggested that you request copies from the New York Board of Fire Underwriters in New York City. It is your belief that the inspection resulted in a finding that there may be "dangerous conditions".

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

First, the Freedom of Information Law is generally applicable to records of an "agency", which is defined in §86(3) of the Law to include governmental entities. The Village of Freeport, for example, is clearly an "agency" subject to the Freedom of Information Law. If Underwriters Laboratories or the Board of Underwriters are not governmental entities, but rather private firms, the Freedom of Information Law would not be applicable to their records.

Second, the Freedom of Information Law pertains to all records of an agency. It is noted 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, examination, 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 Village of Freeport has possession of the reports in which you are interested, those reports would in my view constitute "records" that fall within the scope of rights of access granted by the Law. On the other hand, if the Village does not maintain the reports that you are seeking, it appears that the Freedom of Information Law would not apply.

Third, assuming that the Village possesses the records in question, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law.

Lastly, if the Village does not maintain the records sought and the Freedom of Information Law is not applicable, it is suggested that you might contact the State Insurance Department, for it may have some responsibility relative to issues with which you are concerned. The Department can be reached at (212) 488-5642 or 1-800-342-3736.

I hope that 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: Thomas Di Vincenzo, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3813

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

August 12, 1985

Ms. Virginia R. Adle
[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. Adle:

I have received your letter of July 19 concerning the use of the Freedom of Information Law. Please accept my apologies for the delay in response.

According to your letter, some three years ago, you sought to inspect school tax assessment records maintained by the local school district. While you were reviewing the records, a confrontation developed for no apparent reason with the superintendent. At this time, in order to avoid any similar dispute, you have asked how you may view school tax records and whether you are entitled to seek records of the Board of Assessment concerning decisions relative to applications before that board.

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

First, 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, the governing body of the school district, the school board, is required by §87(1) to adopt its own procedural rules and regulations consistent with the Law and the regulations adopted by the Committee.

I point out that §1401.4 of the Committee's regulations indicates that records should be available for inspection and copying during regular business hours. Further, §1401.2 requires that a "records access officer" designated by the school board be responsible for coordinating an agency's responses to requests for records made under the Freedom of Information Law. In view of the foregoing, it is difficult to understand why the superintendent reacted as he did, for you had the right to inspect accessible records maintained by the school district during business hours.

Second, you sought to indicate that the reason for your request has nothing to do with any feelings that you might have in relation to your neighbors. In this regard, it is emphasized that your identity or reason for requesting records are irrelevant. It has been held that if records are accessible under the Freedom of Information Law, they should be made equally available "to any person, without regard to status or interest" [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

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 (i) of the Law.

With respect to the records in which you are interested, I do not believe that any ground for denial listed in the Freedom of Information Law could appropriately be asserted to withhold the records. Further, long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969)]. Even though an assessment roll might identify the owners of real property, indicate the assessed value of the property and specify whether or not real property taxes have been paid, those records have long been accessible for public inspection and review. Consequently, I believe that the records in which you are interested that are maintained by the school district or by a town or village should be available to you.

Lastly, although an agency may accept an oral request, it may require that a request be made in writing. In such a case, a written request should "reasonably describe" the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3814

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

August 13, 1985

Mr. Tom Rossi
[redacted]

Dear Mr. Rossi:

I have received your letter of July 24, which pertains to an opinion sent to you on July 11.

In brief, your inquiry of last month dealt with your unsuccessful efforts in attempting to obtain records regarding the "times and locations utilized by film crews" involved in the production of television programs or movies in New York City. In your recent letter, you stated that you had received no answer to your requests and asked whether "somebody can give a simple yes or no answer to [you]".

First, having reviewed the opinion sent to you, I believe that my view was clearly expressed, that based upon the information that you provided, the information should be made available.

Second, the Committee on Open Government is authorized to provide advice with respect to the Freedom of Information Law. This office does not have the capacity to compel an agency to grant or deny access to records.

Third, as indicated in the earlier opinion, if an agency denies access to records or fails to respond within the requisite time limits, thereby resulting in a constructive denial of access, an applicant may appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

With regard to a denial by a unit of the Police Department, I believe that the name and address of the Department's appeals officer are as follows:

> William B. Flack
> Assistant Commissioner
> Legal Matters
> NYC Police Department
> One Police Plaza
> New York, NY 10038

I am unaware of the identity of the person to whom an appeal may be sent following a denial by the Mayor's Office of Film Broadcasting. To obtain that information, it is suggested that you contact the Mayor's office or the Office of Corporation Counsel.

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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3815

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

August 13, 1985

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 July 26 in which you raised a question under the Freedom of Information Law.

Specifically, you wrote that you "wish to learn if a certain police officer had been a student under a certain instructor at John Jay College".

In this regard, I offer the following comments.

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

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

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

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

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

In the context of your inquiry, it is doubtful in my view that a list of courses taken by a particular individual would fall within the scope of directory information. If that is so, even if the college has adopted a policy regarding the disclosure of directory information, the information that you are seeking would likely fall outside its scope. Further, unless consent to disclose is granted by the subject of the record, it would appear that the information sought would be required to be kept confidential.

The only additional suggestion that I can make is that, in some instances, colleges prepare and distribute catalogues of courses and the instructors who teach those courses.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3816

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

August 13, 1985

Mr. Carl Richter
[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. Richter and Mr. Aston:

I have received your recent letter in which you requested advice concerning your rights under the Freedom of Information Law.

According to your letter, you have attempted without success to obtain or copy your "Personal Employment Records" from the Buffalo Municipal Housing Authority. You wrote that you are also interested in learning "how much money [the Authority] spent fighting [you] in the courts..."

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

First, the Freedom of Information Law is applicable to records of an "agency", a term defined in §86(3) of the Law to include:

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

From my perspective, the Buffalo Municipal Housing Authority is an "agency", for it is a governmental entity performing a governmental function for the City of Buffalo [see also Westchester Rockland Newspapers v. White Plains Housing Authority, 101 AD 2d 840 (1984)]. As such, I believe that the Authority is required to comply with and give effect to the Freedom of Information Law.

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

Third, in terms of rights, there appear to be two grounds for denial that may be relevant to personnel records about you. Under the circumstances, perhaps the most relevant ground for denial is §87(2)(g), which provides that an agency may withhold records that:

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

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

Under the circumstances, it would appear that most records contained within a personnel file would consist of "intra-agency" materials, i.e. records transmitted between or among officials within the Authority. However, to the extent that they contain factual information, such as test scores, attendance records, determinations about you, and similar information, I believe that they would be available. On the other hand, to the extent that the materials are reflective of advice, recommendation, suggestion or impression, for instance, I believe that they would be deniable.

Further, since the Law enables an agency to withhold "records or portions thereof" falling within one or more of the grounds for denial, an agency in receipt of a request is obliged to review the records sought in their entirety to determine the extent to which the grounds for denial may be applicable, if at all.

The only other ground for denial which in my view might be applicable is §87(2)(b), which provides that an agency may withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy". Although the subject of personnel records could not invade his or her own privacy, it is possible that records contained within a personnel file may identify others. For example, if a personnel file contains recommendations or letters of reference, it is possible that disclosure of the identities of those who prepared such documentation would result in an unwarranted invasion of personal privacy. If that is the case, identifying details might be deleted from such records in order to protect privacy; if the deletion of identifying details would not protect the identities of those individuals, the records might be withheld in their entirety.

Further, there are often provisions within collective bargaining agreements that permit public employees to inspect and copy virtually the entire contents of their personnel files. In such cases, the collective bargaining agreements might provide rights in excess of those granted by the Freedom of Information Law. It is suggested that any existing collective bargaining agreements be reviewed to determine whether those agreements provide rights of access in addition to those granted under the Freedom of Information Law.

With respect to records indicating legal expenses incurred by the Authority to "fight" you, I point out that, while the Authority may engage in an attorney-client relationship with its attorney, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. If, however, portions of the bills in question contain information that is confidential under the attorney-client relationship, those portions could in my view be deleted under §87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records or portions

thereof that are "specifically exempted from disclosure by state or federal statute" (see Civil Practice Law and Rules, §4503). Therefore, while some identifying details in the bills might justifiably be withheld, numbers indicating the amounts expended are in my view accessible under the Freedom of Information Law.

It is also noted that in a decision rendered under the Freedom of Information Law, it was held that checks indicating payment by a village to its attorney were available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., August 20, 1981].

Fourth, when seeking records, a written request should be directed to the "records access officer" designated by the Board of the Authority in which the records sought are "reasonably described". Although you need not identify particular documents to "reasonably describe" the records in which you are interested, it is suggested that you provide as much detail as possible in order to enable Authority officials to locate the records sought.

In order to provide you with additional guidance, enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law and 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.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO - 27
FOIL-AO - 3817

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

August 14, 1985

Ms. Lois Weinstein
Deputy County Attorney
County of Nassau
Office of the County Attorney
Nassau County Executive Building
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. Weinstein:

I have received your letter of July 26 and appreciate your interest in compliance with the Freedom of Information Law.

According to your letter, "An attorney has requested that the Nassau Sheriff's Department permit him to inspect the records of executions and levies against personal property on file in the Sheriff's office pursuant to Public Officers law 84", the Freedom of Information Law. You also wrote that the "Sheriff believes that Public Officers Law 89 (2-a) precludes the disclosure of these records due to the fact that they may contain items of personal nature that may result in economic or personal hardship to the subjects of these records" and contends that the records "may include information not found in the County Clerk's office where the judgment was filed." The sheriff also believes that he may rely upon Application of Nicholas [117 Misc. 2d 630, 458 NYS 2d 858 (1983)].

You have requested an advisory opinion on the matter and, in this regard, I would like to offer the following comments.

First, §89(2-a) of the Freedom of Information Law states 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."

Section 96 is part of Article 6-A of the Public Officers Law, the Personal Privacy Protection Law. While the Freedom of Information Law is applicable to records of any state or municipal governmental entity [see definition of "agency", §86(3)], the Personal Privacy Protection Law specifically excludes from its scope "any unit of local government" [see definition of "agency", §92(1)]. Section 96 limits the capacity of a state agency to disclose personal information to those circumstances listed in paragraphs (a) through (n) of that section. Since the County or office of the County Sheriff would not be an "agency" for the purposes of the Personal Privacy Protection Law or §96, §89 (2-a) of the Freedom of Information Law would not in my view be applicable. If it is not applicable, §89(2-a) would not serve to prohibit or preclude the disclosure of the records in question.

Stated differently, with the enactment of the Personal Privacy Protection Law, a state agency is precluded from disclosing personal information when such a disclosure would constitute an unwarranted invasion of personal privacy, unless the disclosure is made pursuant to one or more of the conditions set forth in §96(1). With respect to records of a municipal agency, which is not subject to the Personal Privacy Protection Law, the Freedom of Information Law applies. The Freedom of Information Law, as a general matter, is permissive; while an agency may withhold records in accordance with the grounds for denial listed in §87(2), it is not obliged to do so, unless a different statute confers confidentiality as envisioned by §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute". As such, I believe that the Sheriff may withhold records when disclosure would constitute an unwarranted invasion of personal privacy. However, there is no obligation to do so, which may be the case with respect to records maintained by a state agency subject to the Personal Privacy Protection Law.

Second, in view of the foregoing, the issue in my opinion involves the extent, if any, to which disclosure would result in an unwarranted invasion of personal privacy pursuant to the Freedom of Information Law.

From my perspective, no clear response can be given without knowledge of additional facts. In Application of Nicholas, supra, it appears that a significant amount of information considered by the court was of a personal nature and in excess of the information maintained by the court where judgment was docketed. Further, there is no information in your letter that indicates the purpose for which the request may have been made.

At this juncture, two points might be added. It is noted initially that §5230 of the Civil Practice Law and Rules describes the form of an execution, the issuance of an execution and a record of executions to be kept by the Sheriff. Since various court records, including dockets kept by a clerk of a court are available to "any person" (see Judiciary Law, §255 and 255-b), it would appear that information maintained by the Sheriff that is the same as that maintained by a court should be available. Other types of personal information, such as that described in the Sheriff's affidavit in Application of Nicholas (458 NYS 2d 858, at 859), might be denied as an unwarranted invasion of personal privacy.

Further, although the purpose for which a request is made is generally irrelevant to rights of access [see e.g., Farbman & Sons v. New York City, 62 NY 2d 75 (1984); Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165], an exception to that rule arises in §89(2)(b)(iii), which states that an unwarranted invasion of personal privacy includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

The Court in Application of Nicholas alluded to petitioner's failure to divulge his purpose in seeking the records, and more recently, the Court of Appeals upheld a denial of the names and addresses of victims of accidents that were sought for purposes of direct mail solicitation [see Scott, Sardano & Pomeranz v. City of Syracuse, __NY 2d__, NYLJ, June 4, 1985]. It is possible, however, that the purpose of the request may not be relevant if the information sought would otherwise be available from court records accessible to the public.

In short, without greater knowledge of the specific nature of the records sought or maintained by the Sheriff, specific advice cannot be provided. However, perhaps the considerations described above will aid you in resolving the issue.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3818

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

August 14, 1985

Mr. Robin Williams
83-A-7055
Fishkill Correctional Facility
Box 307
Beacon, NY 12508

Dear Mr. Williams:

I have received your letter of August 12, as well as the correspondence attached to it.

In terms of background, on June 12 you submitted a request to Karl F. Gerteis, records access officer at the Fishkill Correctional Facility. Mr. Gerteis responded on June 18 by granting access to some of the records sought, while denying access to others. As such, you appealed to Judith LaPook, Deputy Commissioner and Counsel to the Department of Correctional Services. On July 8, Ms. LaPook rendered a determination upholding the response of Mr. Gerteis. In the letter sent to this office, you seek to "appeal" the denial by Mr. Gerteis and Ms. LaPook.

Please be advised that the review of Mr. Gerteis' denial by Ms. LaPook constituted an appeal made pursuant to §89(4)(a). Further, the Committee on Open Government does not have the authority to render a determination on appeal, nor does it have the capacity to compel an agency to grant or deny access.

Under the circumstances, since the Department of Correctional Services has rendered a final determination following an appeal, I believe that you have exhausted your administrative remedies. The only remaining action that you can take would involve the initiation of a judicial proceeding pursuant to Article 78 of the Civil Practice Law and Rules as described in §89(4)(b) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3819

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

August 15, 1985

Mr. Barthemia W. Williams
#85-A-2895
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. Williams:

I have received your letter of August 9. As you requested, enclosed is a copy of the Freedom of Information Law, as well as "Your Right to Know", which describes the Law.

You also raised a question concerning access to medical 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 agencies of state and local government in New York. As such, it does not apply to records of a private physician or hospital, for example [see Freedom of Information Law, definition of "agency", §86(3)].

Second, assuming that you are interested in medical records about yourself, to the extent that the records sought are prepared by and in the possession of public hosptials or the Department of Correctional Services, they are likely available under the Freedom of Information Law in part. It is also likely, however, that portions of those records may be withheld. For instance, medical records consisting of factual information, such as laboratory test results and similar materials are in my view available to the subject of the record; however, those portions consisting of opinion, advice, or recommendations need not in my view be made available under the Freedom of Information Law [see Freedom of Information Law, §87(2)(g)].

Third, a different provision of law generally applicable to medical records is §17 of the Public Health Law. In brief, that statute does not require that medical records be made directly available to a patient. Nevertheless, medical records of a hospital or physician are available upon request of the patient to a physician designated by the patient. Therefore, if you designate the physician of your choice to request medical records pertaining to you from a hospital, I believe that the hospital would release them to that physician.

Lastly, if you are interested in obtaining medical records about a person other than yourself, I believe that such records could be denied, even if the Freedom of Information Law is applicable, on the ground that disclosure would result in an "unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b), 89(2)(b)(ii)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3820

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

August 16, 1985

Mr. Phillip 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 July 29 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you are a provisional employee of the New York City Department of Sanitation, and on June 8, you were among 123 people required to take a written examination for permanent employment in your current position. You added that, at the time of the exam, you were told that answers would be available to you in approximately two weeks. However, the answers were not published and officials of the union were apparently told that "the City would no longer publish the answers because they wanted no protests against the questions." Your inquiry involves whether the answers are available under the Freedom of Information Law.

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

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

Second, relevant to the issue is section 87(2)(h) of the Freedom of Information Law, which permits an agency to withhold records that:

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

Based upon the language quoted above, if an examination question is to be given in the future, I believe that the question and the answer may be denied. Contrarily, if an examination question has been finally administered and will no longer be used, the question and the answer would in my opinion be accessible.

Lastly, when a request is initially denied, an applicant has the right to appeal. Specifically, 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 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 records sought."

Enclosed for your consideration is a copy of "Your Right to Know", which more fully describes the provisions of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3821

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

August 16, 1985

Mr. Joseph D. Mullady
#80-A-1179
Box 51
Comstock, NY 12821

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

Dear Mr. Mullady:

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

According to your letter and the correspondence attached to it, you submitted a request on May 13 for records maintained at the Great Meadow Correctional Facility. In a response dated May 23, some aspects of the records sought were determined to be available, while others were denied. One of the records sought involved a "duplicate tape", the contents of which were found to be available in part. It appears that the accessible portions of the tape recording have not yet been made available. You added that "Because this Department did not comply with [your] request within 30 days..." you cannot challenge a "Superintendent's Proceeding".

In this regard, I offer the following comments.

First, although it appears that certain aspects of a tape recording were determined to be accessible under the Law, the tape has not yet been made available. In my opinion, if that is so, your request has been constructively denied. I would conjecture that your reference to a thirty day period pertains to section 89(4)(a) of the Freedom of Information Law, which provides that a person denied access to records may within thirty days appeal the denial. The cited provision states in relevant part that:

> "any person denied access to a record may within thirty days ap-

> peal 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 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, since more than thirty days have passed following the constructive denial of your request, it is suggested that you resubmit a request. If it is denied due to a failure to respond in a timely manner, an appeal may be directed to Counsel to the Department pursuant to Department regulations.

It is noted that the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for responding to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 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 and 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, the requests is considered "constructively" denied [see regulations, section 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, section 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 section 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, as you requested, I have returned your original correspondence.

I hope that 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: Pedro Quinones, Sr. Correction Counselor

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3822

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

August 16, 1985

Mr. Douglas Blackshear
#81-C-333
Midstate Correctional
Facility
P.O. Box 216
River Road
Marcy, NY 13403-0216

Dear Mr. Blackshear:

I have received your letter of August 14 in which you requested information concerning "the structure, functions and guideline that was handed down by the State Department of Corrections pertaining to the Inmate Liaison Committee".

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 government records generally, such as those in which you are interested, nor does the Committee have the authority to compel an agency to grant or deny access to records.

In short, I cannot provide the information sought because this office does not have the information. Nevertheless, I would like to offer the following comments.

First, as a general matter, a request should be directed to the agency that maintains the records sought. In this instance, it appears athat a request should be submitted to the Department of Correctional Services.

Second, a request should be directed to the "records access officer". According to regulations promulgated by the Department of Correctional Services, a request for records kept at a facility should be directed to the facility superintendent. With respect to records kept by the Department at its Albany offices, the records access officer is the Deputy Commissioner for Administration.

Lastly, it is noted that the Freedom of Information Law pertains to existing records and requires that an agency respond to a request for records. Stated differently, the Freedom of Information Law is not a vehicle under which an agency is required to answer questions or to create a record in response to a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3823

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

August 19, 1985

Mr. Dean C. 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 assistance.

You wrote that on July 11 you submitted a letter of request to the Town Clerk of the Town of Hinsdale. Having received no response, you contacted the Town Clerk on July 19, who told you that the reason for the absence of a response was that "she was waiting for the Highway Superintendent to look up his records". As of the date of your letter to this office, apparently the information sought had not yet been produced.

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

First, having reviewed your request to the Town, a copy of which is attached to your letter, I point out that the Freedom of Information Law pertains to existing records. One aspect of your letter to the Clerk involved a request for an answer to a question regarding the abandonment of any parts of a particular road. If records exist that would contain the information sought, rights granted by the Freedom of Information Law would be applicable. However, if, for example, the Town does not maintain records containing the information sought, it would not be obliged to create or preprepare a new record in order to respond to your request [see Freedom of Information Law, section 89(3)].

Second, with respect to the Clerk's response, it appears that the procedural requirements of the Law might not have been fulfilled. By way of background, section 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, section 87(1) requires that 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 regulations.

One aspect of the Committee's regulations pertains to the designation of a "records access officer". The records access officer has the responsibility of coordinating an agency's response to requests made under the Freedom of Information Law. If the Town Clerk is the designated records access officer, I believe that she would have the duty to respond in accordance with the Law in a timely manner, even though the records sought might be in the physical possession of a different Town officer, such as the Highway Superintendent. It is noted, too, that section 30 of the Town Law indicates that the Town Clerk is the legal custodian of all Town records. Therefore, once again, although the records sought might be in physical possession of the Highway Superintendent, it appears that the records would be within the legal custody of the Clerk.

Third, the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for responding to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 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 business five days is necessary to review or locate the records and determine rights of access. When the receipt of a request is acknowledged within five business days, the agency has ten additional business days to grant or deny access. Further, if no response is given within ten business days of the acknowledgement of the receipt of a request, the request is considered "constructively" denied [see regulations, section 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, section 89(4)(a)].

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business day of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and ay 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 an effort to enhance compliance with the Law, a copy of this opinion will be sent to Ms. Gaylor, 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: Ms. Candice Gaylor

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3824

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

August 19, 1985

Mr. Winston McDonald
84-A-6198
C-3-34
Comstock, NY 12821

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

Dear Mr. McDonald:

I have received your letter of August 6 in which you requested assistance concerning the use of the Freedom of Information Law.

According to your letter, you have sent several requests to two precincts of the New York City Police Department. As yet, however, you received no response to your requests.

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

First, it is suggested that, rather than writing to the precincts directly, you direct a request to the Department's records access officer at 1 Police Plaza, New York, NY 10038. While the officials at the precincts may have prepared the records in which you are interested, the records access officer is generally responsible for answering requests made under the Freedom of Information Law.

Second, section 89(3) of the Freedom of Information Law states in relevant part that a request should "reasonable describe" the records sought. Therefore,when making a request it is suggested that you include as much detail as possible in order to enable Department officials to locate the records sought, such as names, dates, indictment or docket numbers, and similar identifying details.

Third, the Freedom of Information Law and the regulations (21 NYCRR, Part 1401) promulgated by the Committee contain prescribed time limits for response to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 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, section 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, section 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 section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administratiave 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, in the event of a written denial or a constructive denial due to an absence of a timely response, I believe that an appeal may be directed to the Deputy Commissioner for Legal Affairs.

I hope that 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

OML-AO-1196
FOIL-AO-3825

COMMITTEE ON OPEN GOVERNMENT

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

August 19, 1985

Mr. Bruce Gilchrist
[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. Gilchrist:

I have received your letter of August 6 in which you raised questions concerning the Open Meetings Law.

You wrote that "When a Town Board holds 'work sessions' at which no decisions are made, it would appear that no minutes need be taken. Similarly, no minutes need be taken of an 'executive session' in which no decisions are made." The issue that you raised pertains to the situation in which a motion is made during a "work session" to enter into an executive session. Your specific questions are:

> "Does the motion to go into 'executive session', together with how the individual members voted on it, have to be recorded and be available for public inspection?"

and

> "If the answer to the first question is 'yes', where does the vote have to be recorded?"

In this regard, I offer the following comments.

First, it is emphasized that the courts have broadly construed the term "meeting". In a landmark decision rendered in 1978, the Court of Appeals unanimously affirmed a decision of the Appellate Division, Second Department, and held that the term "meeting" encompasses any gathering in which a quorum of a public body convenes to discuss public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be

characterized [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The decision of the Appellate Division made specific reference to so-called "work sessions", "agenda sessions", "conferences", "organizational meetings" and the like during which public business is discussed but in which no binding action is taken.

As such, in my view, the "work sessions" that you described are subject to the Open Meetings Law, and the Board has the same obligation to prepare minutes relative to work sessions as it has with respect to "regular" or "official" meetings.

Second, section 106 of the Open Meetings Law contains what might be considered minimum requirements concerning the contents of minutes. That provision does not require that a verbatim transcript of a discussion held at a meeting be prepared. However, it does require that certain kinds of information be included in minutes.

Section 106(1) pertains to minutes of open meetings and 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."

Based upon the language quoted above, if there are motions, proposals, resolutions and the like introduced or adopted at work sessions, I believe that minutes must be prepared.

Section 106(2) concerns 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..."

In my opinion, the language quoted above indicates that if a public body enters into an executive session but merely engages in a discussion and takes no action, minutes of the executive session need not be prepared. On the other hand, if action is taken during an executive session, minutes must be prepared as described in section 106(2).

Third, as you intimated, section 105(1) requires that a motion be made during an open meeting prior to entry into an executive session. If such a motion is made during a work session, I believe that reference to the motion would have to appear in minutes as required by section 106(1).

Fourth, section 106(3) specifies the times limits within which minutes must be prepared and made available, stating that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Consequently, I believe that minutes of open "work sessions" must be prepared and made available within two weeks of such meetings. If action is taken in an executive session that is held during a work session, minutes must in my view be prepared and mde available in accordance with the Freedom of Information Law within one week of the executive session.

Lastly, although the Open Meetings Law does not specify that minutes include reference to how individual members may have voted on a motion, the Freedom of Information Law contains such a requirement. While the Freedom of Information Law generally pertains to existing records and does not require an agency to create or prepare a record, an exception to the rule involves the votes of members of public bodies. Section 87(3) of the Freedom of Information Law states that:

"Each agency shall maintain:

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

Therefore, when a vote is taken pursuant to a motion to enter into executive session, I believe that minutes must be prepared that include reference to the motion, as well as the manner in which each member cast his or her vote.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3826

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 20, 1985

Mr. Jeffrey Barnes
Inmate Liaison Committee
Mid-State Correctional Facility
Marcy, New York 13403-0216

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

Dear Mr. Barnes:

I have received your letter of August 14 in which you requested information from this office concerning inmate liaison committees. You wrote that you are particularly interested in obtaining a copy of the original and subsequent by-laws of the Inmate Liaison Committee at Attica Correctional Facility.

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 government records generally, such as those in which you are interested, nor does the Committee have the authority to compel an agency to grant or deny access to records.

In short, I cannot provide the information sought because this office does not have the information. Nevertheless, I would like to offer the following comments.

First, as a general matter, a request should be directed to the agency that maintains the records sought. In this instance, it appears that a request should be submitted to the Department of Correctional Services.

Second, a request should be directed to the "records access officer". According to regulations promulgated by the Department of Correctional Services, a request for records kept at a facility should be directed to the facility superintendent. With respect to records kept by the Department at its Albany offices, the records access officer is 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:jm

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 3827

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

August 20, 1985

Mr. Wallace S. Nolen
[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. Nolen:

I have received your letter of July 26 and the materials attached to it, which reached this office on August 12.

You have requested an advisory opinion concerning an alleged "refusal to make copies of micro-fiche" identifying every New York City employee by the New York City Department of General Services. According to your letter, similar information is maintained on microfiche at the Library of the City of New York. However, that list is two years old. Consequently, you requested a copy of the latest microfiche from the Department. In addition, you requested "a printout containing the full first name of each employee as opposed to the first initial of such employee that the current micro-fiche list contains...". It is your contention that a microfiche could be copied at a cost far lower than photocopying some 1,200 to 1,600 pages of a printout containing the same information.

In response to your request, the Assistant General Counsel at the Department of General Services, Ms. Jane Ahearne, offered to prepare photocopies of a printout at the rate of twenty-five cents per page. She also offered to provide a microfiche of the 1983 "civil list", which you rejected since it is not the most current version of the list.

I have contacted Ms. Ahearne on your behalf in order to obtain more information. According to Ms. Ahearne, the latest available microfiche, which is an extra copy, is the 1983 list. That version of the list was offered to you at a cost of $25, which is significantly lower than the fee of $300 - $400 that could be assessed for photocopying a printout version of more current information. Ms. Ahearne noted that the most current microfiche, which is also kept at the City library, includes information added up to December 31, 1984, that the agency maintains only one microfiche containing that information, and that the agency does not have the facilities to prepare a copy of the latest microfiche. Further, the current microfiche is in continual use; therefore, reproduction of the microfiche would necessitate removing it from the agency. In short, it appears that the most current microfiche cannot be duplicated by the agency.

The alternatives to reproducing the microfiche itself involve the preparation of photocopies individually that are contained within the microfiche, or reproducing a printout list of City employees. In my view, the fee for photocopying records stored on microfiche or for photocopying a printout could be twenty-five cents per photocopy, as permitted by section 87(1)(b)(iii) of the Freedom of Information Law. Another possible alternative would involve the production of a new printout generated by computer, rather than photocopying the printout itself, in which case the agency could in my view assess a fee based upon the actual cost of reproduction. Under the circumstances, while the contents of the 1984 microfiche can be photocopied, there appears to be no viable method of reproducing the microfiche itself.

With respect to your request that the microfiche list include reference to employees' first names rather than initials of their first names, I point out that the Freedom of Information Law pertains to existing records. Moreover, 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. As such, I do not believe that the Department is obligated to include full first names in its list.

Lastly, as Ms. Ahearne indicated in her response to your request, if you believe that you have been denied access to records, you have the right to appeal the denial in accordance with section 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:ew

cc: Jane Ahearne, Assistant General Counsel

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3828

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

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GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 20, 1985

Mr. Henry Matthews
76-A-2250
P.O. Box 149
Attica, NY 14011

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

Dear Mr. Matthews:

I have received your letter of August 5 in which you requested assistance in obtaining information from the Department of Correctional Services.

Enclosed with your letter are copies of correspondence which indicates that you have not yet received information that you requested. On May 27, a written request was directed to the Superintendent of the Attica Correctional Facility for a "subject matter list of records..." and a "Chronological Summary Sheet" pertaining to you. Having received no response, you appealed to Counsel to the Department on June 28. In response to that appeal, Acting Counsel, Anthony J. Annucci, wrote that the Attica Correctional Facility had no record of your original request. However, he forwarded your letters to the facility "with direction that they be processed expeditiously as an original Freedom of Information request". In response to Mr. Annucci's determination, on July 19, David Mangus, Senior Correction Counselor, wrote that the request for the subject matter list would be denied on the ground that it is "too broad and too vague". He also wrote that Chronological Summary Sheets would be made available "if specific time periods are given and if the information listed in these Chronological Summary Sheets is not evaluative".

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

First, there appears to be some confusion regarding the phrase "subject matter list". That phrase is commonly used with respect to the record required to be prepared by agencies in conjunction with section 87(3)(c) of the Freedom of Information Law. The cited provision 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."

I note that section 5.13 of the regulations promulgated by the Department of Correctional Services states in subdivision (a) that:

> "Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in his possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office."

In addition, subdivision (c) of section 5.13 states in part that "Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying". I believe that the Department officials often refer to the subject matter list as a master index". Therefore, rather than requesting a subject matter list, it is suggested that you request a "master index" as described in the regulations quoted above.

Second, the remainder of your request involves "Chronological Summary Sheets", which are apparently kept relative to each inmate. While I am unaware of the contents of Chronological Summary Sheets, it is noted that section 89(3) of the Freedom of Information Law states in part that an applicant is required to request records "reasonably described". Stated differently, if a request describes the records sought in sufficient detail to enable agency officials to locate the records, I believe that such a request would reasonably describe the records sought. Once again,

since I am unaware of the nature and contents of the records in question, it is unclear whether your request adequately described the materials sought. However, it is suggested that you resubmit a request indicating particular time periods in which you are interested relative to those records.

Lastly, Mr. Mangus alluded to the possibility of a denial of those records to the extent that they are "evaluative". It appears his comment is based upon section 87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those aspects of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation, or which are "evaluative" in nature, could in my view justifiably be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. David Mangus

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3829

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

August 21, 1985

[redacted]
Box 618
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 [redacted]:

I have received your letter of August 7, 1985.

In your letter, you presented several arguments in support of your position that copies of your mental health records should be made available to you. Unfortunately, the Committee is not authorized, nor does it have the expertise to address those arguments.

However, I would like to clarify what I wrote in my letter to you of August 1. As you will recall, I explained that you are apparently both an inmate incarcerated at Auburn Correctional Facility and a patient being treated through a satellite unit of the Office of Mental Health. Thus, the availability of records produced and maintained by the Department of Correctional Services, including inmate medical records, is governed by the Freedom of Information Law and the Department's regulations. On the other hand, the availability of records produced and maintained by the Office of Mental Health, that is, mental health records, is controlled by the Mental Hygiene Law as explained to you previously.

I regret that I cannot be of further assistance to you. I hope that you are able to obtain the information which you need.

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive Director

CAM:jm

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3830

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

August 22, 1985

Mr. Winston McDonald
84-A-6198, C-3-34
P.O. 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. McDonald:

I have received your latest letter, which is dated August 12, and which again concerns your unsuccessful attempts to obtain records.

According to your letter, you are experiencing difficulty in obtaining records from the New York City Police Department, the Office of the New York City Comptroller and your attorneys.

My previous letter to you pertained to the New York City Police Department, and I will not repeat those comments here.

With respect to your requests directed to the Office of the Comptroller, I have contacted several people at that office on your behalf. However, without knowledge of the substance of your request or the dates of your correspondence, I was unable to locate the person to whom your requests were directed. Nevertheless, I was given the name and address of the person to whom a request should be sent. To ensure that you receive an appropriate response, it is suggested that you resubmit a request to the attention of Chana Schwartz, Office of Counsel, Office of the Comptroller, Room 518, Municipal Building, New York, New York 10007.

It is reemphasized that your request should "reasonably describe" the records sought. Therefore, your request should include as much detail as possible in order to enable agency officials to locate the records sought.

Lastly, information maintained by your attorneys is not likely subject to the Freedom of Information Law. That statute pertains to records maintained by governmental entities in New York. As such, records kept by private attorneys or not-for-profit legal aid groups would in my view fall outside 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

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3831

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 23, 1985

Ms. Janet Rosenblatt
[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. Rosenblatt:

I have received your letter of August 13 in which you requested an advisory opinion under the Freedom of Information Law. Your inquiry concerns rights of access to three types of records maintained by a board of education.

The first category of records involves "visitation reports". You wrote that a visitation report:

> "...is a letter addressed to a school principal from a school superintendent or from an official of the New York State Education Department. Such a letter chronicles a surprise visit by the author to a particular school. The letter goes into the most minute detail as to what conditions were found in the school and in individual classrooms and contains a list of instructions to the principal concerning the improvement of the school's operation. The letter concludes with a statement as to whether the school's operation is satisfactory or unsatisfactory."

The second type of records is a "lesson observation report", which is similar to a visitation report, in that it would concern a surprise visit by a distirct administrator in a classroom of a particular teacher.

The third category of records concerns grievances filed by principals or vice principals and the ensuing decisions. The grievances pertain to possible violations of a collective bargaining agreement.

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

I point out initially that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, it appears that two of the grounds for denial may be relevant to the records in question. The degree to which they would be applicable would be dependent upon the nature and content of particular records.

Perhaps the ground for denial of greatest significance is section 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 policy or determinations must be made available. Concurrently, to the extent that such materials consist of opinion, advice, recommendations and the like, I believe that they could justifiably be withheld.

I believe that each of the three types of records could be characterized as inter-agency or intra-agency materials, for they would be prepared and transmitted between or among officials of one agency, a school district, or perhaps between officials of a state agency, such as the State

Education Department, and those of another agency, a school school district. Based upon your descriptions of a visitation report and a lesson observation report, it would appear that findings relative to conditions in a school or a classroom could likely be characterized as factual information accessible under section 87(2)(g)(i). With respect to visitation reports, if in fact the reports contain instructions that must be carried out, it would appear that those instructions would be accessible pursuant to section 87(2)(g)(ii). The concluding statement in a visitation report might be characterized as a "final agency determination" accessible under section 87(2)(g)(iii). A similar rationale might be reached relative to a conclusion appearing in a lesson report. It is emphasized that my comments are conjectural, for I am not familiar with the specific contents of the reports in question. My conclusions might be different if, for instance, the concluding statement regarding a school or teacher is reflective of an opinion or a recommendation, rather than a "determination".

The remaining ground for denial of potential significance is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". From my perspective, the standard in the Law is flexible and, therefore, is often subject to conflicting interpretations. Further, agency officials must often make subjective judgements concerning whether disclosure of particular records would result in a permissible as opposed to an unwarranted invasion of personal privacy.

I believe, however, that the courts have enunciated two general principles concerning the privacy of a public employee. First, it has been 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. Second, on several occasions, it has been found that if records are relevant to the performance of a public employee's official duties, disclosure would constitute 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; Capital Newspapers v. Burns, 490 NYS 2d 651, AD 3 Dept., 1985]. Conversely, if records are irrelevant to

the performance of one's official duties, disclosure has been found to result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984].

In my opinion, the capacity to withhold based upon a finding that disclosure would result in an unwarranted invasion of personal privacy would be dependent upon the specific contents of records. For instance, if a grievance includes personal information, such as references to a medical problem, it would appear that those portions of a record might be denied [see attached, Freedom of Information Law, section 89(2)(b)(i)]. Further, I believe that a decision rendered in conjunction with a grievance or a grievance proceeding would likely be accessible, for it would constitute a final agency determination that is relevant to the performance of a public employee's official duties. If certain aspects of a decision rendered following a grievance contain reference to medical or "personal" information, perhaps those aspects of the records could be withheld under section 87(2)(b), while the remainder 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
Enc.

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3832

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

August 26, 1985

Mr. Dean Streeter
[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. Streeter:

I have received your recent letter in which you described a problem encountered with respect to the Town of Waddington.

Specifically, you wrote that a referendum was held on July 30 concerning the purchase of real property by the Town. You apparently requested a copy of the "public notice" of the special election and were told that you had to fill out an application form. Having received a form by mail, you submitted it to the Town, which denied the request on the ground that six notices were posted at various locations in the Town and published in a local newspaper. You have questioned the Town's denial.

In this regard, I 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 section 87(2)(a) through (i) of the Law.

Second, assuming that the Town maintained an original or copy of the notice, I believe that it should have been made available, for none of the grounds for denial could appropriately have been asserted.

Third, you indicated that you were told that a reason for the denial was that you intended to "publish" the notice. Here I point out that your reason for making a request or seeking records is irrelevant to rights of access. It has been held judicially that records accessible under the Freedom of Information Law should be made equally available to any person "without regard to status or interest" [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; also M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

I would like to add that nothing in the Law indicates that a particular form must be completed when making a request. Section 89(3) of the Law provides that a written request must "reasonably describe" the records sought. As such, it has consistently heen advised that a failure to complete a form prescribed by an agency does not constitute a valid basis for delaying or denying access. In a related vein, it has also been advised that any request made in writing that reasonably describes the records sought should suffice.

Lastly, having reviewed a copy of the application attached to your letter, the denial of your request was signed by "J. Albert Wright, Town Supervisor". The application form indicates that you could appeal the denial to "Waddington Town Board, J. Albert Wright, Town Supervisor". Under the regulations promulgated by the Committee, which govern the procedural aspects of the Law, the "records access officer shall not be the appeals officer" [see 21 NYCRR section 14-01.7(b)]. If the Town Supervisor denied your request in his capacity as records access officer, I do not believe that he could appropriately serve as appeals officer as well.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Hon. J. Albert Wright, Town Supervisor

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3833

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

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WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 26, 1985

[redacted]
Drawer B
Stormville, NY 12582

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

Dear [redacted]:

I have received your letter of August 10, in which you requested assistance in obtaining certain medical records.

You wrote that you have been trying to obtain your medical and psychiatric records related to treatment you received on September 1, 1980 from Kings County Hospital Center. You have obtained a single page "hand injury report" from the Center, but no psychiatric records were released. Apparently, the Center has acknowledged that the records exist, but it has experienced difficulty in locating them. In this regard, I offer the following comments.

First, under the Freedom of Information Law, I believe that medical records maintained by a municipal hospital or facility are available to the individual to whom the records relate to the extent that the records contain statistical or factual information. On the other hand, those portions of the records which include evaluations, diagnostic opinions or recommendations could, in my view, be withheld [see Freedom of Information Law, section 87(2)(g)].

Second, you wrote that the Center has "confirmed" that the records exist, but have not been able to locate them. Section 89(3) of the Freedom of Information Law provides that if requested, an agency must certify that records cannot be found after diligent search. In this regard, you may wish to request such a certification.

In addition, it is possible that the attending physician maintains a copy of the records that you seek. Section 17 of the Public Health law provides a limited right of access to medical records maintained by private physicians. That section requires a physician to make a patient's medical records available to another physician on behalf of the patient. Thus, you may wish to contact a physician with whom you are familiar to obtain, on your behalf, the medical records that you seek.

I hope 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

RJF:CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3834

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

August 26, 1985

Mr. Lymond Stephenson
84-A-1338 4-F-32
Downstate Correctional Facility
P.O. Box F
Fishkill, NY 12524

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

Dear Mr. Stephenson:

I have received your letter of August 19, in which you requested the "intervention" of this office concerning requests for records.

According to your letter and the materials attached to it, you have requested records under the federal Freedom of Information and Privacy Acts from the Supreme Court, Kings County, and the Office of the Kings County District Attorney. As of the date of your letter to this office, you have received no response to those requests.

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

First, the provisions that you cited are federal statutes. I believe that those statutes apply only to records maintained by federal agencies. As such, they would not be applicable to records maintained by either the Supreme Court or the District Attorney.

Second, there are statutes in New York known as the Freedom of Information Law and the Personal Privacy Protection Law. However, both states specifically exclude the courts and court records from their coverage. In addition, the Personal Privacy Protection Law pertains only to state agency records and specifically excludes entities of local government and the offices of district attorneys from its scope. As

such, I do not believe that either the Freedom of Information or the Personal Privacy Protection Laws could appropriately be cited to request records from a court. It is noted, however, that various other statutes (i.e., section 255 of the Judiciary Law) often grant significant rights of access to court records. Therefore, when seeking records from a court, it is suggested that a request be directed to the clerk of the court.

I believe, however, that the Freedom of Information Law is applicable to records maintained by the Office of the District Attorney [see New York Public Interest Research Group, Inc. v. City of New York, Sup. Ct., New York Cty., NYLJ, September 27, 1982; Dillon v. Cahn, 79 Misc. 2d 300, 259 NYS 2d 981 (1974); and Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., August 11, 1981, aff'd w/no opinion, 85 AD 2d 672, motion for leave to appeal dismissed, 55 NY 2d 1018 (1982)]. Without greater knowledge of the contents of the records that you are seeking or the extent to which the Office of the District Attorney maintains the records in which you are interested, I could not conjecture as to rights of access. Further, it appears that the records sought pertain to events that occurred more than ten years ago. Consequently, it is questionable whether all of the information that you are seeking continues to exist.

It is suggested that you resubmit a request to Mr. Stephen Kessler, Assistant District Attorney, who serves as Information Access Officer at the Office of the Kings County District Attorney. I note that your request to the Office of the District Attorney was made by means of a petition. Please be advised that a request made under the Freedom of Information Law can be made in the form of a letter. Under the Law, section 89(3) states that an agency is required to response to a request made in writing that "reasonably describes" 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-383

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

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GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 26, 1985

Mr. Kevin Corrigan
#79-C-604
P.O. Box 618
Auburn, NY 13024-9000

Dear Mr. Corrigan:

I have received your letter of August 21, in which you requested records from this office.

In this regard, it is noted at the outset that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As a general matter, this office does not serve as a repository or central source of records. Consequently, this office does not maintain the records that you are seeking.

To seek records unde the Freedom of Information Law, a request should be sent to the "records access officer" at the agency or agencies that you believe would maintain the records sought. I point out, too, that section 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 in order to enable agency officials to locate the records sought.

Lastly, it appears that the records in which you are interested may be maintained by a court. Please be advised that the Freedom of Information Law specifically excludes the courts and court records from its scope [see Freedom of Information Law, sections 86(1), definition of "judiciary" , and 86(3), definition of "agency"]. While court records may be available from a court clerk under various provisions of the Judiciary Law and other statutes (see e.g., Judiciary Law, section 255), I could not conjecture as to rights of access to the information sought based upon the information that you have provided.

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

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3836

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 26, 1985

Mr. H. Carl Koch
[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. Koch:

I have received your letter of August 9 in which you requested further advice regarding the availability of information contained on certain identification cards.

You asked whether the New York City Human Resources Administration is required to:

> "disclose simply a yes or no answer to the question of whether a '666' or a variant thereof such as '999' or '669' etc. is encoded generally on all EPFT identification cards?"

In this regard, I offer the following comments.

First, as explained in my letter to you of June 12, the numerical data encoded on the EPFT identification cards would, if disclosed, impair the security of the access codes and could result in the unauthorized issuance of public assistance benefits. Therefore, I believe that records indicating the computer access codes regarding the EPFT cards may be properly withheld under section 87(2)(i) of the Freedom of Information Law.

Second, in my opinion, the Administration is not required to provide you with a "yes or no" answer regarding the number 666. The Freedom of Information Law grants rights of access to records maintained by an agency rather than information generally known by its employees. In other words,

unless the information sought is maintained in some physical form, an agency is not required by the Freedom of Information Law to respond orally or in writing to inquiries from the public. Furthermore, section 89(3) provides that an agency need not create records which do not already exist.

In sum, I do not believe that the Administration is required to disclose a "yes or no" answer to your question.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3887

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

August 27, 1985

Mr. Sam and 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 correspndence.

Dear Mr. and Ms. DeCesare:

I have received your letter of August 16 in which you requested an advisory opinion.

Your inquiry concerns requests for certain complaints sent to the Commission on Cable Television. Apparently, there is some confusion regarding the disclosure of the identity of complainants by the City of Schenectady and the Commission. I will try to clarify what Mr. Freeman has already explained to you and, hopefully, any misunderstandings can be eliminated.

First, you wrote that Mr. Freeman gave you the impression that "complete cable consumer complaints" could be obtained from the City but that they could only be made available from the Commission with the names deleted. In this regard, I note that the Freedom of Information Law, which applies to city and State governmental agencies, provides that records, or portions thereof, may be withheld where disclosure would result in an unwarranted invasion of personal privacy (see section 87(2)(b) of the Freedom of Information Law). The Committee has consistently advised that the identity of those who submit complaints to governmental agencies may be withheld. It is the Committee's position that disclosure of the complainants' identity would result in an unwarranted invasion of personal privacy. However, the substance of the complaint, which is relevant to the work of the agency, should be made available.

In addition, I point out that while the Freedom of Information Law permits an agency to withhold records in certain instances, the Law does not require withholding. However, the new Personal Privacy Protection Law does require State agencies to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy. I believe that Mr. Freeman was referring to this distinction when he explained that the City of Schenectady could reveal complaints in their entirety while the Commission, a State agency, would be required to delete the identifying details if it determines that disclosure would result in an unwarranted invasion of personal privacy.

Second, you mentioned that you are not interested in violating a cable subscriber's confidentiality but rather you are seeking access to complaints from people who are not subscribers or customers of cable services. While other statutes and regulations may provide for the protection of privacy with respect to personal information about cable subsscribers, the preceding discussion of an "unwarranted invasion of personal privacy" pertains to all complaints received by an agency. In my opinion, the identities of complainants may be withheld in a variety of circumstances regarding possible health, traffic or cable television violations. Thus, I believe that the Commission may, and in some instances, must, delete the identifying details of complaints that it receives from subscribers or others.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Bill Huff, Commission on Cable Television

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3838

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 27, 1985

Mr. John Johnson
[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. Johnson:

I have received your letter of August 16 in which you seek an advisory opinion under the Freedom of Information Law.

Specifically, you asked that I review five appeals attached to your letter that were sent to Kermit E. Jackson, Supervisor of the Town of Rensselaerville, and that I comment with respect to rights of access.

Before commenting on the appeals, 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 of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, it is emphasized that the term "record" is expansively defined in section 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, examina-

> tions, 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 Freedom of Information Law includes within its scope any information maintained by the Town, "in any physical form whatsoever...". Therefore, photographs kept by the Town, which are the subjects of two of your appeals, would constitute "records" subject to rights of access granted by the Law.

Third, section 89(3) of the law requires that an applicant "reasonably describe" the records sought when making a request. The quoted clause has been interpreted judicially to mean that if the agency can locate records based upon the terms of a request, the applicant has met his or her burden of reasonably describing the records sought [see Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

And fourth, the Freedom of Information Law in section 87(2) provides a right to inspect and copy records that are accessible under the Law. Section 89(3) states in part that an agency is required to prepare a copy of a record upon payment of the appropriate fee. With respect to fees, an agency cannot generally charge for inspection of records or the personnel time involved in searching for records. If an applicant is seeking copies of records, section 87(1)(b)(iii) permits an agency to charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproduction of records that cannot be photocopied.

Your first two appeals involve pictures taken of you by a named individual at specific times and places. Assuming that the photographs are kept by the Town, as suggested earlier, I believe that they would constitute "records" subject to rights of access. Further, it appears that they should be available to you. The only ground for denial that might be offered would involve an unusual situation in which the photographs were taken for a law enforcement purpose in conjunction with an investigation. Section 87(2)(e)(i) permits an agency to withhold records compiled for law enforcement purposes when disclosure would interfere with a law enforcement investigation. If that ground for withholding is not relevant, I cannot envision any other that could appropriately be asserted to deny access.

The third appeal concerns records of inspections made by the Town Building Inspector from July 15 to August 3. It appears that one of the grounds for denial may be relevant. However, due to the structure of that provision, it is likely that the records are available, at least in part. Specifically, section 87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policies or determinations must be made available. Concurrently, to the extent that such materials are reflective of opinion, advice or recommendation, for example, they could be withheld.

I believe that records prepared by a building inspector could be characterized as "intra-agency" materials. However, having discussed the topic of inspection reports on many occasions, they often consist largely of "factual data" that would be available under section 87(2)(g)(i). Further, if code violations were found, they would likely constitute "final agency determination" available under section 87(2)(g)(iii). It is noted, too, that although a building inspector has some law enforcement authority, it has been found that records prepared by a building inspector could not generally be withheld as records compiled for law enforcement purposes [see Young v. Town of Huntington, 388 NYS 2d 978 (1976)].

The fourth appeal involves records indicating "time as well as mileage expense claimed" by a named individual "for the commission of his Town directed duty". It is noted that the request is open-ended in that it does not indicate any particular time period. As such, it is unclear whether the records sought are intended to pertain to a specific period of time or the entirety of a person's employment.

Assuming that it can be determined which records have been requested, they would in my opinion be available. As a general matter, records indicating the expenditure of public moneys are accessible, including vouchers or claims for reimbursement. In addition, it has been found that records of attendance, including hours or days claimed for sick leave, for instance, are accessible [see e.g., Capital Newspapers v. Burns, 490 NYS 2d 651, __AD 2d__ (1985)].

I point out that section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". However, it has been held in a variety of contexts that public employees enjoy lesser protection of privacy than others, for they are required to be more accountable than others. It has also generally been held that records that 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 Capital Newspapers v. Burns, supra; 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; 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, October 30, 1980].

The last appeal concerns "Copy(ies) of all correspondence received and transmitted by the Town..." and copies of postage receipts and related information. Once again, the request does not specify any time period related to the records sought. As such, it is questionable in my view whether that request "reasonably described" the records sought. Further, due to the breadth of that request, which seems to involve nearly all Town records, I cannot offer specific direction concerning rights of access. It is suggested, therefore, that you might want to narrow your request.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to the Supervisor.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Hon. Kermit E. Jackson, Town Supervisor

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3839

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 28, 1985

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 latest letter, which again describes your feelings concerning police agencies and their responses to requests for records.

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

First, as you are aware the Committee has only the capacity to advise. As such, this office cannot compel an agency to grant or deny access to records, or otherwise comply with the Freedom of Information Law. Further, the Committee does not have the authority to engage in an in camera review of records, an actual inspection and evaluation of records that are the subject of a request. Although you might feel that opinions of this office "reinforce" actions of a police department that you consider to be "illegal", my intent is always to render an opinion based upon the Law as it currently exists. In many instances, I might believe that an agency's action is unfair or inappropriate, but nonetheless, consistent with law. As a result of those situations, the Committee has often recommended changes in the law. Some of our attempts to change the law have been successful; some have not.

Second, while it may be costly and time consuming to initiate a challenge in court to a denial of access to records, it is emphasized that the Freedom of Information Law is based upon a presumption of access and that an agency that

withholds records has the burden of proving that one or more of the grounds for denial can be appropriately asserted. That burden is different from the usual proceeding commenced under Article 78 of the Civil Practice Law and Rules, which places the burden of proof on the member of public who challenges an agency's action or refusal to act.

Lastly, you expressed the view that the Town of Southold has failed to transmit to this office copies of appeals and the ensuing determinations as required by section 89(4)(a) of the Freedom of Information Law. Often there is little that we can do, for we are unaware of the existence of an appeal. However, in those cases in which the Committee is made aware of the fact that appeals have been made, but in which the materials are not sent to the Committee, contact can be made with the agency as an effort to ensure future compliance.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Judith Terry, Town Clerk, Town of Southold

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3840

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

August 29, 1985

Mr. Wallace S. Nolen
[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. Nolen:

I have received your letter of August 19, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you have directed a series of requests to the New York City Department of Consumer Affairs, which, among other functions, licenses process servers. The correspondence attached to your letter indicates some aspects of a request made on June 5 were denied on June 27 by Elaine Werbell, Freedom of Information Office for the Department. Specifically, in response to a request concerning three named individuals (or firms), Ms. Werbell wrote that "Under Section 87.2(e)(i) we may withhold information about subjects that are under current investigation". You have expressed the view that, while some items may be withheld, others should be made available.

In this regard, it is noted at the outset that I am not familiar or knowledgeable with respect to the records in question or the specific duties of the Department of Consumer Affairs. Nevertheless, I would like to offer the following general 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 section 87(2)(a) through (i) of the Law.

Second, the introductory language of section 87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of one or more of the grounds for denial. Based upon the quoted language, I believe that the Legislature envisioned situations in which a single record or report might be both accessible or deniable in part. Moreover, in my opinion, the language imposes an obligation on an agency to review the record or records sought in their entirety to determine which portions, if any, may justifiably be denied.

The provision cited by Ms. Werbell permits an agency to withhold records or portions thereof that "are compiled for law enforcement purposes and which, if disclosed, would... interfere with law enforcement investigations or judicial proceedings".

From my perspective, the extent to which section 87(2)(e)(i) may be asserted is dependent upon several factors. For instance, often records relating to an investigation or used in conjunction with an investigation may have been compiled or received in the ordinary course of business rather than for law enforcement purposes. In such cases, section 87(2)(e) could not likely be asserted as a basis for denial. For example, in a case in which minutes of open meetings of a public body were used and maintained by a district attorney in conjunction with a criminal investigation, it was determined that those records were available to the public [King v. Dillon, Supreme Court, Nassau County, December 19, 1984]. Although relevant to an investigation, the minutes were prepared in the ordinary course of business and, as such, remained accessible to the public. While I am unaware of the nature of the records that were denied, I do not believe that all records that pertain to or that are used in an investigation could necessarily be characterized as records "compiled for law enforcement purposes".

Further, section 87(2)(e)(i) is based upon potentially harmful effects of disclosure. Therefore, the question in my view involves the extent to which records compiled for law enforcement purposes would, if disclosed, "interfere" with a law enforcement investigation or judicial proceeding. Perhaps some aspects of the records might not if disclosed result in the harm envisioned by section 87(2)(e)(i); however, other aspects of the records might justifiably be withheld.

Lastly, I point out that, in the event of a denial, an applicant may within thirty days of the denial appeal in accordance with section 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: Elaine Werbell

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3841

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

August 29, 1985

Mr. O. Shelly
[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. Shelly:

I have received your letter of August 20 addressed to Ms. Cheryl Mugno. Ms. Mugno and I would like to express our thanks for your kind comments.

You have raised the following question:

> "If one requests and obtains material through the provisions of the Freedom of Information Laws (provisions of the Public Officers Law), are there any restrictions on the subsequent release of the information?"

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

First, if your question is whether the recipient of records made available under the Freedom of Information Law is restricted regarding the use of the records, I do not believe that any such restrictions exist. Stated differently, once a record has been disclosed under the Freedom of Information Law, I believe that a member of the public may use the information as he or she sees fit.

Viewing the issue from a different perspective, you may be asking whether information made available to one member of the public under the Freedom of Information Law is generally accessible to other members of the public. Here I point out that, as a general matter, the Freedom of Information Law does not distinguish among applicants for records. Further, it has been held that when records are accessible under the

Freedom of Information Law, they should be made equally available to any person, "without regard to status or interest" [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; see also M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

An exception to that rule might involve a situation in which records are made available to a particular individual under the Freedom of Information Law or the Pesonal Privacy Protection Law because the records pertain to that individual. In such a case, while the records may be accessible as of right to that individual, it is possible that the same records might be withheld from third parties 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

OML-AO-1208
FOIL-AO-3842

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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August 30, 1985

Mr. Rex Smith
Newsday
Long Island, NY 11747

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

Dear Mr. Smith:

I have received your letter of August 28, as well as the documentation attached to it.

The materials pertain to the existing Suffolk County local law regarding the filing of financial disclosure statements by certain County officials, and a proposal to amend the local law introduced by a County Legislator. You have asked that I review the materials for the purpose of commenting on whether the local law and the operations of the Suffolk County Board of Public Disclosure "are subject to the provisions of New York's open government laws". You also requested answers to the following questions:

> "(1) Under the Freedom of Information Law, should a list naming employees covered by the local law, specifying whether or not they have waived confidentiality under Section 9 of the local law, be available for public inspection?
>
> (2) Should minutes of the meetings of the Suffolk County Board of Public Disclosure be available for public inspection?
>
> (3) Under the state Open Meetings Law, would meetings of the county Board of Public Disclosure be open to the public?"

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

It is noted initially that the Freedom of Information Law is broad in its scope. Section 86(4) of the Law defines "record" to include:

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

As such, I believe that financial disclosure statements would constitute "records" 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 section 87(2)(a) through (i) of the Law.

The introductory language of section 87(2) indicates that an agency may withhold "records or portions thereof" that fall within one or more of the grounds for denial. Based upon the quoted language, I believe that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. The language also in my view imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

With respect to the current local law regarding release of financial disclosure statements, it appears that the statements are considered "confidential", unless the subject of a disclosure statement consents to disclosure. Here I point out that, although records may in some instances be characterized as "confidential", they may be considered confidential in my view only when a statute, an act of the State Legislature or Congress, so prescribes. In terms of the Freedom of Information Law, section 87(2)(a) permits an agency

to withhold records that "are specifically exempted from disclosure by state or federal statute". Since the local law in question is not a statute, I do not believe that it can require "confidentiality". This is not to suggest that financial disclosure statements submitted under the existing local law must be made available in their entirety. However, I believe that they are subject to whatever rights might exist under the Freedom of Information Law.

Perhaps the most relevant exception to rights of access relative to the existing local law or the proposed local law is section 87(2)(b), which enables an agency to withhold records or portions thereof to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Here I point out that the Freedom of Information Law, as it pertains to municipalities, such as Suffolk County, is permissive. A municipal agency may withhold records when disclosure would constitute an unwarranted invasion of personal privacy; nevertheless, there is no obligation to do so. Further, if the only basis for withholding records concerns unwarranted invasions of personal privacy, and if the subject of the records consents to disclosure, thereby waiving the protection of privacy, the records would in my view become available.

It is possible that, despite the confidentiality restriction present in the existing local law that some portions of the financial disclosure statements might be found to be available. The standard in the Freedom of Information Law concerning privacy is flexible. Reasonable people often differ with regard to whether disclosure of personally identifiable information would result in a permissible as opposed to an unwarranted invasion of personal privacy. However, it has been found in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are generally required to be more accountable than others. In addition, various decisions rendered under the Freedom of Information Law indicate that records that are relevant to the performance of public employees' official duties are available, for disclosure in those situations 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; Capital Newspapers v. Burns, 490 NYS 2d 651, AD 3 Dept.,

1985]. Conversely, when records or portions of records pertaining to public employees are irrelevant to the performance of their official duties, they could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984]. As such, it is reiterated that, notwithstanding the requirement of confidentiality present in the existing local law, it might be found that some aspects of financial disclosure statements are accessible, based upon a finding that disclosure would result in a permissible, not an unwarranted invasion of personal privacy.

By means of analogy, you may be aware that Governors Carey and Cuomo have promulgated executive orders requiring the submission of financial disclosure statements by certain executive branch employees. While the financial disclosure statements are not available in their entirety, "public versions" are disclosed pursuant to the Freedom of Information Law. The public inspection versions include information regarding the sources of income, assets and liabilities, while the amounts related to those types of information are deleted to protect personal privacy. I believe that the system is based upon the principle that the public has the right to know the sources of income or liabilities of certain public officials in order to determine whether or not those individuals may be engaged in an actual or potential conflict of interest.

At this juncture, I offer responses to your specific questions.

First, I believe that if a list naming employees covered by the local law exists, it should be made available. It is noted that one of the few instances in the Freedom of Information Law in which an agency must create a record involves payroll information. Section 87(3)(b) requires each agency to maintain:

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

Therefore, the identities of those subject to the local law, their titles and salaries must be made available by means of a different record, a payroll record prepared by Suffolk County. I note, however, that as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if no list of employees subject to the local law exists, I do not believe that Suffolk County would be required to prepare such a list on your behalf.

Assuming that such a list does exist, once again, I believe that it would be available. Further, if the list specifies whether or not persons covered by the local law have waived confidentiality, that portion of the list would also in my view be accessible, for it does not appear that there is anything "personal" about either a grant of access or a decision to opt for confidentiality.

The second and third questions deal with the Board of Public Disclosure created by the local law.

In my opinion, the Board is a "public body" subject to the requirements of the Open Meetings Law. Section 102(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 description of the County's Board of Public Disclosure in the documentation that you enclosed, I believe that each of the conditions found in the definition of "public body" can be met by the Board. Therefore, I believe that the Board must convene its meetings open to the public and provide notice of its meetings in accordance with section 104 of the Open Meetings Law.

It is emphasized that a public body may under appropriate circumstances enter into a closed or "executive" session. Further, I believe that much of the Board's work could likely be conducted during an executive session, for section 105(1)(f) of the Open Meetings Law permits a public body to exclude the public from a meeting to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Based upon the language quoted above, if the Board is reviewing financial disclosure statements submitted by a particular employee or discussing issues relative to conflicts of interest or other related matters pertaining to particular employees, I believe that it could conduct executive sessions pursuant to section 105(1) of the Open Meetings Law. Moreover, a public body may generally take action during a proper executive session, unless its action involves the appropriation of public monies.

With respect to minutes, section 106(2) concerns 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."

The language quoted above in my view would require that minutes be made available. However, depending upon the nature of the action taken by the Board, it is likely that identifying details could often be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I believe that minutes indicating the adoption of policy or determinations of general applicability would be 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:jm

cc: Jane Devine, County Legislator

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3843

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September 3, 1985

Mr. Joseph C. Messina
[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. Messina:

I have received your letter of August 20 in which you requested an advisory opinion.

According to your letter and the attachments, the Town of Mamaroneck has published a report, prepared by Joseph Fisch, which reviews the organization, operation and personnel of the Town's Police Department. The original report, approximately seventy-five pages in length, was submitted by Mr. Fisch to the Town Board. The report that was made available to you and to the general public is approximately forty-seven pages in length. The Town Board deleted portions of the original report pursuant to sections 87 and 89 of the Freedom of Information Law. You represent the Chief of the Town's Police Department, Charles Baumblatt, and, on his behalf, seek access to the deleted portions of the Report.

You requested the deleted materials and were denied access by the Town Clerk. Upon appeal, the Town Supervisor upheld the denial, explaining that the deletions are based upon section 87(2)(b) and (g) of the Freedom of Information Law and, therefore, may properly be withheld. The Town Supervisor stated that "many and perhaps most of the deletions refer to individuals in the Department other than Charles Baumblatt" and that "disclosure of much of this material relating to the individual members of the Department would be an unwarranted invasion of personal privacy". The Supervisor also wrote that:

> "[t]he information contained in the report also reflects statements made to Mr. Fisch in confidence, all of which falls within the provisions of Section 87 (2)(d) [sic] of the Public Officers Law."

In a second letter, the Town Supervisor wrote that she had omitted to state a second basis for denying your request. She explained that the material was also being denied under section 87(2)(g), in that it constitutes intra-agency materials "which are not statistical or factual tabulations, instructions to staff, or final agency policy or determinations." You would like to know whether section 87(2)(b) and (g) are proper grounds for denying the deleted portions of the report.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law provides that all records of an agency are available, except those records or portions of records that can be withheld under one or more of the grounds listed in section 87(2)(a) through (i).

Section 87(2)(b) of the Law provides that records, or portions thereof, may be withheld if disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article." Section 89(2)(b)(iv), for example, provides that an unwarranted invasion of personal privacy includes:

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

In my view, section 89(2)(b)(iv) may be cited as a basis for withholding the deleted material of the report to the extent that it includes personal information about individuals that is not relevant to the work of the Town Board or Police Department. For instance, the deleted material may include the identity of members of the Department who related incidents or information pertaining to the operation of the

Department. I believe that while the details identifying the individuals may properly be withheld, the information pertaining to the operation of the Department, which is presumably relevant to the work of the Town Board, should be made available unless a different ground for denial may be asserted.

Second, section 89(2)(c)(ii) of the Law provides that disclosure does not constitute an unwarranted invasion of personal privacy "when the person to whom a record pertains consents in writing to disclosure". Based upon the cited provision, to the extent that the material sought pertains to Chief Baumblatt and does not identify those individuals who related the information, I believe those portions of the deleted report should be made available to you, again, unless a different ground for denial exists.

Third, the Town Supervisor stated that some of the deleted material also includes statements made in confidence and with reliance upon nondisclosure. The Supervisor indicated that such information falls within the provisions of section 87(2)(b) of the Law. In Matter of Washington Post Company v. New York State Insurance Department, 61 NY 2d 557, the Court of Appeals noted that, absent a clear legislative intent to establish and preserve confidentiality, a promise of confidentiality by an agency does not deem records exempt from disclosure. Moreover, section 89(2)(b) (v) provides that an unwarranted invasion of personal privacy includes:

> "disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

Since the deleted portions of the report may include information which is indeed relevant to the ordinary work of the Police Department, I do not believe such statements may be withheld from disclosure under section 89(2)(b) of the Freedom of Information Law.

Fourth, the records which you seek were also denied under section 87(2)(g). That provision allows an agency to withhold materials which 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."

The Court of Appeals has recently held that reports prepared by outside consultants, for the purpose of aiding in the deliberative process of the agency which requested such opinions and recommendations from the consultant, may be considered "intra-agency material" under the Freedom of Information Law (Matter of Xerox Corporation v. Town of Webster, 65 NY 2d 131). The Town Supervisor explained that Mr. Fisch "reported directly to the Town Board as its advisor on Police Department Affairs" and that his report was a result of a study undertaken at the request of the Board. Based upon the information you provided, I believe that the Report may be considered an intra-agency record.

Fifth, I point out that not all intra-agency materials are properly withheld under the Freedom of Information Law. For example, intra-agency materials which are statistical or factual tabulations or data may not be withheld under section 87(2)(g). This provision exempts opinion, recommendations and advice, but not factual information.

Moreover, under the original statute, section 88(1) (d) of the Freedom of Information Law required that agencies make available "internal or external audits and statistical or factual tabulations made by or for the agency". The present Law has expanded the availability of intra-agency records to grant rights of access to statistical or factual "data" as well as "tabulations". Thus, collections of statements of objective information logically arranged and reflecting objective reality are considered factual tabulations or data (Ingram v. Axelrod, 90 AD 2d 568). "Chronologies of events","analyses of the records", "list of interviews" and "reports of interviews" were also found to be factual data (id. at 569).

Based upon the preceding discussion, I believe that the factual information, if any, included in the deleted portions of the Report would not be properly withheld under section 87(2)(g) of the Freedom of Information Law. Furthermore, to the extent that the deleted portions include information pertaining to Chief Blaumblatt and do not identify other individuals, I believe that those materials could not be withheld as 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

cc: Ms. Dolores A. Battalia, Town Supervisor

COMMITTEE ON OPEN GOVERNMENT

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 3, 1985

Mr. Herbert Thomas
#79-A-1632
Drawer B
Stormville, NY 12582

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

Dear Mr. Thomas:

I have received your letter of August 25 and the correspondence attached to it.

By way of background, the correspondence indicates that you requested test results from Dutchess County involving particular chemicals. In response, you were informed that thousands of tests have been conducted, but that they are filed by names of companies or owners rather than by chemical name. Subsequently, you apparently requested, by means of an appeal, test results for a particular company as well as test results for certain chemicals concerning the "water company, water system/treatment plant that supply..." the Greenhaven Correctional Facility. The Commissioner of Health responded, stating that there has been no denial, adding that:

> "If you will merely make arrangements with Mr. Lazarony to come to our office, you may examine files and identify the precise pages that you wish copied and furnished to you. Our records are furnished at 25 cents per page, which is payable prior to delivery.

> "Since we are without personnel to conduct record searches in our behalf of any person, the individual documents must be identified. This can only be accomplished by your appearance at the office to examine our files and identify the document you wish to purchase."

You have sought my comments on the matter and asked whether the Dutchess County Health Department is an "agency" subject to the Freedom of Information Law and whether the test results constitute "records" subject to the Law.

In this regard, I offer the following observations.

First, section 86(3) of the Freedom of Information Law, which pertains to records of an agency, defines the term "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, I believe that the Dutchess County Health Department is an "agency" required to comply with the Freedom of Information Law.

Second, test results or documentation containing test results would, in my view, clearly constitute "records", for section 86(4) of the Law defines "record" to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to,

> reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Therefore, the materials in question would in my opinion consist of "records" of an "agency" that fall within the coverage of the Freedom of Information Law.

Third, it is emphasized that section 89(3) of the Freedom of Information Law requires that, when making a request, an applicant seek records "reasonably described". I do not believe that an applicant must identify with particularity the record or records in which he or she in interested. However, to "reasonably describe" the records sought, an applicant must provide sufficient detail to enable an agency to locate the records.

In view of the responses to your requests, the means by which records are kept or filed has a bearing upon whether the terms of a request reasonably describe the records sought. For example, the Health Department does not apparently maintain its records in a manner that enables its staff to locate records on the basis of test results indicating that specific chemicals have been found in the water. Consequently, as the Department's Records Access Officer, John F. Lazarony, suggested, a request for records pertaining to a particular company, owner or perhaps the Greenhaven Correctional Facility would enable the Department to locate the records and provide access to them.

Lastly, assuming that you can "reasonably describe" the records in which you are interested and that the Department can locate the records and make them available, I do not believe that you can be required to inspect them in person. Section 87(2) of the Freedom of Information Law provides the public with the right to inspect and copy accessible records. Further, Section 89(3) requires that, upon payment of the appropriate fees, an agency must make copies of accessible records. Therefore, particular records that you seek could be made available to you by mail upon payment of the requisite fees for photocopying and postage.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Dr. John R. Scott, Commissioner of Health
John F. Lazarony, Sr., Assistant Commissioner

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3845

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 5, 1985

Mr. Thomas Androvett
#85-A-2823
354 Hunter Street
Ossining, NY 10562

Dear Mr. Androvett:

I have received your recent letter in which you explained that you are attempting to gain access to court records under the Freedom of Information Law or the Judiciary.

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

First, the Freedom of Information Law applies to records of an "agency", a term defined in section 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 function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, section 86(1) defines "judiciary" to mean:

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

Therefore, the Freedom of Information Law does not apply to courts or court records.

Second, as you suggested, court records are often available pursuant to different provisions, such as section 255 of the Judiciary Law, a copy of which is enclosed.

Lastly, in view of the language of section 255 of the Judiciary Law , it is suggested that a request for court records be directed to the clerk of the court in which the proceeding was conducted. Such a request should contain as much detail as possible, including docket and index numbers, for example, in order to enable the clerk to locate the records sought. It is also suggested that you might want to 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:ew

Enc.

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3846

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 5, 1985

Ms. Carol DeMare
Reporter
The Times Union
News Plaza
Box 15000
Albany, NY 12212

The staff of the Committee on 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. DeMare:

I have received your letter of August 28 in which you requested an advisory opinion under the Freedom of Information Law. Your inquiry pertains to records sought from the New York State Racing and Wagering Board concerning James Coyne.

According to the correspondence attached to your letter, on July 28 you requested information from the Board, which was treated as a request made under the Freedom of Information Law. Although some of the information sought was provided, Mr. Thomas C. Davide, Secretary to the Board, denied access to other aspects of your request, stating that:

> "Your request for information concerning the horses in which Mr. Coyne has an ownership interest and the identity of those individuals who may be in partnership with Mr. Coyne is denied. Access is denied because the information sought would, if disclosed, constitute an unwarranted invasion of personal privacy pursuant to Public Officers Law, section 87(2)(b)."

You appealed the denial on August 27, and also requested "copies of records pertaining to Mr. Coyne's license, as well as details and/or copy of a report which determined, after an investigation, that Mr. Coyne's official duties were not related to pari-mutuel racing activities or the taxation thereof."

In this regard, I 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 section 87(2)(a) through (i) of the Law.

Second, as a general matter, it has been advised that licenses are available to the public, even though they identify particular individuals. From my perspective, various activities are licensed due to some public interest in ensuring that individuals or entities are qualified to engage in certain activities, such as teaching, selling real estate, owning firearms, practicing law or medicine, etc., as well as owning race horses. I believe that licenses, and often information related to licenses should be available, for they are intended to enable the public to know that an individual has met appropriate requirements to be engaged in an activity that is regulated by the state or in which the state has a significant interest.

Third, Mr. Davide's denial was based upn section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof to the extent that disclosure would result in "an unwarranted invasion of personal privacy". That standard in my opinion is flexible and agency officials must, in some instances, make subjective judgments when issues of privacy arise. However, it is clear that not every record that identifies an individual may be withheld. Disclosure of intimate details of peoples' lives or personal information irrelevant to the work of an agency might, if disclosed, constitute an unwarranted invasion of personal privacy; nevertheless, other types of personal information maintained by an agency, particularly those types of information that are relevant to the agency's duties, would if disclosed often result in a permissible rather than an unwarranted invasion of personal privacy.

In my view, since Mr. Coyne holds a license granted by the Board, the two areas of information denied by Mr. Davide, information concerning ownership interest in horses and the identities of those in partnership with Mr. Coyne, are likely available. Section 89(2)(b) lists various examples of unwarranted invasions of privacy; none in my opinion could be cited as a basis for withholding either of the areas of information that were denied. Moreover, as you suggested in your appeal, records filed with county clerks identifying partners are available for public inspection and copying (see e.g., Partnership Law, section 91). Since that kind of information concerning partnerships is available from a county clerk, I believe that the same or equivalent information maintained by the Board would also be available. Again, although the information identifies particular individuals, in my opinion disclosure would result in a permissible rather than an unwarranted invasion of privacy.

With respect to the report to which you alluded where the Board determined that Mr. Coyne's official duties were not related to racing activities, two of the grounds for denial may be relevant. However, the extent to which they may be asserted would be dependent upon the specific contents of the report.

It is assumed that the determination by the Board was the result of an inquiry arising out of section 107 of the Racing and Wagering Law, which, in part, prohibits state and local public employees from holding a license, if their duties "involve pari-mutuel racing activities".

One ground for denial that may be relevant is section 87(2)(b) pertaining to unwarranted invasions of personal privacy. In addition to comments made earlier regarding that provision, I point out that it has been found in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are generally required to be more accountable than others. Moreover, various decisions rendered under the Freedom of Information Law indicate that records that are relevant to the performance of public employees' official duties are available, for disclosure in those situations 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; Capital Newspapers v. Burns, 490 NYS 2d 651, AD 3 Dept., 1985].

The extent to which personal or related information may be contained in the Board's report is unknown to me. Nevertheless, it is reiterated that the fact that the report might pertain to a particular individual would not necessarily remove it from the scope of rights of access on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Further, it is noted that the introductory language of section 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 that follow. On the basis of the quoted language, it is clear in my view that the Legislature envisioned situations in which a single record or report might be both accessible and deniable in part. I believe that the language also imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. In short, even though certain aspects of a record may properly be denied, the remainder might be available.

The other ground for denial of potential significance is section 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, final agency policies or determinations must be made available. Concurrently, those aspects of inter-agency or intra-agency materials reflective of advice, opinion, recommendations and the like may generally be withheld.

It appears that the report in question could be characterized as "intra-agency material". As suggested earlier, the extent to which it is available or deniable would be dependent upon its contents.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Thomas C. Davide, Secretary to the Board
David B. Vaughan, Access Appeals Officer

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-384

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
JOHN C. EGAN
WALTER W. GRUNFELD
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 9, 1985

[redacted]
Drawer B
Stormville, NY 12582

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

Dear [redacted]:

I have received your letter of August 28 in which you requested assistance.

According to your letter, you are seeking copies of the "referrals from security" mentioned by Jean Beck in the application for admission as a patient to a mental health facility. Although a copy of the application was made available to you, the referrals apparently were not. In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law provides that all records of an agency are available unless the records, or portions thereof, may be withheld under section 87(2)(a) through (i) of the Law. While it is not clear what information is contained in the "referrals from security", I believe that several provisions of section 87(2) may be relevant.

First, section 87(2)(b) permits an agency to withhold records which, if disclosed, would constitute an "unwarranted invasion of personal privacy". If the referrals include personal information about other individuals such information might justifiably be withheld. For example, the referrals may reveal the identity of persons, other than yourself, which would not otherwise be known and which may therefore constitute an unwarranted invasion of personal privacy.

Second, the records access officer may determine that the referrals, if disclosed, would endanger the life or safety of some person. Upon such a determination, the referral could be withheld under section 87(2)(f) of the Law.

Third, the referrals may be inter or intra-agency materials which consist of opinions or suggestions and thus may be withheld under section 87(2)(g). However, to the extent that the records include factual data, I believe those portions should be available to you.

Finally, I suggest that you request copies of the referrals from the records access officer at Green Haven Correctional Facility pursuant to the Freedom of Information Law. The records access officer is required to respond to your request in writing by either granting access or denying access. If your request is denied, the reasons for such denial must be explained and you must be informed of the right to appeal a denial.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3848

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

September 9, 1985

Mr. Winston McDonald
#84-A-6198
C-3-34
Comstock, NY 12821

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

Dear Mr. McDonald:

I have received your letter of September 1 in which you cited difficulties in obtaining court records.

According to your letter, on several occasions you submitted requests and appeals under the Freedom of Information Law concerning various records maintained by Westchester County Court. As yet, however, you have not received any response to your requests.

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

First, the Freedom of Information Law is applicable to records of an "agency", a term defined in section 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, section 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 would not pertain to the records that you are seeking, for the courts and court records fall outside the requirements of the Freedom of Information Law.

Second, although the Freedom of Information Law is not applicable, other statutes often grant substantial rights of access to court records (see e.g., Judiciary Law, section 255). Further, as a general matter, the clerk of a court is the custodian of court records. Therefore, if you have not done so in the past, it is suggested that a request be directed to the clerk of the court in which the proceeding was conducted.

Lastly, under the circumstances, it is suggested that you seek the services of an attorney. Perhaps a representative of a legal aid group or Prisoners' Legal Services, for example, could provide the help you need.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3849

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

September 10, 1985

Mr. Bartley J. Costello, III
Hinman, Straub, Pigors & Manning
Attorneys at Law
90 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 soley upon the facts presented in your correspondence.

Dear Mr. Costello:

I have received your letter of September 3 and appreciate your kind comments.

You are seeking advice concerning rights of access to information requested by means of a letter of July 19 addressed to Mr. V. James Gutowski of the Governor's Office of Employee Relations. In that letter, a copy of which is attached to your correspondence, you raised a series of questions relative to "the administration of education and training programs during the last fiscal year as they apply to State managerial or confidential employees".

Having reviewed your letter to Mr. Gutowski, I point out that your requests for information were generally made in the form of questions, i.e., "How were the programs determined?" or "Where were the courses given?" In this regard, it is noted at the outset 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 for "information". For example, one of your questions involves the percentage of participants who attended programs that completed the programs. If no record has been prepared that indicates such a percentage, the agency would not in my opinion be obligated to prepare a new record containing the information sought.

In short, while the information sought might exist, I believe that an applicant should seek records, rather than raise questions about information.

Assuming that records exist that contain the information sought, it appears that the records would be accessible in great measure, if not in toto. The ensuing comments will be based upon an assumption that the information sought has been prepared in the form of a record or records.

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 section 87(2)(a) through (i) of the Law.

Second, it is likely that one ground for denial may be of particular relevance. However, due to its structure, much of the information sought would likely be available. Specifically section 87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those aspects of inter-agency or intra-agency materials that consist of advice, opinion, suggestion or recommendation, for example, could in my view be withheld.

The first two questions raised in your letter involve the manner in which programs were determined and how providers were selected. I believe that rights of access can be determined on the basis of the contents of the records. For instance, if memoranda leading to decisions were advisory, they could likely be withheld. On the other hand, if there

is a stated policy that indicates how programs are determined or how providers are selected, such records would be available under section 87(2)(g)(iii). If programs were determined on the basis of a survey of employees, the results of a survey would likely constitute statistical data available under section 87(2)(g)(i).

The next series of questions pertains to the manner in which services were provided, i.e., by means of a contract. From my perspective, any contract or similar agreement to which an agency is party is accessible. In brief, none of the grounds for denial could in my view be asserted to withhold a contract or agreement between a state agency and another party.

You asked how many participants attended each program, what percentage completed the courses and where the courses were held. Such records would be reflective of factual information accessible under section 87(2)(g)(i).

Another question involves the evaluation of programs. Again, the nature of the records would determine rights of access. An evaluation by the staff of OER might consist solely of opinion and, therefore, be deniable. An evaluation by participants might have led to the preparation of statistics that would be available. Without knowledge of the manner of evaluation, more specific advice cannot be offered.

The remaining questions involve payments made to providers and expenditures made by the agency with respect to "personnel, publications, periodicals and other matters". Records reflective of payments or expenditures would consist of factual information that would, in my opinion, be available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: V. James Gutowski, Assistant Director

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3850

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

September 10, 1985

Mr. Charles H. Lee
Sheriff's PSB Jail
P.O. Box 976
Syracuse, NY 13201

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

Dear Mr. Lee:

I have received your letter of August 30 in which you requested assistance from this office.

You would like to know how to obtain copies of certain papers and an order filed in a "Superior Court". Apparently, the County Clerk claims that no such Order or action was ever filed. You want to know how to show "that an Action was filed, acted upon and an Order duly filed". In this regard, I offer the following comments.

First, I note that the Freedom of Information Law grants rights of access to records maintained by an agency. However, section 86(3) of the Law excludes the judiciary, or courts of the State, from the definition of "agency". Thus, access to court records is not controlled by the provisions of the Freedom of Information Law.

Second, with respect to access to court records, section 255 of the Judiciary Law requires a court clerk to diligently search the files, papers, records and dockets of his office upon the request of an individual. Moreover, that section provides that the clerk shall certify that a requested document or paper, of which the custody legally belongs to him, can not be found. Thus, if that provision is applicable, you may wish to request such a certification from the County Clerk with respect to the records which you seek.

Finally, if you has served another party with any of the documents sought, you may wish to contact that party and request 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive
Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3851

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

September 11, 1985

Mr. Francis R. Taormina
Assistant Superintendent
Niskayuna Central School District
Van Antwerp Road & Dexter Street
Niskayuna, New York 12309

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

Dear Mr. Taormina:

I have received your letter of September 5 in which you requested an advisory opinion.

You asked, "Is a parent entitled to the names of the course titles a teacher took in order to obtain his or her degree as a matter of public information?" In response to your question, I offer the following comments.

First, assuming that the school district maintains a transcript or other document indicating course work completed by the teacher, such a document would be a "record" subject to the provisions of the Freedom of Information Law. As you know, all records of an agency are presumed to be available unless the record, or portion thereof, may be withheld under section 87(2)(a) through (i) of the Law. Relevant to your inquiry, section 87(2)(b) permits an agency to withhold records which, if disclosed, would result in an unwarranted invasion of personal privacy.

Second, whether disclosure of a particular record would result in an unwarranted invasion of personal privacy is often a question whose answer is subject to a variety of reasonable opinions. However, the courts have found in various contexts that public employees enjoy a lesser degree of privacy than others, reasoning that public employees are to be held more accountable.

Specifically, it has been held 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 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); Steimnetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Capital Newspapers v. Burns, 490 NYS 2d 651, AD 3 Dept., 1985]. On the other hand, if records or portions of records are irrelevant to the performance of one's official duties, it has been held that those records may be withheld as 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].

In my opinion, records which would reflect whether a teacher meets or has met the qualifications for his or her position would indeed be relevant to the performance of the teacher's official duties. Thus, for example, I believe that a record which reflects that the teacher is certified in a particular area by the Department of Education should be available to an individual, for such a record would be relevant to whether the teacher is qualified to teach in New York.

However, unless the teacher was required to pass certain courses in order to qualify for his or her position, the names of the courses completed by a teacher as part of a degree program could, in my view, be withheld under the Freedom of Information Law as an unwarranted invasion of personal privacy. While the fact that a teacher obtained a particular educational degree may be relevant to his or her qualifications for a position, I do not believe that the particular courses would likewise be relevant. Thus, if particular courses are not prerequisites for the teacher's employment, I believe that the names of the courses may properly be withheld.

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

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3852

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

September 13, 1985

Mr. Abdel-Jabbar Malik
[redacted]

Dear Mr. Malik:

I have received your appeals concerning denials of requests for records that you directed to a Senior Correction Counselor at the Auburn Correctional Facility and an "Inspector General" located in Long Island City.

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, section 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 records sought."

In view of the language quoted above, it is suggested that you appeal to the heads of the respective agencies. I note that an appeal regarding a denial of access to records kept at a state correctional facility may be made to

Counsel to the Department of Correctional Services in Albany. I cannot, however, provide specific direction concerning your other appeal, for it is unclear which agency maintains 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3853

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

September 13, 1985

Mr. Paul Stephen Beeber
President & General Counsel
NYS Coalition Opposed to
Fluoridation, Inc.
P.O. Box 263
Old Bethpage, NY 11804-8882

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

Dear Mr. Beeber:

I have received your letter of September 6, as well as the correspondence attached to it. Your inquiry concerns your unsuccessful efforts in obtaining information from the New York City Department of Environmental Protection.

Specifically, on December 11, 1984, you transmitted a request under the Freedom of Information Law to Commissioner McGough for a variety of information concerning fluoridation. Having received no response, the same request was made on January 14, 1985. The receipt of the request was acknowledged on February 13 by Marie A. Dooley, Assistant Counsel, who wrote that the Department was "reviewing the records involved, and since such records are voluminous in nature, we will be able to grant or deny your request in approximately six to eight weeks". Due to an absence of a response, you reminded Ms. Dooley of your request by means of a letter dated April 22. Although you have contacted other government officials in the hope that they might assist you, as of the date of your letter, you had not yet received any of the information sought or a written denial of access.

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

First, it is noted that the Freedom of Information Law pertains to records maintained by an agency. Section 89(3) of the Law states that, as a general rule, an agency is not required to create or prepare a new record in response to a request. Several aspects of your request involve questions raised about the New York City fluoridation program. In short, the Department in my opinion is required to grant or deny access to existing records; however, it is not obligated to answer questions by preparing new records. For example, one aspect of your request pertains to the annual cost of fluoride chemicals used to fluoridate New York City water supplies in terms of the total cost for all five boroughs, and by means of a "cost breakdown" for each borough. If no record exists that indicates a "cost breakdown" for each borough, the Department in my view would not be required to prepare a new record containing the information sought in response to a request made under the Freedom of Information Law.

Second, to the extent that the information sought exists in the form of a record or records, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Third, having reviewed your request, it would appear that one of the grounds for denial is particularly relevant. However, due to its structure, I believe that existing records that fall within the scope of your request would likely be available. Section 87(2)(g) of the 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, in-

structions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those portions of inter-agency or intra-agency materials reflective of advice, opinion, recommendation or suggestion, for example, could justifiably be withheld.

Under the circumstances, it appears that your request involves "statistical or factual tabulations or data" that would be available.

Fourth, I point out that section 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, section 87(1) requires each agency to adopt its own regulations in conformity with the Law and consistent with the Committee's regulations. In the case of New York City, I believe that the Department in question is required to comply with the Mayor's Uniform Rules and Regulations adopted pursuant to the Freedom of Information Law.

One of the aspects of the Committee's regulations involves the designation of one or more "records access officers". A records access officer has the duty of coordinating an agency's response to requests made under the Freedom of Information Law. The records access officer also is responsible for assisting an applicant in identifying the records sought, if necessary [21 NYCRR section 1401.2]. As such, in the future, rather than directing an initial request to the Commissioner or the head of an agency, it is suggested that requests be sent to a records access officer.

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits concerning responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 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: Joseph T. McGough, Commssioner
Marie A. Dooley, Assistant Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1207
FOIL-AO-3854

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

September 16, 1985

Mr. Karl Thuge
Fire Fighting Products
Corporation
186 East Shore Drive
Massapequa, NY 11758

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

Dear Mr. Thuge:

I have received your letter of September 4 in which you requested assistance in obtaining information from the Massapequa Board of Fire Commissioners.

According to your letter and attachments, you requested various records concerning the purchase of a certain fire fighting apparatus on August 14 from the Board of Fire Commissioners. Specifically, you would like to inspect all bids and documents submitted at the bid opening, copies of minutes of all meetings pertaining to the purchase, and copies of "the report from the fire insurance rating organization which makes recommendations as to the needs of the apparatus of the Massapequa Fire District". In addition, you asked to know "from where the funds are coming to pay for this apparatus". The request was apparently sent to the attention of the Board's attorney, William Sinnreich, and you wrote that you have not yet received a response to your request.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law provides that all records of an agency are presumed to be available unless the record, or a portion thereof, may be withheld under section 87(2)(a) through (i) of the Law. Section 86(3) defines "agency" to include:

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

Based upon the statutory definition, I believe that the Massapequa Board of Fire Commissioners is an agency subject to the Freedom of Information Law.

Second, the Freedom of Information Law grants rights of access to records rather than information. In other words, if the information which you seek is not maintained in some physical form, an agency is not required to create a record. Moreover, a request must "reasonably describe" the records sought [see section 89(3) of the Freedom of Information Law].

Third, I believe that many of the records which you have requested, if they exist, should be made available to you. As to the bids and documents submitted at the bid opening, I can think of no basis under the Freedom of Information Law which would permit the Board to withhold that information at this time.

Likewise, minutes of Board meetings in which the purchase of the apparatus was discussed would be available. I note that the Open Meetings Law provides minimum requirements for preparing minutes of meetings held by a public body. Section 106 of that Law requires that minutes of an open meeting consist of:

> "...a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

While section 106 requires a summary of only the more formal aspects of a meeting, it is possible that the Board prepared the minutes of its meetings with more detail. I believe that the minutes taken at the open Board meetings would be available to you in any form in which they are prepared.

Fourth, you requested "to know from where the funds are coming to pay for this apparatus - capital reserve account, general tax monies or tax anticipation notes." As I explained if this type of information is reflected in some physical form, I believe that such records would be available to you. However, the Board need not create a record in response to your questions.

Finally, without more detail, it is difficult to advise with respect to the availability of the "report from the fire insurance rating organization". Since I am not familiar with the organization or its relationship with the Board, I cannot advise with certainty as to your right of access to the report.

Requests for records of an agency should be forwarded to its records access officer. Thus, I suggest that you submit your request to the Board's records access officer who, as you know , has five business days within which to grant or deny access. A denial of access must be in writing and state the reasons for such denial. If you receive no response from the records officer after five business days, you may consider your request "constructively" denied and appeal to the Board's Appeals Officer. The Appeals Officer must respond within ten business days of receiving 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Assistant Attorney General David Smith
William Sinnreich
Mr. Herman Payne, Chairman
Massapequa Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3855

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

September 18, 1985

Mr. Beverly Taylor
83-A-3012
Great Meadow Correctional Facility
Box 51
Comstock, New york 12821-0051

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

Dear Mr. Taylor:

I have received your letter of July 23, which reached this office today.

You requested various records from this office concerning Superintendent's Proceedings conducted at the Great Meadow Correctional Facility. In this regard, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. This office does not have possession of records generally, such as those in which you are interested, nor does it have the authority to compel an agency to grant or deny access to records. In short, the Committee cannot provide the records sought, because this office does not maintain the records.

It is also noted that a request should be directed to the records access officer of the agency that maintains the records sought in accordance with an agency's regulations adopted pursuant to the Freedom of Information Law.

Having reviewed the regulations of the Department of Correctional Services, a request for records maintained at a correctional facility should be directed to the facility superintendent or his designee. With respect to records kept by the Department at its Albany offices, a request may be sent to the Assistant Commissioner for Administration.

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-3856

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

September 19, 1985

Mr. Anthony Buscemi
[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. Buscemi:

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

According to your letter, officials of the Town of New Windsor have indicated that you must pay a fee of fifteen dollars per hour to "retape the minutes" of Town Board meetings. You added that they told you that you must have "your own two recorders and they have to have a clerical employee sit with [you]" while you are recording the minutes. The fee of fifteen dollars per hour was established by means of a local law adopted in 1984. Attached to your letter is a copy of a portion of the New Windsor Code, which in section 19-3K(1) states that:

> "Taping or retaping of Town Board minutes shall be accomplished only in the presence of a representative of the Town Clerk's office and shall be conducted upon payment of a fee of fifteen dollars ($15.) per hour for each hour or portion thereof that the representative from the Town Clerk's office expends on each request."

In my opinion, the fee established by the local law is inappropriate and void to the extent that if conflicts with the Freedom of Information Law.

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

First, section 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 (21 NYCRR Part 1401). In turn, section 87(1) requires each agency, such as the Town of New Windsor, to promuglate rules and regulations pursuant to those adopted by the Committee.

Second, section 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. If records cannot be photocopied, as in the case of a tape recording, a fee must be based upon the actual cost of reproduction. Further, section 1401.8(3) of the Committee's regulations states that fees for records such as tape recordings:

> "...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."

Third, in terms of background, section 87(1)(b)(iii) of the Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocpy 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, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law establishing a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction 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 photoccopy, or a fee that exceeds the actual cost of reproduction.

Fourth, I do not believe that the Board can compel a member of the public to use two tape recorders when a copy of a tape recording is requested. Section 89(3) of the Freedom of Information Law states in relevant part that, upon payment of or offer to pay the appropriate fee, an agency is required to provide a copy of an accessible record. It is noted, too, that in response to a contention that the reproduction of a tape recording may be burdensome and involve personnel costs, it was found that:

> "There is no exemption provided in Public Officers Law, Section 87(2) for requests which may be burdensome and 21 NYCRR Section 1401.8(c)(3) specifically provides that the agency may not include personnel salaries in assessing reproduction costs" [see Zaleski v. Hicksville Union Free School School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27. 1978].

In sum, I do not believe that the local law establishing a fee of fifteen dollars per hour for reproducing a tape recording of an open meeting of the Town Board is proper. Moreover, the fee that may be imposed by the Town for copies of such records may in my opinion be based solely upon the actual cost of reproduction, excluding personnel costs and similar expenses.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to the Town Board of the Town of New Windsor.

I hope that I have 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-3857

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

September 23, 1985

Mr. Anthony Romandette
Albany County Jail
840 Albany Shaker Road
Albany, NY 12211

The staff of the Committee on Open 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 your letter of September 10, which concerns unanswered requests sent to the Albany County Jail.

The information sought involves the "first and last name and correct spelling of all medical personnel presently employed at the Albany County Jail" (emphasis yours) and "a reasonable detailed current list by subject matter, of all records in possession of the Albany County Jail..."

First, having contacted a representative of Albany County on your behalf, I was informed that the records access officer for records kept at the County Jail is the County Clerk. Therefore, it is suggested that a request for records kept at the County Jail be addressed to the County Clerk, Mr. Guy Paquin.

Second, the Freedom of Information Law pertains to existing records. Stated differently, an agency is not required to create or prepare a record in response to a request, unless there is specific direction to the contrary [see Freedom of Information Law, section 89(3)]. For example, if no particular record exists indicating the names of "medical personnel" employed at the County Jail, the agency would not in my opinion be obliged to prepare such a record to comply with the Freedom of Information Law.

Third, however, I believe that the names of medical personnel would likely be found in another record. Although the Freedom of Information Law generally pertains to existing records and does not require an agency to create a record, one of the exceptions to that rule concerns payroll information identifying public employees.

Specifically, section 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..."

Therefore, even if no individual record has been prepared that identifies only medical personnel, the payroll record described above must be prepared and made available.

The other aspect of your request also involves a record that an agency is required to create. Section 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 in my opinion intended to refer to every record maintained by Albany County or the County Jail; from my perspective, as the language of section 87(3)(c) suggests, it is intended to refer to the types of records, by category, and in reasonable detail, kept 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-3858

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

September 23, 1985

Mr. Asher J. Matathias
[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. Matathias:

I have received your correspondence that was originally addressed to Attorney General Abrams. As indicated by Richard S. Redlo, Assistant Attorney General, the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law.

According to your letter of August 25 addressed to the Attorney General, you requested a list of those who voted in an election held by Sanitation District 1. The list would apparently include the names and addresses of those who voted in an election for commissioner. Although you submitted a written request some time ago, as of the date of your letter, you had not yet received a response.

In this regard, I offer the following comments.

First, having researched the issue on your behalf, section 212 of the Town Law pertains to the election of district commissioners of improvement districts. However, nothing in that statute pertains specifically to the disclosure of a list of voters. Consequently, I believe that rights granted by the Freedom of Information Law would be applicable.

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 section 87(2)(a) through (i) of the Law.

Third, it does not appear that any of the grounds for denial could justifiably be asserted. As a general matter, lists of names and addresses of registered voters are available. For instance, section 5-602 of the Election Law requires that a county board of elections must publish "a complete list of names and residence addresses of the registered voters for each election district..." Further, such lists are available "for public inspection" at offices of a board of election and copies may be sold for a fee "not exceeding the cost of publication". It is noted that the voter registration list kept by a county board identifies those who have voted within a particular period of time.

Once again, while there is no specific direction in any law of which I am aware dealing with disclosure of a list of those who voted in a district election, since analogous records must be made available in other contexts, I believe that the list in which you are interested must also be made available. It is noted, too, that a recent decision held that a "registration poll record" is a "public record" available for inspection and copying, despite claims that disclosure would result in an unwarranted invasion of privacy [see Reese v. Mahoney, Supreme Court, Erie County, June 28, 1984].

In sum, I believe that the list that you are seeking should be made available under the Freedom of Information Law, for none of the grounds for denial would in my view be applicable.

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee [21 NYCRR Part 1401] prescribe time limits for responses to request.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 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 the Board of Commissioners of the District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners, Sanitary Distict 1

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3859

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

September 23, 1985

Mr. Thomas F. Gogan
Northern Manhattan
Improvement Corp.
601 West 181st Street
No. 21
New York, NY 10033

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

Dear Mr. Gogan:

I have received your letter of September 6, which reached this office on September 13.

Your inquiry pertains to a request for a "T.I.L. Intake Survey" concerning a particular piece of real property. The survey was prepared and maintained by the New York City Department of Housing Preservation and Development, which denied your initial request and an ensuing appeal.

You wrote that the survey in question, among other items, "provides an exact factual tabulation of building conditions, system by system...". In addition, you wrote that the materials contain "numerical estimates as to the specific probable costs of repairing or replacing the enumerated building systems". In the initial response to your request, the denial was based upon a contention that the survey "was in the form of an intra-agency material" that "had no bearing or influence on the Agency's final determination". In response to your appeal, Mr. Joseph V. Fiocca stated that the memorandum "had no bearing on the agency's final determination" and, therefore, could be withheld.

In this regard, I 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 of records fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, the ground for denial to which officials of the Department alluded is section 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.

Under the circumstances, it appears that the record that you are seeking could justifiably be characterized as "intra-agency material". Nevertheless, as suggested earlier, to the extent that it contains "statistical or factual information or data", I believe that it must be made available. In my view, statistical or factual information found within inter-agency or intra-agency materials would be independently accessible even though it might not have been used or relevant to an agency's determination. Therefore, the rationale for the denial offered by Department officials is, in my opinion, inconsistent with the direction provided by the Freedom of Information Law.

Further, in a somewhat analagous situation involving estimates and projections prepared in the budget process, it was held that estimates and the like that may have been advisory in nature nonetheless constituted statistical tabula-

tions accessible under the Freedom of Information Law. The court noted that those tabulations were accessible even though they were not reflective of "objective reality" [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

In sum, to the extent that the record sought contains statistical or factual information, I believe that it should be made available to you pursuant to section 87(2)(g)(i) of the Freedom of Information Law, irrespective of the use of that information in the agency's determination.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to the records access and appeals officers of the Department of Housing Preservation and Development.

I hope that 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: Joseph V. Fiocca, Records Appeals Officer
Mark D. Trachtenberg, Records Access Officer

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3860

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

September 23, 1985

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 September 5, which reached this office on September 13.

You wrote that you requested information from Mr. John Bintz, Controller of the City of Amsterdam, concerning a delinquent taxpayer. Specifically, you indicated that you seek to know "who that person was, what property he owned, what he owed and what agreement was made between him and to [sic] city to prevent foreclosure." Since the City did not apparently respond in a timely manner to your original request, another request was made on September 1. Mr. Bintz answered your letter on September 3, stating that:

> "The Freedom of Information Act does not mandate that I respond to you at all. It does, however, require that I make the information available for your inspection during regular business hours. The books of my office are available anytime you wish to look at them. I do not compile information for anyone accept as required by the laws of the State of New York and the Charter of the City of Amsterdam."

You asked whether Mr. Bintz's comments were "correct". In this regard, I offer the following comments.

First, I point out that section 89(1)(b)(iii) of the Freedom of Information law requires the Committee on Open Government to promulgate general regulations governing the procedural implementation of the Law. In turn, section 87(1) requires the governing body of a public corporation, such as the City Council of the City of Amsterdam, to adopt its own requlations in conformity with the Law and consistent with the Committee's regulations.

One of the aspects of the regulations involves the designation of one or more "records access officers" [see 21 NYCRR, section 1401.2]. The records access officer has the duty of coordinating an agency's response to requests made under the Freedom of Information Law. As such, as a general rule, a request should be directed to an agency's designated records access officer. Nevertheless, the same provision of the regulations cited earlier states that:

> "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 form continuing to do so."

If Mr. Bintz is a designated records access officer, I believe that he would have the duty to respond to a request.

Second, Mr. Bintz contended that he is not required to compile information except as required by law. I am in general agreement with his statement, for the Freedom of Information Law is applicable to existing records maintained by an agency. Moreover, section 89(3) states in part that, as a general matter, an agency is not required to create or prepare a new 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, the Freedom of Information Law would not apply. However, assuming that records do exist that contain the information in question, rights granted by the Freedom of Information Law would be applicable.

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 section 87(2)(a) through (i) of the Law.

Under the circumstances, assuming that the information that you are seeking exists in the form of a record or records, I believe that it would be available, for none of the grounds for denial could in my view appropriately be asserted. It is noted that records pertaining to the assessment of real property and the payment of real property taxes have long been generally accessible.

Lastly, you indicated that the City of Amsterdam did not in your opinion respond to requests in a timely manner. Here I point out that the Freedom of Information Law and the Committee's regulations prescribe time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 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: John H. Bintz, Controller

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-
FOIL-AO-3861

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

September 24, 1985

[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 September 12, in which you requested advice regarding rights of access to records.

According to your letter, you were employed by a state agency for approximately five years. You wrote that you resigned to accept a position outside of government and that, prior to your resignation, you were involved in a "disciplinary incident" that was settled. You indicated that you would like to examine the following items:

> "(1) Any work of mine that was investigated by the NYS Labor Department.
>
> (2) Any investigative report regarding me.
>
> (3) Any correspondence among my superiors regarding the disciplinary incident.
>
> (4) A list of all Labor Department officials who had any role regarding the disciplinary indicent.
>
> (5) Mr. Joseph Kearny's (Employee Relations Representative III) investigative file."

In this regard, I offer the following comments.

It appears that both the Freedom of Information law, which generally concerns rights of access to government records, and the Personal Privacy Protection Law, which pertains to rights of access by individuals to records about them kept by state agencies, are relevant. However, without additional information regarding the "disciplinary incident", and the records related to that incident, I cannot offer specific advice. Nevertheless, I would like to offer the following general comments in the hope that they will be useful to you.

First, both the Freedom of Information and the Personal Privacy Protection Laws require that an applicant request records "reasonably described". As such, I do not believe that an applicant must identify records sought with specificity. However, a request should contain sufficient detail to enable agency officials to locate the records sought.

Second, both statutes pertain to existing records. As a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, there is no list of Labor Department officials who had a role in conjunction with the disciplinary incident, the Labor Department would not in my opinion be required to create such a list on you behalf in response to a request.

With respect to the Freedom of Information Law, as noted earlier, that statute grants rights of access to records on the part of the public. The Freedom of Information Law is based upon a presumption of 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 section 87(2)(a) through (i) of the Law.

There may be one or more grounds for denial appearing in the Freedom of Information Law that could be cited to withhold records or portions thereof, depending upon the nature and content of the records. One of the grounds for denial, section 87(2)(b), states that an agency may withhold records or portions thereof when disclosure would constitute an "unwarranted invasion of personal privacy". While I do not believe that you could invade your own privacy, it is possible that the records identify others, such as members of the public or perhaps other Department employees, and that disclosure of identifying details concerning those individuals would result in an unwarranted invasion of personal privacy. To that extent, identifying details could be deleted to protect the privacy of others.

Another ground for denial of potential significance is section 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. Concurrently an agency may withhold inter-agency or intra-agency materials reflective of opinion, advice, recommendation and the like.

Another possible relevant ground for denial, depending upon the nature of the incident, is section 87(2)(e), which permits agencies to withhold records compiled for law enforcement purposes under circumstances specified in the Law. I will not detail those circumstances here, for it would seem unlikely that section 87(2)(e) would be applicable, because the disciplinary incident was settled.

The Personal Privacy Protection Law may provide you with rights of access in addition to those granted by the Freedom of Information Law. In brief, a state agency is required to make available, to the subject of a record, records pertaining to that person. An exception to rights of access would involve records compiled for law enforcement purposes in a manner analagous to section 87(2)(e) of the Freedom of Information Law [see Personal Privacy Protection Law, section 95(5)(a)]. Further, rights of access to records by individuals do not apply to:

> "attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in

> subdivisions (c) and (d) of section three thousand one hundred of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or proceeding, court ordered or grand jury subpoena, search warrant or other court ordered disclosure" [section 95(6)(d)].

Once again, the extent to which material might have been prepared for litigation before a "quasi-judicial or administrative tribunal" in relation to the disciplinary incident is unknown to me. However, it is possible that some records might be withheld on the basis of the cited provisions.

Lastly, it is suggested that you submit a written request for records to the Labor Department under the provisions of both the Freedom of Information and Personal Privacy Protection Laws. To aid you, enclosed are brochures that serve as guides to both of those statutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3862

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

September 24, 1985

Mr. Frank Costa
Concerned Citizens of North Babylon
344 Van Buren Street
North Babylon, New York 11703

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

Dear Mr. Costa:

I have received your letter of September 13, in which you have alleged that the North Babylon School District has failed to respond to a series of requests in a timely manner.

In this regard, I offer the following comments.

First, although numerous requests have been made, the nature of the records sought is not indicated. Consequently, I cannot comment on rights of access to the records, but only rather on the procedural requirements imposed upon the District.

Second, the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, contain prescribed time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 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: Margaret B. Doyle, Business Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3863

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

September 24, 1985

Mr. Michael Hajovsky
[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. Hajovsky:

I have received your letter of September 10 and the materials attached to it.

Your inquiry concerns rights of access to complaints made against New York Life Insurance Company that are kept by the State Insurance Department. Specifically, you have requested sixty-one complaints that "were upheld by the department as justified and in which some disciplinary or administrative action was taken" by the Department against the Company. You stated that you seek the complaints with the names of complainants included in order that you make contact with those individuals in the course of your "research". It is your view that the deletion of complainants' identities cannot be justified in every instance.

The other aspect of your letter concerns fees for photocopying. Apparently the Department seeks to charge twenty-five cents per photocopy for any and all photocopies requested. You wrote that "the New York State Freedom of Information Law allows for reduction and waiver of fees", and that "[T]herefore the blanket policy of the Insurance Department in denying all request[s] for reduction or waiver of fees is contrary to the law."

In this regard, I offer the following comments.

First, with respect to complaints submitted to agencies, it has generally been advised that the substance of a complaint is available, but that the identifying details regarding a complainant might be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" under section 87(2)(b) of the Freedom of Information Law. In dealing with the protection of personal privacy, several judicial decisions have been based upon the relevance of identifying details to an agency. If, for instance, you enter a restaurant and believe that it is unsanitary and later transmit a complaint to your local health department, the health department in reviewing the complaint in all likelihood does not base its actions on who you are (your identity). On the contrary, its concern is whether the complaint is valid; i.e., whether the restaurant was indeed unsanitary. Moreover, I would conjecture that often complaints are investigated even if they are submitted anonymously. If that is so, the contention that the identity of a complainant is irrelevant to the work of the agency would in my view be strengthened. In short, I believe that a complaint must be made available, but that the agency may, in many circumstances, delete identifying details, such as the name of a complainant, when disclosure would in the agency's view constitute an unwarranted invasion of personal privacy. In other circumstances, i.e., where a complaint has led to a public proceeding, such as a lawsuit brought by a complainant, the identity of the complainant is effectively made public. If the agency is aware of such a disclosure, I would agree that disclosure under the Freedom of Information Law would result in a permissible rather than an unwarranted invasion of personal privacy, and that the identity of a complainant should be made available.

It is also noted that section 89(2)(b) of the Freedom of Information Law lists a series of five unwarranted invasions of personal privacy. However, in my view, that list is not exhaustive. The introductory language in section 89(2) states that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the ensuing examples of unwarranted invasions of privacy. Therefore, from my perspective, section 89(2)(b) represents but five among conceivable dozens of unwarranted invasions of personal privacy, and the examples presented in the cited provision should not be considered the only instances in which records may be withheld under the privacy provisions.

Of possible significance is one of the examples of unwarranted invasions of privacy appearing in section 89(2)(b). Specifically, section 89(2)(b)(iv) states that an unwarranted invasion of personal privacy includes:

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

It is possible that a contention could be made that a complaint contains information of a personal nature which if disclosed would result in personal or economic hardship to the complainant. Further, as suggested earlier, it might be contended that the identity of the complainant is largely irrelevant to the work of the agency; what is relevant is whether or not the complaint has merit.

The foregoing should not be construed to mean that the identity of the complainant may always be withheld or made available. Rather, it would appear that the events that relate to a complaint and its outcome may be significant in determining whether the identity of a complainant may be deleted with justification from a record.

Second, in conjunction with your comments regarding fees, I point out that section 87(1) of the Freedom of Information Law requires each agency to promulgate regulations under the Freedom of Information Law concerning various aspects of the implementation of the Law, including:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute" [section 87 (1)(b(iii)].

An agency may establish regulations under which agency records are made available free of charge; some agencies have established a fee of ten cents per photocopy. Notwithstanding those situations, I believe that the Insurance Department may assess a fee of up to twenty-five cents per photocopy.

Further, although the federal Freedom of Information Act (5 USC section 552) contains provisions pertaining to the waiver of fees, the New York Freedom of Information Law does not contain analogous 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
Executive Director

RJF:jm

cc: Nathan Silver
Paul Altruda

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3864

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

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 25, 1985

Mr. John Johnson
[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. Johnson:

I have received your letter of September 3 in which you requested an advisory opinion.

You asked that I review six letters of appeal addressed to the Supervisor of the Town of Rensselaerville, Kermit E. Jackson. You would like to know whether the requested records should be open to public inspection. For background information regarding the Freedom of Information Law, I refer you to Mr. Freeman's letter to you of August 27. In addition, I offer the following comments.

First, you requested "all records showing all grants coming from the Federal Revenue Sharing [Plan] and all records showing all disbursements from this Federal Revenue Sharing Account from January 1, 1980 to August 13, 1985." While I am not familiar with the Sharing Plan or its relationship to the Town of Rensselaerville, if the records which you seek reflect federal money provided to the Town and the amount of money expended therefrom, those records, in my view, would be available to you under the Freedom of Information Law. Moreover, I believe that the identity of the recipient programs of the sharing account would likewise be available.

Second, you requested payroll records for all Town employees for the payroll period from June 1 to August 15, 1985, including records which reflect the employees who received compensation for working Sundays between July 1 and August 15, 1985. In my opinion, Town payroll records which indicate the compensation paid to Town employees would be

available. However, to the extent that the records reflect payroll withholdings or other deductions, such portions may, if disclosed, constitute an unwarranted invasion of personal privacy and thus may be withheld under section 87(2)(b) of the Law.

Third, you requested all tax maps of the Town of Rensselaerville, all deeds to property owned by the Town, all maps indicating State-owned property within the town and the assessed value of all such lands. I believe that those records are available for public inspection and copying. Some of the records, however, may not be maintained by the town and should be requested from the office in which they are held. For instance, the tax maps of the Town may be found in the Albany County Courthouse if the Town does not maintain the maps.

Fourth, you would like to know whether the following records are available for public inspection:

> "1. All disbursements made by the Town of Rensselaerville, New York for the months of May, June, July, 1985.
>
> 2. All Rensselaerville building permits that have been issued from May 14, 1983 to August 15, 1985.
>
> 3. All Inspection reports by the Albany County Health Dept. regarding the Rensselaerville Water Dist."

With respect to the records of disbursements and building permits, I know of no basis for withholding such information. Again, so long as the records exist in some physical form and are maintained by the Town, I believe that they should be made available to you.

In addition, the inspection reports prepared by the Albany County Health Department regarding the Rensselaerville Water District constitute inter or intra-agency materials. As such, section 87(2)(g) would permit the Town to withhold those portions of the report which consist of suggestions, recommendations, opinion and advice. On the other hand, those portions of the report which include factual or statistical tabulations or data, or final agency policy or determinations must be made available unless another ground for withholding can be cited.

Fifth, you requested all pictures taken of you by a named individual at a particular time and place. If the photographs are maintained by the Town, I believe that they would constitute "records" under the Freedom of Information Law and are likely available to you. However, one basis for withholding the photographs may be relevant. For instance, if the photographs were taken for a law enforcement purpose, they may be withheld by the Town under section 87(2)(e)(i) of the Law if disclosure would interfere with a law enforcement investigation. I cannot envision any other ground which could be asserted by the Town for withholding the photographs.

Finally, you requested all correspondence between the Town and the Department of Environmental Conservation and the Albany County Health Department from January 1 to August 16, 1985. You also requested "all records regarding engineering reports on the Rensselaerville Demo Site and Town Mine and the project cost of such reports made from March 1 to August 15, 1985." The requested records, in my view, constitute inter-agency or intra-agency materials. As discussed above, such records may be withheld to the extent that they 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 other words, those portions of the correspondence between the Town and the state agencies and of the engineering reports which reflect opinion, advice or recommendation could be withheld under section 87(2)(g) of the Law. However, those portions of the records which contain factual or statistical information, for example, would be available.

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

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive Director

CAM:ew

cc: Hon. Kermit E. Jackson

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3865

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

September 27, 1985

Ms. Anne M. Wasserstrom
Project Director
Project REAP
Empire State Plaza
Suite 108
Concourse Level
Albany, NY 12242

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

Dear Ms. Wasserstrom:

I have reviewed the <u>Project REAP Implementation Guidelines</u> and I believe that they are in compliance with the requirements of the Personal Privacy Protection Law. Having also reviewed the forms you developed for the use of the program, it appears that they, too, meet the requirements of the Law.

As we discussed last week, I was initially concerned about the statutory authority of the program and, hence, its authority to disclose records containing personal information. After speaking with several staff members at the Office of General Services and the Governor's Office of Employee Relations, I believe that the program falls within the statutory duties and powers of the Director of the Office of Employee Relations as set forth in sections 653 and 654 of the Executive Law. As such, I believe that personal information may be disclosed when necessary to operate Project REAP.

For your information, I note that with respect to the Freedom of Information Law, I believe that OGS would be the agency to which requests for records would be made. As you and George Cochran explained, the offices of REAP are located within the offices of OGS and the staff of REAP are State employees paid through OGS. Thus, I believe that the

records maintained by REAP would fall within the definition of "record" as defined in section 86(4) of the Freedom of Information Law. As such, the records of REAP would be subject to the availability under the Law, through the records access officer of OGS.

The Committee appreciates your efforts to comply with the Personal Privacy Protection Law. I wish you much success with Project REAP.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: George Cochran, OGS

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3866

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279-

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 30, 1985

Honorable Paul Feiner
Legislator
Westchester County Board of Legislators
803 Michaelian Office Building
White Plains, New York 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. Feiner:

I have received your letter of September 19 and the correspondence attached to it.

In brief, you serve Westchester County as a member of the Board of Legislators. Recently, you requested two departmental budget requests that were denied by the County.

In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Unlike the original Freedom of Information Law which granted access to specified categories of records to the exclusion of all others, the Law since 1978 has stated that all records in possession of government in New York are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in section 87(2)(a) through (i).

In my opinion, the only ground for denial that may be offered with respect to the records sought is section 87(2)(g). The cited provision states that an agency may withhold records or portions thereof that:

> are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

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. Therefore, to the extent that the records sought consist of statistical or factual tabulations or data, or are reflective of agency policy or determinations, they are in my opinion accessible. At this juncture, none of the records could likely be characterized as final determinations. Portions of the records, however, might contain agency policy adopted in the past, and substantial portions of the records might contain "statistical or factual tabulations or data".

It is noted that two decisions rendered to date have dealt with budget information that is likely analogous to the information you are seeking. Both decisions were handed down under the Freedom of Information Law as originally enacted.

In Dunlea v. Goldmark [54 AD 2d 446, affirmed without opinion, 43 NY 2d 754 (1977)], the Appellate Division, Third Department, held that budget worksheets containing advice in the form of numbers were accessible. The Court noted that although the figures contained in the worksheets may not have been reflective of "objective reality", they were nonetheless accessible on the ground that they constituted "statistical tabulations". The worksheets were sought after the adoption of the executive budget.

The second determination that dealt with similar subject matter was rendered by the Appellate Division, Second Department. In Delaney v. DelBello [62 AD 2d 281 (1978)], upon which the denial of your request was based, it was held that budget estimates submitted by agency heads to the County Executive were deniable. In Delaney, the court found that only "supporting" statistical or factual tabulations relative to a budget are accessible. In order to discern whether such tabulations are "supporting", the budget obviously must pass to make such a determination. Consequently, Delaney was distinguished from Dunlea on the basis that the information was sought in Delaney prior to the adoption of the budget, while it was sought after the adoption of the budget in Dunlea.

I disagree with the holding in Delaney for several reasons. First, the current Freedom of Information Law, as noted earlier, is based upon a presumption of access. Further, the Law defines "record" to include any information in possession of an agency "in any physical form whatsoever" [section 86(4)]. Therefore, the nature of the contents of records determines the extent to which records or portions thereof may be withheld. A distinction in terms of time cannot in my view justifiably be made under the Law. For example, if a factual tabulation appears in a record, it is accessible, whether or not it relates to a proposed or an adopted budget. Its nature alone determines rights of access under section 87(2)(g). Therefore, I believe that the distinction made in Delaney based upon the time of submission of the records sought would be irrelevant under the current Freedom of Information Law.

Second, Delaney relied heavily upon 9 NYCRR 145.1(2). Reliance upon that section of the New York Code of Rules and Regulations was in my view misplaced. The cited provision constituted a portion of the regulations adopted under the original Law by the State Division of the Budget, which exempted "opinions, policy options and recommendations" from the coverage of the Freedom of Information Law. It may have been relevant to the Dunlea case, but it had no connection whatsoever to the controversy in Delaney. The Freedom of Information Law requires this Committee to promulgate regulations regarding the procedural aspects of the Law, and all agencies in the state must in turn adopt regulations no more restrictive than those promulgated by the Committee. The regulations adopted by the Division of the Budget, however, pertained not only to procedures, but to rights of access as well. In this regard, an agency cannot in my opinion adopt regulations more restrictive in terms of rights of access than a statute [see Zuckerman v. Board of Parole, 53 Ad 2d 405; Morris v. Martin, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. If an agency could adopt regulations more restrictive than the statute, the statute would be of no effect. In short, 9 NYCRR 145.1(2) should in my opinion have had no relevance to the Delaney determination.

Third, the phrase "statistical or factual tabulations or data" is subject to conflicting interpretations. The phrases "factual tabulations" or "factual data" in my view would not result in substantial questions regarding their interpretation. But what constitutes "statistical tabulations" or "statistical data"? In my opinion, there must be a difference betweeen "factual" tabulations or data and "statistical" tabu-

lations or data, or the Legislature would not have included the word "statistical" within the Law. In this regard, if the phrase "statistical tabulations or data" does not include items such as proposed budget estimates, the word "statistical" appearing in section 87(2)(g)(i) would have no apparent meaning.

Fourth, the legislative declaration contained in section 84 of the Freedom of Infomration Law states that the people must have the right "to review the documents and statistics leading to determinations..." The statement of legislative intent makes clear that statistical or factual findings that precede the making of determinations are intended to be available. The Delaney decision appears to have passed over a relevant portion of the Freedom of Information Law, its statement of intent. Although the phrase "statistical or factual tabulations" may be subject to conflicting interpretations, the courts have long held that in cases in which the specific language of a statute is unclear but the statute's legislative intent is clear, the statement of intent should be used as a guide to appropriate interpretation. Further, the rules of construction have long held that remedial legislation, such as the Freedom of Information Law, should be construed liberally.

In sum, I believe that the phrase "statistical or factual tabulations or data" should be construed broadly to include within its scope statistical or factual data that may be developed prior to the submission of budget estimates. Therefore, to the extent that the records in question consist of statistical or factual data or contain statements of policy, they are in my opinion available.

It is emphasized that descriptive explanations or opinions regarding accessible information, such as statistical tabulations, would in my opinion be deniable under section 87(2)(g). For example, while a chart consisting of statistical projections should be made available, descriptive or deliberative explanations or rationales reflective of the thought process used in the compilation of a chart would in my view be deniable.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Andrew P. O'Rourke
Edward M. Gibbs

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3867

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

October 1, 1985

Mr. T.D. Reznik
U.S. Veterans
70 Wykagyl Station Building
New Rochelle, NY 10804

Dear Mr. Reznik:

I have received your letter of September 24, which reached this office on September 30, in which you requested "copies of materials describing the NYS Freedom of Information Law" and raised a series of questions.

By way of background, I point out that the Freedom of Information Law was originally enacted in 1974 by means of Chapters 578, 579 and 580 of the Laws of 1974. In its initial form, it appeared in sections 85 to 89 of the Public Officers Law. The original version was repealed and replaced with a new Freedom of Information law by means of Chapter 933 of the Laws of 1977, which became effective on January 1, 1978 and which can be found in sections 84 to 90 of the Public Officers Law.

Enclosed in conjunction with your request are copies of the Freedom of Information Law published by the Consolidated Laws Service, which includes the legislative history of each section and a reprint of the Law prepared by this office. In addition, enclosed is a copy of "Your Right to Know", which explains the Freedom of Information Law.

The intent of the Law is stated in section 84, entitled "Legislative Declaration"

You asked which state or municipal departments or officials are "mandated to enforce this law and in which manners of action?" In what may be a related question, you asked for "official definitions" of "agency", "department", "administrative office" and "official".

It is unclear what meaning is to be inferred from the term "enforce". If the question involves which entities are required to comply with the Freedom of Information Law, the Law is applicable to agency records, and the term "agency" is defined in section 86(3) to include:

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

As such, the Freedom of Information Law generally is applicable to records of entities of state and local government, except the courts and the State Legislature, whose records are dealt with separately in section 88 of the Law.

The other terms that you identified are not defined in the Law. However, rights of access pertain to all agency records, whether or not the records are characterized as "official". In this regard, it is noted that section 86(4) defines "record" broadly to mean:

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

If "enforcement" is intended to pertain to who may seek to compel compliance with the Law, there is no agency upon which such authority has been conferred. In short, any person denied access to records under the Freedom of Information Law may challenge the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules as described in section 89(4)(b) of the Law. Section 89(4)(c) permits a court to award attorney's fees to a member of the public who "substantially prevails" in a challenge to a denial of access when the conditions described in that provision are met.

Lastly, you asked for the reasons for which a person can be exempt from paying research or photocopying expenses. Here I point out that section 89(1)(b)(iii) requires the Committee on Open Government to promulgate general regulations

concerning the procedural aspects of the Law (see attached regulations, 21 NYCRR Part 1401). In turn, section 87(1) requires each agency to adopt regulations in conformity with the Law and consistent with the Committee's regulations. The regulations are required to refer to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute" [see Freedom of Information Law, section 87(1)(b)(iii)].

Therefore, an agency may, by means of regulations, establish fees for photocopying up to twenty-five cents per photocopy. While there is no provision in the Freedom of Information Law concerning the waiver of fees, no fee may be assessed for "research" or personnel expenses. Consequently, the state Freedom of Information Law differs from the federal Freedom of Information Act. Under the federal Act, a federal agency may waive fees, but may charge for research or research time; conversely, an agency subject to the state Law does not operate under any waiver provision, but it cannot charge for search or research.

I hope that 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-3868

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

October 2, 1985

Mr. Jesse W. Brodey
Reporter
Greenburgh Inquirer
20 Lenox Avenue
White Plains, NY 10603

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

Dear Mr. Brodey:

I have received your letter of September 19, as well as the correspondence attached to it.

Your inquiry concerns a denial of access to records by the Westchester County Executive and Budget Director. The records sought involve two departmental budget requests.

In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Unlike the original Freedom of Information Law which granted access to specified categories of records to the exclusion of all others, the Law since 1978 has stated that all records in possession of government in New York are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in section 87(2)(a) through (i).

In my opinion, the only ground for denial that may be offered with respect to the records sought is section 87(2)(g). The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

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. Therefore, to the extent that the records sought consist of statistical or factual tabulations or data, or are reflective of agency policy or determinations, they are in my opinion accessible. At this juncture, none of the records could likely be characterized as final determinations. Portions of the records, however, might contain agency policy adopted in the past, and substantial portions of the records might contain "statistical or factual tabulations or data".

It is noted that two decisions rendered to date have dealt with budget information that is likely analogous to the information you are seeking. Both decisions were handed down under the Freedom of Information Law as originally enacted.

In Dunlea v. Goldmark [54 AD 2d 446, affirmed without opinion, 43 NY 2d 754 (1977)], the Appellate Division, Third Department, held that budget worksheets containing advice in the form of numbers were accessible. The Court noted that although the figures contained in the worksheets may not have been reflective of "objective reality", they were nonetheless accessible on the ground that they constituted "statistical tabulations". The worksheets were sought after the adoption of the executive budget.

The second determination that dealt with similar subject matter was rendered by the Appellate Division, Second Department. In Delaney v. DelBello [62 AD 2d 281 (1978)], upon which the denial of your request was based, it was held that budget estimates submitted by agency heads to the County Executive were deniable. In Delaney, the court found that only "supporting" statistical or factual tabulations relative to a budget are accessible. In order to discern whether such tabulations are "supporting", the budget obviously must pass to make such a determination. Consequently, Delaney was distinguished from Dunlea on the basis that the information was sought in Delaney prior to the adoption of the budget, while it was sought after the adoption of the budget in Dunlea.

I disagree with the holding in Delaney for several reasons. First, the current Freedom of Information Law, as noted earlier, is based upon a presumption of access. Further, the Law defines "record" to include any information in possession of an agency "in any physical form whatsoever" [section 86(4)]. Therefore, the nature of the contents of records determines the extent to which records or portions thereof may be withheld. A distinction in terms of time cannot in my view justifiably be made under the Law. For example, if a factual tabulation appears in a record, it is accessible, whether or not it relates to a proposed or an adopted budget. Its nature alone determines rights of access under section 87(2)(g). Therefore, I believe that the distinction made in Delaney based upon the time of submission of the records sought wuld be irrelevant under the current Freedom of Information Law.

Second, Delaney relied heavily upon 9 NYCRR 145.1(2). Reliance upon that section of the New York Code of Rules and Regulations was in my view misplaced. The cited provision constituted a portion of the regulations adopted under the original Law by the State Division of the Budget, which exempted "opinions, policy options and recommendations" from the coverage of the Freedom of Information Law. It may have been relevant to the Dunlea case, but it had no connection whatsoever to the controversy in Delaney. The Freedom of Information Law requires this Committee to promulgate regulations regarding the procedural aspects of the Law, and all agencies in the state must in turn adopt regulations no more restrictive than those promulgated by the Committee. The regulations adopted by the Division of the Budget however, pertained not only to procedures, but to rights of access as well. In this regard, an agency cannot in my opinion adopt regulations more restrictive in terms of rights of access than a statute [see Zuckerman v. Board of Parole, 53 Ad 2d 405; Morris v. Martin, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. If an agency could adopt regulations more restrictive than the statute, the statute would be of no effect. In short, 9 NYCRR 145.1(2) should in my opinion have had no relevance to the Delaney determination.

Third, the phrase "statistical or factual tabulations or data" is subject to conflicting interpretations. The phrases "factual tabulations" or "factual data" in my view would not result in substantial questions regarding their interpretation. But what constitutes "statistical tabulations" or "statistical data"? In my opinion, there must be a difference betweeen "factual" tabulations or data and "statistical" tabulations or data, or the Legislature would

not have included the word "statistical" within the Law. In this regard, if the phrase "statistical tabulations or data" does not include items such as proposed budget estimates, the word "statistical" appearing in section 87(2)(g)(i) would have no apparent meaning.

Fourth, the legislative declaration contained in section 84 of the Freedom of Infomration Law states that the people must have the right "to review the documents and statistics leading to determinations..." The statement of legislative intent makes clear that statistical or factual findings that precede the making of determinations are intended to be available. The Delaney decision appears to have passed over a relevant portion of the Freedom of Information Law, its statement of intent. Although the phrase "statistical or factual tabulations" may be subject to conflicting interpretations, the courts have long held that in cases in which the specific language of a statute is unclear but the statute's legislative intent is clear, the statement of intent should be used as a guide to appropriate interpretation. Further, the rules of construction have long held that remedial legislation, such as the Freedom of Information Law, should be construed liberally.

In sum, I believe that the phrase "statistical or factual tabulations or data" should be construed broadly to include within its scope statistical or factual data that may be developed prior to the submission of budget estimates. Therefore, to the extent that the records in question consist of statistical or factual data or contain satements of policy, they are in my opinion available.

It is emphasized that descriptive explanations or opinions regarding accessible information, such as statistical tabulations, would in my opinion be deniable under section 87(2)(g). For example, while a chart consisting of statistical projections should be made available, descriptive or deliberative explanations or rationales reflective of the thought process used in the compilation of a chart would in my view be deniable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1213
FOIL-AO-3869

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279

October 3, 1985

Mr. John Johnson
[redacted]

The staff of the Committee on Open Governement 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 recent letter in which you requested an advisory opinion concerning requests directed to the Town of Rensselaerville.

Specifically, according to your letter, the Town Board at several recent meetings entered into executive sessions. Subsequently, you submitted requests under the Freedom of Information Law for minutes of executive sessions. As of the date of your letter to this office, you had not received responses to those requests.

In this regard, I offer the following comments.

First, there is no indication in your letter of the nature of the topic or topics that may have been considered during the executive sessions.

Here I point out that, prior to entry into an executive session, a public body is required to accomplish a procedure prescribed in the Law. Specifically, section 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, a motion to enter into an executive session must be made during an open meeting. Further, the motion must indicate in general terms the topic or topics to be considered.

Second, the Open Meetings Law contains provisions pertaining to minimum requirements relative to the contents of minutes. In the case of executive sessions, section 106(2) states in part 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..."

If, for example, a public body enters into an executive session and merely discusses an issue or issues but takes no action, there is no requirement that minutes of an executive session be prepared. Contrarily, based upon section 106(2), if action is taken during an executive session, minutes reflective of the nature of the action, the date and the vote must be prepared. Further, section 106(3) requires that minutes of executive sessions must be prepared and made available within one week.

Third, even if no action was taken during the executive sessions, and if, therefore, no such minutes exist, I believe that Town officials are nonetheless required to respond to your requests made under the Freedom of Information Law in a timely manner.

It is noted that the Freedom of Information Law and the regulations promulgated by the Committee prescribe time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3870

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

October 3, 1985

Ms. Nancy Connell
Times Union
Knickerbocker News
News Plaza
Box 1500
Albany, NY 12212

The staff of the Committee on 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. Connell:

I have received your letter of September 25 addressed to Ms. Cheryl Mugno of this office in which you requested an advisory opinion.

According to your letter and the correspondence attached to it, you requested from the Office of Court Administration a copy of an audit prepared by that agency pertaining to the Albany City Marshall's Office. Your request was denied on the basis of section 87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law as originally enacted was restrictive in terms of rights of access, for it made available only categories of records so specified in the Law. One of those categories of accessible records included "internal or external audits and statistical or factual tabulations made by or for the agency" [see original Freedom of Information Law, section 88(1)(d)]. Effective January 1, 1978, a new Freedom of Information Law reversed the presumption of the original statute. The current Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Further, the current Freedom of Information Law is in my view clearly intended to preserve rights of access previously granted and to expand rights of access in conjunction with the standards found in section 87(2) of the Law.

Second, the introductory language of section 87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of one or more of the grounds for denial. Based upon the quoted language, I believe that Legislature envisioned situations in which a single record or report might be both accessible or deniable in part. Moreover, the language in my opinion imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, as indicated in Mr. Eiseman's denial, there appears to be but one ground for denial of relevance. Specifically, section 87(2)(g) provides that an agency may withhold records that:

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

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

One of the areas of intra-agency materials that is accessible under the Law involves "statistical or factual tabulations or data". It is important to note that the original Law referred to "statistical or factual tabulations". Section 87(2)(g)(i), however, refers to statistical or factual "data", even if it does not appear in tabular form. Therefore, if, for instance, the audit contains facutal information appearing in narrative rather than tabular form, it would in my view be accessible.

Additionally, depending upon the nature of the audit, it might be viewed as a final agency determination accessible under section 87(2)(g)(iii). Nevertheless, without knowledge of the nature or function of the audit, it is not clear whether it could be characterized as a "final agency 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

cc: Mr. John Eiseman, Deputy Counsel

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3871

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

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GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 3, 1985

Mr. Dennis J. Gaggi
85-A-2862 (1F7)
Downstate Correctional Facility
Box F - Red Schoolhouse Road
Fishkill, New York 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. Gaggi:

I have received your letter of September 24 in which you requested advice regarding the use of the Freedom of Information Law to obtain copies of medical records and other "legal material" from the Downstate Correctional Facility.

In this regard, I 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 section 87(2)(a) through (i) of the Law.

Second, enclosed for your consideration is a copy of the regulations promulgated by the Department of Correctional Services containing the procedure by which records may be requested. It is noted that section 5.20 of the regulations pertains to the examination of inmate records by an inmate or his attorney and that section 5.24 involves medical records. In this regard, I direct your attention to section 5.24(a)(9) which states that an inmate medical record may be made available to:

> "...attorneys representing inmates in proceedings in which the inmate's commitment pursuant to section 402 of the Corrections Law is in issue, and attorneys representing inmates in other matters, upon upon written request, when accompanied by an authorization signed by the person whose record is desired, or by someone authorized to act on his behalf..."

Based upon the provisions quoted above, it is suggested that you might want to request that an attorney representing you submit a written request for your medical records based upon a signed authorization.

Third, I have engaged in several discussions regarding access to medical records by inmates with officials of the Department of Correctional Services. As a general rule, I believe that the Department provides access to medical information of a factual nature, such as a laboratory tests, x-rays, and similar information. Medical records reflective of advice, such as a diagnostic or psychiatric opinion, are generally withheld. In my view, that policy is reflective of compliance with the Freedom of Information Law, for factual information contained within the intra-agency materials must be made available, while such materials that consist of advice, recommendation, or opinion, for example, may justifiably be withheld [see Freedom of Information Law, section 87(2)(g)].

Fourth, based upon the enclosed regulations, if records are maintained at your facility, it appears that a request may be transmitted to the facility superintendent (see section 5.20). A request for other medical records kept by the Department in Albany may be submitted to the Assistant Commissioner of Health Services, Department of Correctional Services, Building 2, State Campus, Albany, New York 12226 [see section 5.24(b)].

Lastly, also enclosed is a copy of "Your Right to Know" which generally describes the provisions of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3872

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

October 3, 1985

Mr. John D. Charles
Managing Attorney
Prisoners' Legal Services
of New York
84 Holland Avenue
Albany, NY 12208

The staff of the Committee 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 Mr. Charles:

I have received your letter of September 23 in which you questioned a denial of access to records by the Commission of Correction.

According to your letter and the correspondence attached to it, you requested from the Commission two reports, one of which is not maintained by that agency. The other is entitled "An Abuse of Authority at the Attica Correctional Facility", which was apparently prepared in 1977. However, Counsel to the Commission denied access to the report on the ground that "this document has not been accepted as a final Commission document". He added that the Commission "has no plans to make this a final report". It is your view that "if such a procedure were authorized, agencies could easily avoid the Freedom of Information Act by simply designating all records an 'non-final'".

In this regard, I offer the following comments.

First, I have contacted William Pelgrin, Counsel to the Commission, on your behalf, in an effort to learn more of the situation and the nature of the report. It appears that the Commission operates under a procedure in which it reviews reports and determines whether or not to accept the reports as final. From my perspective, that procedure may be relevant to rights of access granted by the Freedom of Information Law. Nevertheless, the characterization of a record or report as "non-final" in my view represents one among what may be many factors concerning rights of access.

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 section 87(2)(a) through (i) of the Law.

Further, it is emphasized that the introductory language of section 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. In my opinion, the quoted language indicates a recognition of the Legislature that a single record may be both accessible and deniable in part. I believe that it also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may be withheld.

At this juncture, it would appear that the most relevant basis for denial, particularly in view of the response offered by Mr. Pelgrin, is section 87(2)(g).

The cited provision permits an agency to withhold records that:

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

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, instruc- tions to staff that affect the public, or final agency policies or determinations must be made available. Concurrently, to the extent that inter-agency or intra-agency materials are reflective of advice, opinion, suggestion, and the like, I believe that they could be withheld.

It appears that the report in question was prepared by staff and that it could be characterized as "intra-agency" material. However, I believe that its specific contents

would determine the extent to which the report is accessible or deniable under section 87(2)(g). By means of example, if a report is prepared and consists solely of a statistical study, I believe that it would be available, whether or not it is accepted as "final" by an agency. On the other hand, if a report consists solely of advice or opinion, for instance, it could likely be withheld, assuming that it is not considered as agency policy or a final agency 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

cc: Mr. William Pelgrin, Counsel

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3873

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

October 4, 1985

Mr. F. Scott Perkins
83-C-879
Attica Correctional Facility
Box 149
Attica, New York 14011-0149

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

Dear Mr. Perkins:

I have received your letter of September 24 in which you asked whether it is possible to gain access to records pertaining to your participation in the Merle Cooper Program at the Clinton Correctional Facility.

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

It is noted at the outset that I have contacted the Department of Correctional Services to obtain additional information about the Merle Cooper Program. Based upon our discussion, it is not clear whether the records involving your participation in the program have been transferred in their entirety to the Attica Correctional Facility, or whether the records remain, perhaps in part, at the Clinton Correctional Facility. Consequently, it is suggested that, in accordance with the regulations promulgated by the Department of Correctional Services, requests be sent to the Superintendents at both Attica and Clinton.

When making a request, section 89(3) of the Freedom of Information Law requires that an applicant seek records "reasonably described". Consequently, it is suggested that you provide sufficient detail to enable agency officials to locate the records in which you are interested.

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 section 87(2)(a) through (i) of the Law.

Without knowledge of the contents of the records, I could not advise with certainty that they would be accessible or deniable. However, it appears that section 87(2)(g) is most relevant. Section 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 or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those aspects of inter-agency or intra-agency materials reflective of advice, opinion, recommendation or suggestion, for instance, could likely be withheld.

It appears that records maintained by either facility concerning your participation in the program could be characterized as "intra-agency" materials. As indicated earlier, the contents of the records in my opinion would determine the extent to which they are 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3874

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

October 4, 1985

Mr. John Rampolla
74-A-2591
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. Rampolla:

I have received your letter of September 26 in which you requested advice regarding the Freedom of Information Law.

Attached to your letter is a request for information sent to the New York City Medical Examiner concerning "the release of a bullet removed from a homicide victim in 1973". More specifically, you requested information contained in a log book:

> "...revealing who, what time and what other relevant information regarding the handing over of the bullet removed from the deceased subsequent to autopsy to the Police Department."

As the defendant involved in the homicide, you wrote that you need the information "in pursuit of proving [your] innocence." You have asked whether the information in question is accessible and to whom you may appeal in the event that your request is denied.

In this regard, I offer the following comments.

First, I point out that in your request, you alluded to both the New York Freedom of Information Law and "Title 5 U.S.C.A.", which is a provision of the federal law. The federal Freedom of Information Act is found in Title 5 of the United States Code. However, the federal Act pertains to records maintained by federal agencies. The New York Freedom of Information Law is applicable to records of state and local government, including New York City.

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 section 87(2)(a) through (i) of the Law.

Third, it would appear that the information sought, if it still exists, would likely be available. However, without greater knowledge of the facts and circumstances surrounding the incident, I could not advise with certainty as to rights of access to the information sought. It is possible, too, that the information might be maintained by the court in which the proceeding in which you were convicted was conducted.

Fourth, in the event of 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 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."

While I do not know specifically to whom an appeal should be directed, I believe that an appeal could be sent to the Chief Medical Examiner or his designee. It is noted, too, that if your request is denied, the letter of denial should indicate the reasons as well as the name and address of the person to whom an appeal should be sent.

Lastly, enclosed is a copy of the recently enacted revision of the New York City Admistrative Code pertaining to the Medical Examiner. Section 17-206 deals respectively with records of the Medical Examiner and fees for copies of particular 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3875

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

October 4, 1985

Ms. Jo Ann Silverstein
[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. Silverstein:

I have received your letter of September 24 in which you requested an advisory opinion.

Specifically, attached to your letter is a copy of a "grouper law" enacted by the Board of Trustees of the Village of Ocean Beach. Under that law, leases of "single-family residence dwellings must be filed with the Village. One of the provisions of the grouper law states that "Leases filed pursuant to this chapter shall not be subject to the New York Freedom of Information Act". You have questioned the legalilty of the grouper law as a "joint owner of property(s) leased by [your] husband without [your] knowledge or permission".

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, the following comments pertain only to the provision of the grouper law that relates to the Freedom of Information Law.

First, I do not believe that the portion of the grouper law removing leases from the requirements of the Freedom of Information Law is valid. The Freedom of Information Law is applicable to all records of an agency, such as a village. It is noted that the term "record" is defined in section 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."

As such, leases filed with the Village constitute "records" that fall within the requirements 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 section 87(2)(a) through (i) of the Law.

Third, from my perspective, the only means by which a confidentiality provision such as that contained in the grouper law could be valid would involve the passage of a special statute by the State Legislature. If a local law, ordinance, rule or regulation is passed that requires confidentiality, it is in my view void to the extent that it abridges rights of access granted by a general law such as the Freedom of Information Law. The provision in the Freedom of Information Law regarding confidentiality is section 87(2)(a), which states that an agency, such as a village, may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". As such, only a statute passed by the State Legislature or Congress can require confidentiality; a local law cannot unless special legislation is enacted under the Municipal Home Rule Law (see sections 23 and 40). In short, a local law cannot in my opinion require confidentiality or otherwise restrict access to records in a manner inconsistent with a statute enacted by the State Legislature, such as the Freedom of Information Law.

Fourth, in terms of rights of access, there may be a ground for denial listed in the Freedom of Information Law of relevance concerning leases filed with the Village. Specifically, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy". Since there is no judicial determination of which I am aware that deals specifically with leases filed with an agency by private persons, it is unclear whether they would be available to the general public. However, as joint owner of the leased property, I believe that any leases filed with the Village that pertain to property in which you have an interest 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:ew

cc: Board of Trustees, Village of Ocean Beach

OMC-AO-1215
FOIL-AO-3876

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

October 10, 1985

Mrs. Marjorie F. Wickes
[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 Mrs. Wickes:

As you are aware, I have received a copy of your letter addressed to Robert H. Giles, Editor of the Rochester Democrat & Chronicle, in which you stated that you would seek an opinion from this office.

In that letter, you identified yourself as a member of the Seneca Park Master Plan subcommittee and indicated that you have repeatedly been denied access to "any form of a map which shows the proposed changes". The inability to review such a map has in your view effectively prevented accurate information from being disseminated to interested people. In response to your latest request, the records access officer for Monroe County, Frederick W. Lapple, wrote that the County does not have in its records a copy of the map, which had been presented to the subcommittee by Mr. Reimer, a consultant, at a meeting held in June. Mr. Lapple added that it is his understanding that the map will:

> "ultimately be incorporated into Mr. Reimer's final report to the subcommittee and that all subcommittee members will receive a copy of the report. At that time, the report will become an official record of the County and will be available to the public under the Freedom of Information Law."

Further, although the map was presented at the meeting held in June, you wrote that Assistant County Executive Alexander J. DiPasquale was quoted in the Democrat & Chronicle as stating that it would be "violating the process" to disclose the plan to the public. During our conversation, you indicated that the map was prepared for the County by a consultant and that the map is in the physical custody of the consultant rather than the County.

In addition to your letter, you sent a variety of materials concerning the process under which a master plan is to be adopted. Throughout the materials, reference is made to public participation and to the duties of subcommittees, such as that on which you serve. It is clear on the basis of the materials that the subcommittee is supposed to be involved "at all stages throughout the preparation of each master plan to review work in progress and advise...on issues of citizen concern" (document entitled "Monroe County Parks Advisory Committee - Public Participation Process).

In this regard, I offer the following comments.

First, although not relevant to the Freedom of Information Law per se, if there has been any "violation of the process", it appears that the violation involves the inability of the subcommittee to carry out its duties as intended and as described in the documentation pertaining to the process of developing a master plan. In short, based upon your description of events, the subcommittee was designated to participate in every stage of the process, and yet it appears that County officials have not enabled the subcommittee to represent or speak on behalf of the public by diminishing its role.

Second, in terms of the Freedom of Information Law, a statement that disclosure would "violate the process" would not in my view constitute a basis for withholding 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 section 87(2)(a) through (i) of the Law.

Third, it is important to note that the Freedom of Information Law pertains to "records" of an agency, such as Monroe County. In this instance, as stated earlier, it appears that the map in which you are particularly interested was prepared for the County by a consultant and that the consultant has the only copy. Nevertheless, I believe that the map is 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."

Based upon the definition quoted above, which makes specific reference to maps, I believe that the map in question consists of "information...produced...by...or for an agency..." Therefore, even though the map might not be in physical possession of the County or considered "official", I believe that it is nonetheless a "record" subject to the Freedom of Information Law and that Monroe County would be required to respond to a request for the map in accordance with the Law.

Fourth, in terms of access, rights on the part of the public are in my view questionable. It appears that a map prepared by a consultant for the County would fall within the scope of section 87(2)(g), which pertains to "inter-agency or intra-agency materials" [see Xerox Corp. v. Town of Webster, 65 NY 2d 131 (1985)]. Although the cited provision constitutes a basis for denial, due to its structure, it often requires that records or portions of records be made available. Specifically, section 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 or intra-agency materials may be withheld, portions of such mater-

ials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those aspects of inter-agency or intra-agency materials reflective of advice, recommendation, or opinion, could likely be withheld.

I am unaware of any judicial decision concerning a map that exists in the nature of a draft. In this instance, the map was apparently prepared by the consultant and reflects the consultant's opinion. However, it has been held that statistical or factual information need not be reflective of "objective reality", and that statistical or factual data in the nature of estimates or projections, for example, are 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)]. Like estimates or projections of expenditures prepared in the budget process that were found to be available, even though they were not reflective of "objective reality" (see Dunlea, id.), perhaps a draft of the map would be found to be similarly accessible to the public.

Fifth, the committees and subcommittees designated by Monroe County or the Monroe County Executive are in my opinion public bodies subject to the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)]. If, for example, the draft map was discussed or exhibited at an open meeting of a public body, it might be contended that any basis for withholding was effectively waived by means of the prior public disclosure.

Lastly, it is emphasized that the preceding comments concerning the Freedom of Information Law pertain to rights of access conferred upon any member of the public. In your capacity as a member of a subcommittee designated by the County, which is charged with particular duties, it is suggested that, in order to carry out your duties, you need to review the map. Without the capacity to do so, the functions of the subcommittee, as described in the materials that you forwarded, would likely be severely diminished. As such, it is suggested that you continue to confer with County officials in an effort to obtain the information that would enable you, as a member of the subcommittee, to carry out your duties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert H. Giles
Alexander J. DiPasquale
John Lamb
Don B. Martin

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3877

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

October 10, 1985

Ms. Rosemary Babcock
Village Clerk-Treasurer
Village of Lancaster
Municipal Building
5423 Broadway
Lancaster, NY 14086

Dear Ms. Babcock:

I have received your letter of October 8. Enclosed, as requested, is a copy of "You Should Know", which describes the provisions of the Personal Privacy Protection Law. You also requested the section of law which states that the Freedom of Information Law pertains to volunteer fire departments.

In this regard, I point out that there is no particular provision of law that clearly indicates that a volunteer fire department or a volunteer fire company is subject to the Freedom of Information Law. However, in a decision rendered by the Court of Appeals, the State's highest court, it was determined in 1980 that a volunteer fire company is an "agency" subject to the Freedom of Information Law and that the records of a volunteer fire company are subject to rights of access granted by the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)].

Enclosed for your review are copies of the Freedom of Information Law and the decision rendered by the Court of Apeals that pertains to the issue raised in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew
Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3878

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

October 10, 1985

Mr. Jeffery L. Ball
#A-166500
State Prison of
South Michigan
4000 Cooper Street
P.O. Box E
Jackson, Michigan 49204

Dear Mr. Ball:

I have received your letter of October 5 in which you requested that this office obtain records on your behalf from the Erie County Sheriff.

More specifically, attached to your letter is a request sent to the public information officer at the Erie County Sheriff's Department on September 18. In that request, you indicated that you were incarcerated at the Erie County Jail for a specific period and you sought all records pertaining to you that were prepared during the period of your incarceration. As of the date of your letter to this office, you have received no response.

In this regard, I 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 have the authority to obtain records on behalf of an individual. Consequently, I cannot supply the records that you are seeking.

Second, although the Freedom of Information Law provides significant rights of access, without knowledge of the contents of the records that you are requesting, I cannot provide specific advice concerning rights of access. In short, depending upon the contents of the records, they might be accessible or deniable in whole or in part.

Third, under the circumstances, since your request has not been answered, I believe that you have the right to appeal on the ground that your request has been constructively denied.

Here I point out that the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401) prescribe time limits during which an agency must respond to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 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 the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, section 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, section 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 section 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 letter will be sent to the Office of the Erie County Sheriff.

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

cc: Erie County Sheriff
ATTN: Public Information Officer

COMMITTEE ON OPEN GOVERNMENT

OMG-AO- 1216
FOIL-AO- 3879

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279?

October 11, 1985

Ms. Mary Margaret Williams
Ms. Louise Snyder
League of Women Voters
132 Spring Street
Rochester, NY 14608

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

Dear Ms. Williams and Ms. Snyder:

I have received your letter of September 27, which you wrote as representatives of the Irondequoit Bay Task Force of the Rochester Metro League of Women Voters.

Your questions concern your efforts to observe meetings of and obtain information from the Irondequoit Bay Coordinating Committee (IBCC), a Technical Committee of the IBCC, and a Citizen Advisory Committee.

You wrote that the IBCC was appointed by the Monroe County Executive. The Committee's work involves a "four step process", including the "establishment of environmental objectives, identifying appropriate development management measures, designing the necessary ordinances and regulations to implement the measures, and recommending a long term mechanism for continued intergovernmental coordination in the Irondequoit Bay area". You added that the Committee also "carries out coordinated review of permit applications for development in the Irondequoit Bay area".

The IBCC has, according to your letter, designated a Technical Committee that reviews permit applications and drafts "goals, management practices and ordinances" for the IBCC. In addition to a statement that meetings of the Technical Committee have been closed on the ground that they are "work sessions", you indicated that:

"2. Copies of the proposal and permit reviews from the Technical Committee to the IBCC which are the main subjects of discussion at meetings of the IBCC, are not available to observers. It is difficult to follow the discussions as observers only hear those portions of the text that are read aloud, e.g sometimes a reference is made to a section only by number only.

"3. The Chair of the IBCC declined to make available copies of ordinances prepared for towns around the bay to the Citizens Advisory Committee which is to review these ordinances as revised by the towns. One member of the Advisory Committee was able to obtain a copy from a town planner. However, unless others of the 9 member committee obtain copies from the towns, these members will not be aware of the original proposals to the towns from the IBCC when they review the revisions made by the towns.

"4. There are no minutes of the IBCC.

"5. The Citizen Advisory Committee has no chair and does not meet as a committee but only to make response as individuals to the IBCC proposals.

"6. There were no announced meetings of the IBCC between December 28, 1984 and March 14, 1985 yet it appears that there were meetings of subgroups during that period.

"7. No copy of the Monroe County Comprehensive Plan is available, only 'Draft II' of several, but not all, of the elements. A county staff person told us the reason 'Draft II' copies were available rather than a

> copy of the Comprehensive Plan in total was that it was Draft II of each element which was adopted by the legislature. We were also told that a complete set of the elements was not available, because they are being revised."

In this regard, I offer the following comments.

First, as I understand the facts described in your letter, each of the committees that you identified would constitute a "public body" required to comply with the Open Meetings Law. Section 102(2) of the Law defines "public body" to include:

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

Based on a review of the definition, I believe that the Committees in question possess each characteristic necessary to find that they are public bodies. It appears that each of the committees consists of two members. While they might not have the capacity to take final action, but rather only the capacity to advise, I believe that they are required to carry out their duties by means of a quorum in accordance with section 41 of the General Construction Law. Further, as designees of the County Executive, or designees of a committee selected by the County Executive, each committee in my view conducts public business and performs a governmental function for a public corporation, Monroe County. I point out, too, that the definition of "public body" makes specific reference to committees, subcommittees and similar bodies and that it has been held by the Appellate Division, Fourth Department, that an advisory committee designated by an executive head of an agency constitutes a public body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)]. If my assumptions are accurate, the IBCC, the Technical Committee, and the Citizens Advisory Committee each constitute public bodies subject to the Open Meetings Law.

You mentioned that the Citizen Advisory Committee does not meet as a committee. In this regard, if less than a quorum of a public body convenes, the Open Meetings Law does not apply. Concurrently, however, an affirmative vote of less than a majority of the total membership of a public body is in no way effective. Stated differently, an entity subject to the Open Meetings Law cannot in my opinion carry out any of its duties unless it does so by means of an affirmative vote of a majority of its total membership.

Second, you indicated that the Technical Committee has held closed meetings on the ground that the meetings are "work sessions". Here I point out that, in its initial form, the definition of "meeting" was subject to conflicting interpretations. "Meeting" was defined to mean "the formal convening of a public body for the purpose of officially transacting public business". It was contended by many that gatherings held solely for the purpose of discussion and without any intent to take action fell outside the scope of the Open Meetings Law, for those those gatherings would not have been held for the purpose of "transacting" public business. Nevertheless, the issue resulted in a lawsuit which was finally determined by the State's highest court, which held that work sessions and similar gatherings constitute "meetings" subject to the Open Meetings Law in all respects [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 (1878)]. In brief, the court held that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and irrespective of the manner in which a gathering is characterized. As such, it is clear in my opinion that a so-called "work session" is a meeting that must be conducted in accordance with the requirements of the Open Meetings Law.

Third, you wrote that the IBCC does not maintain minutes. Section 106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. With respect to minutes of open meetings, section 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."

Further, section 106(3) requires that minutes of open meetings be prepared and made available within two weeks.

Fourth, meetings of public bodies must be preceded by notice given pursuant to section 104. In brief, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, notice must be given to the news media and to the public by means of posting in the same manner as described above, "to the extent practicable" at a reasonable time prior to the meeting.

The remaining issues pertain to access to records. With regard to records, the Freedom of Information Law is applicable to all agency records. Since the committees that are the subject of your letter are the creation of Monroe County, I believe that their records fall within the scope of the Freedom of Information Law [see Syracuse United Neighbors, supra].

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 section 87(2)(a) through (i) of the Law. As such, in order to deny access to records, the denial must be based upon an exception to rights of access described in the Freedom of Information Law.

Without greater knowledge of the contents of the records to which you alluded, I cannot provide specific direction. However, assuming that records are disclosed or exhibited at open meetings, it might be contended that any ground for denial that might otherwise be cited has been waived by means of such public disclosure.

If records relative to the permit review process are prepared or sent to a committee by a person seeking a permit, for example, it would appear that such records are available, for it is unlikely that any of the grounds for denial could justifiably be cited. Other types of records prepared by an agency likely fall within the scope of section 87(2)(g). That provision represents one of the grounds for denial. Nevertheless, due to its structure, it often requires that records or portions of records be made available. Specifically, section 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 or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Lastly, you asked for my comments with respect to "compliance with Open Government Laws in Monroe County compared with that in other counties in New York State". This office does not maintain statistics or similar studies that could be used to compare compliance among municipalities. From my perspective, there are some entities within Monroe County that strenuously attempt to comply with the Freedom of Information and Open Meetings Laws; others likely do not seek to comply with the same vigor. Further, in all honesty, disagreements is some cases arise because reasonable people may differ.

I hope that 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3880

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

October 11, 1985

Mr. Larry Basheer Hameed
#80-C-490
S.H.U. 5
Drawer B
Stormville, NY 12582

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

Dear Mr. Hameed:

I have received your letter of September 30 in which you requested assistance regarding a request made under the Freedom of Information Law.

According to your letter and the correspondence attahced to it, you unsuccessfully requested a copy of a "transcript, minutes or tapes" pertaining to a hearing conducted by the superintendent of a correctional facility. Having reviewed our files, I have located a copy of the determination on appeal rendered by Judith LaPook, Counsel to the Department of Correctional Services. In brief, having reviewed that determination, it does not appear that records were denied, for the information sought does not exist in the form of a record or records. Specifically, Ms. LaPook indicated that "no transcript of the Tier III hearing has been made" and that, consequently, "none need be supplied". In this regard, it is noted that the Freedom of Information Law pertains to existing records and that 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 made under the Freedom of Information Law. As such, if no transcript of the proceeding was prepared, the Department in my opinion was not obligated to create such a transcript on your behalf in response to a request made under the Freedom of Information Law.

You suggested that as a litigant, a right to a transcript that must be prepared might now exist. Whether that is so does not involve the provisions of the Freedom of In-

formation Law, but perhaps other provisions of law that are outside the jurisdiction or expertise of the Committee. Therefore, I suggest 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

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3881

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

October 15, 1985

Ms. Janet Rosenblatt
[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. Rosenblatt:

I have received your letter of September 24 in which you requested an advisory opinion regarding the availability of "lesson observation reports".

Attached to your letter were several lesson observation reports which were apparently prepared by a school district official who observed a teacher's class and then conferred with that teacher following the class. It is not clear whether all of the reports were prepared by the same official or whether they pertain to classes taught by the same teacher. Nonetheless, the reports generally describe the lesson taught and include comments regarding the strengths of the lessons and improvements which could be implemented. The reports conclude with summaries, such as "This was a satisfactory lesson". The names of the observer and of the teacher were deleted.

You asked several questions concerning the availability of the reports under the Freedom of Information law. In this regard, I offer the following comments.

First, I am not aware of any court decision pertaining to the availability of visitation reports, lesson observation reports or the like. Thus, my opinion is based upon my interpretation of the provisions of the Freedom of Information Law.

Second, as you are aware, the Law provides that all records of an agency are available unless they may be withheld under one or more of the grounds for denial listed in section 87(2)(a) through (i) of the Law. Two of those grounds are relevant to the observation reports.

Section 87(2)(b) permits an agency to withhold records which, if disclosed, would result in an unwarranted invasion of personal privacy. As Mr. Freeman explained to you in his letter of August 23, the courts have generally held that disclosure of records which are relevant to the performance of a public employee's official duties is 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; Capital Newspapers v. Burns, 490 NYS 2d 651, __ AD 2d __, 1985]. I have included copies of these opinions at your request.

In my view, the lesson observation reports are indeed relevant to the performance of the teacher who was observed and to the duties of the individual observing the class. Therefore, I believe that disclosure of the observation reports would not constitute an unwarranted invasion of the teacher's or of the observer's privacy.

Third, the lesson observation reports constitute intra-agency materials under section 87(2)(g) of the Freedom of Information Law. That section provides that, to the extent that the records do not include statistical or factual data, instructions to staff that affect the public, or final agency action or determinations, such records or portions thereof may be withheld. In other words, those portions of the lesson observation reports which include opinion, suggestions, recommendations or advice may be withheld.

You asked whether the statement, "This was a satisfactory lesson", which appears at the end of the reports is a "final agency determination" or an opinion. In my view, a "final" agency determination would involve a record which sets forth a decision which has been made at some stage of a formal or informal proceeding. For instance, if the statement was offered as a final rating, it might be viewed as a final determination, assuming that the rating is not appealed or challenged. A letter of reprimand would be an example of such a final rating or final determination. On the other hand, if the statement was not final but rather used to assist a final decision maker at some other time, the statement would be considered an opinion and may be denied under section 87(2)(g).

In its present context, I believe that the statement, "This was a satisfactory lesson", was merely an expression of opinion. While it is not clear from your letter, it appears that the lesson observation visits may be conducted for various reasons. They may be used to provide guidance and training to teachers by offering advice and suggestions for improving his or her teaching skills. In addition, the reports may be prepared for later consideration regarding the renewal or nonrenewal of the teacher's contract. In any event, I believe that the description of the strengths of the lesson and the recommendations for improvements indicate that the statement is evaluative rather than a final determination.

You also asked whether the reports contain statistical or factual information which would be available to the public. In my view, the reports contain some factual information, such as the description of the lesson. Such factual information could not, in my opinion, be withheld under section 87(2)(g). However, those portions of the report which reflect the writer's opinion as to the strengths and weaknesses of the class could be withheld. Although it may be a "fact" that such opinions were rendered and that recommendations were made, the opinions and recommendations remain deniable.

Lastly, you asked whether the names of the teacher and the observer should be available. In my opinion, the only basis for withholding the reports, or portions thereof, is section 87(2)(g) regarding intra-agency or inter-agency materials. I do not believe that the names of the teacher or the observer can properly be deleted under that provision, for their names could be considered factual information. Moreover, disclosure of their names would not, in my view, constitute an unwarranted invasion of personal privacy since the lesson observations pertain to those employee's official duties and responsibilities.

I hope 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
Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3882

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

October 16, 1985

Mr. Gerald S. Koszer
Records Access Officer
New York City Department
of Finance
1 Centre Street
Room 506
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 correspondence sent to the Committee.

Dear Mr. Koszer:

I have received correpondence from Mr. Charles J. Theophil, who asked that I prepare an advisory opinion to be sent to you.

Mr. Theophil indicated that he requested that copies of records be certified as required by the Freedom of Information Law "without extra fee". He wrote that you explained that the New York City Department of Finance assesses a fee for certification. From my perspective, I do not believe that an agency can assess a fee for certification of records made available under the Freedom of Information Law.

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

First, as you may be aware, section 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, 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 [see 21 NYCRR 1401.8(a)(3)]. However, I believe that a fee may be charged in conjunction with providing a service whereby a legal certification is prepared.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Charles J. Theophil

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3883

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

October 17, 1985

Mr. W.D. Frankenstein
[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. Frankenstein:

I have received your letters of September 25 and October 8 in which you requested assistance in obtaining certain records from the Division of Housing and Community Renewal.

According to your letter of August 23 to Mr. Charles Hogg, Director of Public Information for the Division, you appealed the denial of the "Apartment Registration, including the lawful rent on April 1, 1984 for apartment #405 in the Roger Williams Hotel". You received a response to that letter from Nathaniel Geller, Assistant Deputy Counsel for Rent Administration, dated October 2. Mr. Geller explained to you that your request for rent registration data concerning apartment 405 was not denied. Rather, the Division has no information concerning that apartment because, while the building is registered, apartment 405 is not registered. He also stated that the matter of the apartment registration will be referred to the Division's Compliance Bureau regarding the owner's apparent non-registration of apartment 405.

On your behalf, I contacted Mr. Geller for a further explanation of his letter to you. He indicated that, after checking the Division's files, no records regarding apartment 405 are maintained. He believes that the apartment may not have been registered and, without further investigation, he cannot determine whether the apartment was required to be registered. Although Ms. Warburton's letter may have indicated that a more "complete data search" should be done, Mr. Geller has stated that, upon his review of the records, no further information on apartment 405 exists.

Under section 89(3) of the Freedom of Information Law, an agency need not create a record which does not already exist. However, upon request, an agency must certify that it does not have possession of the requested record or that such record cannot be found after a diligent search. If you desire such a certification, I believe that Mr. Geller will prepare one for you. However, in order to obtain information concerning apartment 405, I suggest that you contact the Compliance Bureau of the Division which apparently will be reviewing the matter.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:jm

cc: Nathaniel Geller

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3884

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

October 17, 1985

Mr. Harry W. Fairbank
NYSUT
115 Green Street
Kingston, NY 12401

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

Dear Mr. Fairbank:

I have received your memorandum of September 30, in which you asked that I confirm in writing your understanding of a conversation that we had on September 27.

Specifically, the situation involves rights of access by a teacher employed by a school district to a college transcript pertaining to him that is maintained in the personnel file kept by the school district.

In this regard, I offer the following comments.

First, the Freedom of Information law pertains to "records" maintained by an agency, such as a school district. Section 86(4) of the Freedom of Information Law defines "record" broadly to include:

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

Based upon the language quoted above, if a transcript is maintained by the school district, I believe that it would constitute a "record" subject to rights of access. I point out, too, that the Court of Appeals, the state's highest court, has construed the definition of "record" as expansively as its language indicates, stating that:

> "The statutory definiton 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; see also Washington Post v. Insurance Department, 61 NY 2d 557 (1984)].

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 section 87(2)(a) through (i) of the Law.

Under the circumstances, I do not believe that any ground for denial could be asserted when a teacher requests a copy of a transcript pertaining to himself or herself. The transcript, from my perspective, consists of a factual account of grades of a particular individual while attending an educational institution. While I believe that a transcript requested by a third party could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b); also Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980], I do not believe that an individual could invade his or her own privacy. Moreover, unless a different ground for denial is applicable, section 89(2)(c) of the Freedom of Information Law states in relevant part that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...(iii) when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

In sum, it is my view that a transcript maintained by the school district is a "record" subject to rights of access granted by the Freedom of Information Law and that it should be made available to the person to whom it pertains.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3885

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

October 18, 1985

Mr. Robert F. Reninger
Treasurer
Fairview Fire District
250 Knollwood Road
White Plains, NY 10607

The staff of the Committee on Open 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 October 2, as well as the correspondence attached to it.

You indicated that you are the Treasurer of the Fairview Fire District. On September 18, you requested a copy of a legal opinion sent to the Board of Fire Commissioners concerning the proposed purchase of a new fire engine. Since you did not receive any response, you appealed to the Board of Fire Commissioners on the ground that you were constructively denied access. It is apparently your view that, as a public officer, you should have the right to obtain a copy of the opinion.

In this regard, I offer the following comments.

From my perspective, the Freedom of Information Law pertains to rights of access to agency records conferred upon the public. As a general matter, if a record is accessible under the Freedom of Information Law, it should be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Concurrently, if a record falls within the scope of one or more of the grounds for denial, I believe that it may be withheld from a member of the public who seeks the record under the Freedom of Information Law.

In the context of your question, it appears that one of the grounds for denial is particularly relevant. Specifically, 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..."

Based upon the language quoted above, those aspects of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like may in my view be withheld. In this instance, I believe that the opinion in qustion could be characterized as "intra-agency" material that falls outside the scope of rights of access granted by the Freedom of Information Law.

In view of the foregoing, as a member of the public, I do not believe that you would have a right under the Freedom of Information Law to obtain a copy of the opinion that you are seeking. As a public officer, it might be contended that you have a need to obtain the record sought in order to carry out your official duties. However, that factor would not in my opinion grant a right to you as a member of the public who seeks to employ the Freedom of Information Law as a vehicle for obtaining the record.

In sum, it appears that the record sought could be withheld under the Freedom of Information Law. Whether, as a public officer, you have some additional right would in my view be dependent upon the terms of other provisions of law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

COMMITTEE ON OPEN GOVERNMENT

OML-AO-1221
FOIL-AO-3886

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

October 18, 1985

Mr. John Johnson
[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. Johnson:

I have received your letter of October 1 in which you requested an advisory opinion.

According to your letter, a conference was conducted by represenatives of the Town of Rensselaerville, the Department of Environmental Conservation and the Albany County Health Department concerning problems relative to a "landfill and mining operation" in the Town. When you attempted to attend, you were excluded. Your first question involves your right to attend the conference under the Open Meetings Law.

In this regard, I point out that the Open Meetings Law pertains to meetings of public bodies, and that section 102(2) of the 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."

Although representatives of the Town, a state and a county agency were present at the gathering in question, it does not appear that a quorum of a public body, i.e., the Town Board,

was present. If that was so, if no quorum of any public body was present, the Open Meetings Law would not in my opinion have applied. As such, if my assumptions are accurate, the public would not have had the right to attend the gathering.

The remaining question is whether you are "entitled to inspect all paper work, minutes, agreements made, letters of understanding made between the Town..." and the other agencies. As you are aware, the Freedom of Information Law governs with respect to rights of access to records.

Without knowledge of the nature or content of any such records, specific advice cannot be offered. Nevertheless, it appears that one of the grounds for denial would be of particular significance. Due to its structure, however, that provision often grants significant rights of access. Section 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 policy or determinations must be made available. Concurrently, those portions of inter-agency or intra-agency materials containing opinion, advice or recommendation, for example, could in my view 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: Hon. Kermit Jackson, Town Supervisor

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3887

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 21, 1985

Mr. Samuel Davis
#80-A-4134
E-9-14
P.O. Box 618
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. Davis:

I have received your letter of September 30 in which you requested an advisory opinion.

You wrote that you have been transferred from a medium security facility to a maximum security facility. You believe that the transfer was arbitrary and that it has affected your chances for early parole. You requested all records pertaining to your transfer, including a memorandum written by Lt. Tagliaferro. You were provided with copies of a transfer form from which "pertinent information was deleted" but you were not provided with Lt. Tagliaferro's memorandum. You would like to know whether the records you requested should be made available in full, without deletion, under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. In other words, all records of an agency are available unless they can be withheld under one or more of the grounds listed in section 87(2)(a) through (i) of the Law. Two grounds for withholding may be relevant to the availability of the records which you seek.

As you have been informed, section 87(2)(b) permits an agency to withhold records, or portions of records, which if disclosed would constitute an unwarranted invasion of personal privacy. It is possible that the requested records may

contain information which would identify other persons who had supplied information to the correctional facility which relates to your transfer . Unless those individuals were employees of the facilities who relayed the information as part of their official duties, it is possible that the identity of those who provided the information could be withheld.

In addition, the records were denied pursuant to section 87(2)(g) as inter-agency or intra-agency materials. Such materials may be withheld except to the extent that they include statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations. Conversely, to the extent that the records sought include advice, opinion, suggestions or recommendations, such records, or portions thereof, may be withheld. Based upon the information presented in your letter, it appears that the deleted materials likely include the opinions or recommendations of facility staff with respect to your transfer. In my view, those opinions and recommendations may be denied under section 87(2)(g) of the Freedom of Information Law. However, if the deleted materials include, for example, factual information or final agency policies or determinations, I believe that those portions 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

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3888

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

October 21, 1985

Mr. Bill Dill
Evening Observer
10 East Second Street
Dunkirk, NY 14048

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

Dear Mr. Dill:

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

According to your letter, the City of Dunkirk is involved in developing its harborfront and, as a part of its project, has been acquiring land near the harbor over the course of several years. You wrote that:

> "Earlier this year, the city moved to condemn those properties in the harborfront area that it could not acquire through outright purchase. The State Supreme Court approved the city's eminent domain petition and since that time, the city has taken title to the land and has forwarded checks to the property owners based on property appraisals that were done at the direction of the city."

You added, however, that City officials have "refused [your] request for a list of those payments..." Attached to your letter is a written denial by Ms. Jane E. Love, City Attorney and Records Access Officer. The denial was based upon sections 87(2)(b) and 89(2)(b)(iv) of the Freedom of Information Law, which concern unwarranted invasions of personal privacy, and section 87(2)(c).

In this regard, I offer the following comments.

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

Section 87(2)(c) permits an agency to withhold records or portions thereof when disclosure "would impair present or imminent contract awards or collective bargaining negotiations". I am unaware of any decision that deals squarely with the issue presented. However, there is a situation in which the principle may be useful for purposes of analogy. In Murray v. Troy Urban Renewal Agency, Inc., [56 NY 2d 888 (1982)], the records sought involved "reports by an independent appraiser on the potential use and value of certain buildings that the agency owned and planned to offer for sale to the public" [id., 889-890]. The Court of Appeals affirmed the decision of the Appellate Division in which it was held the appriaiser's reports could be withheld on the basis of section 87(2)(c) of the Freedom of Information Law. Nevertheless, the court added 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., 890).

In the context of your inquiry, it is my view that records indicating payment with respect to properties that have been acquired and where the transactions relating to particular parcels have been consummated, are accessible under the Freedom of Information law for section 87(2)(c) could not at this juncture be asserted to withhold records concerning those properties (see also, Shaw v. Triborough Bridge and Tunnel Authority, Sup. Ct., New York County, NYLJ, June 17, 1980). Further, in Murray, supra, as in the situation that you described, the projects carried out by both Troy and Dunkirk involve the sale or acquisition, on a piecemeal basis, of a number of properties located within a certain area. As indicated by the Court of Appeals, records pertaining to properties for which transactions were consummated should be made available, even though some transactions relating to the project had not yet been completed.

With respect to privacy, the denial cited section 89(2)(b)(iv) of the Freedom of Information law, which states that an unwarranted invasion of personal privacy includes:

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

For various reasons, I do not believe that the language quoted above is justifiable.

First, following the completion of a transaction, it is difficult to envision how disclosure of the identities of former property owners could result in economic or personal hardship. Second, records indicating payments made by a municipality have long been available under the Freedom of Information Law and other statutes (see e.g., General Municipal Law, section 51). And third, assessment records identifying owners of properties are generally available. As such, other records could likely be obtained that identify owners of properties taken by means of eminent domain.

In sum, based upon the language of the Freedom of Information Law and its interpretation, I believe that the records sought should be made available. To attempt to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to Ms. Love, City Attorney, and Mayor Gregoreski.

I hope that 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. Love, City Attorney
Mayor Gregoreski

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3889

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 21, 1985

Ms. Terri Thorfinnson
North County Legal Services
61 Brinkerhoff Street
Plattsburgh, NY 12901

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

Dear Ms. Thorfinnson:

As you are aware, I have received your letter of October 10 in which you requested an advisory opinion and asked that a copy be sent to Mr. Harold Alexander of the Saranac Elementary and Junior High School.

The problem, according to your letter, "is that the Saranac School principal is denying [your] client access or copies of his son's record because he is the non-custodial parent".

In this regard, it is noted at the outset that rights of access in this instance are determined under the provisions of the federal Family Educational Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as the "Buckley Amendment". 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 by what had been the U.S. Department of Health, Education and Welfare and is now the U.S. Department of Education. The 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 regulations, section 99(3)].

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

Lastly, I would like to point out that in a similar situation, it was found by Supreme Court, Albany County, that a non-custodial parent enjoys rights conferred by the Family Educational Rights and Privacy Act, even when the custodial parent signed a statement indicating that she did not authorize a school district to transmit records to the natural father [Page v. Rotterdam-Mohonasen Central School District, 441 NYS 2d 323 (1981)]. Further, the Court specified that the natural parent has rights granted under the Act, "unless such access is barred by state law, court order, or legally binding instrument", none of which were present (id. at 325).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Harold Alexander

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3890

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 21, 1985

Mr. Michael Malinowski
#84-A-5568
Clinton Correctional Facility
Annex
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. Malinowski:

I have received your letter of October 3 in which you requested an advisory opinion.

You would like to know whether the following records should be made available by the City of Yonkers under the provisions of the Freedom of Information Law.

> "1. Copy of the Manual describing and setting forth the procedure for filling out and filing of police forms utilized by the City of Yonkers Police Department, such forms include but are not limited to: 'Initial incident reports (DD-5)', 'On Line booking arrest worksheets (PD 244-159)', 'Police property Clerk's Invoice (200M-1129011) as well as accident reports'.
>
> 2. Request for copy of any and all forms, copies thereof that are utilized by the City of Yonkers.
>
> 3. Memorandum and policy as promulgated by the Yonkers Police Department in relation to correct procedures and actions to be used during a high speed Car Chase.

> 4. Copies of Policy and Memorandum on the procedure on handling photographic evidence, specificly that of crime scene films and the testing thereof and the equipment utilized by your agency in the testing of said evidence.
>
> 5. Copies of the Motor Vehicle Card or Number for Yonkers Patrol Car #601, a Four door (4) Plymouth Volare Sedan (1980)."

In this regard, I offer the following comments.

The Freedom of Information Law is based upon a presumption of access; that is, all records of an agency, including a city police department, are available unless the records, or portions thereof, may be withheld under one or more of the grounds for denial listed in section 87(2)(a) through (i) of the Law. Two grounds for denial are relevant to the records you have requested.

First, section 87(2)(e) of the Freedom of Information Law permits an agency to withhold records compiled for law enforcement purposes to the extent that disclosure would...:

> "iv.reveal criminal investigative techniques or procedures, except routine techniques and procedures."

It appears that at least one of your requests may be denied under the provision cited above. Specifically, your request for memoranda and policy relating to correct procedures to be used during high speed car chases might reveal non-routine criminal investigative techniques or procedures. To the extent that disclosure of the Department's high speed car chase procedures would allow "miscreants to tailor their activities to evade detection", I believe that records related to the procedures may be withheld (see DeZimm v. Connelie, 102 AD 2d 668, 671).

Second, section 87(2)(g) of the Law allows agencies to withhold inter-agency and intra-agency materials which are not:

> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

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

Specifically, any manuals which include instructions to the staff that affect the public, such as instructions for completing forms or for handling or testing evidence may not in my opinion be denied pursuant to section 87(2)(g)(i). Likewise, copies of blank forms used by the Department and copies of the "Motor Vehicle Card or Number" for a particular department vehicle may be available as factual information under section 87(2)(g)(i).

I note, however, that section 89(3) of the Freedom of Information Law does not require an agency to create records which do not already exist. In other words, to the extent that the records sought are maintained by the Department, they are records subject to availability under the Law. However, if you have requested records or information which does not exist in some physical form, the Department need not create a record on your behalf.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3891

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

October 24, 1985

Mr. Jack McAndrew
[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. McAndrew:

I have received your letter of October 9 in which you requested an advisory opinion.

According to your letter, you requested access to two subpoenas issued to two teachers employed by the Port Jervis School District. You explained that the teachers participated in a PERB hearing in which you were the charging party. Since they were subpoenaed, they did not lose any sick time benefits. Your request was denied because the subpoenas "are part of the confidential personnel records for the respective individuals" and, as such, "are not available for review or duplication." It is your contention that the subpoenas should be made available to you.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access; that is, all records of an agency are available unless the records, or portions thereof, may be withheld under one or more of the grounds for denial listed in section 87(2) (a) through (i) of the Law. Thus, an agency may not deny an entire record if only portions of such record may be withheld under the grounds listed in section 87(2). Likewise, an agency may not deny all records located in a file which may include many other records that are not properly deniable. In my view, an agency must review an entire record or an entire file in order to determine the records or portions thereof which must be made available under the Law.

Second, as Mr. Freeman explained to you in his letter of January 16, 1985, the mere placement of records in personnel files does not make them privileged or confidential. If the subpoenas may be properly withheld by the District, the reason therefor must be based on the grounds for denial set forth in the Law. In my opinion, the only relevant basis for withholding the subpoenas would be section 87(2)(b), which allows an agency to deny records which, if disclosed, would constitute an unwarranted invasion of personal privacy.

Third, section 89(2)(b) of the Freedom of Information Law provides examples of disclosures which constitute an unwarranted invasion of personal privacy. For instance, a disclosure of information of personal nature which would result in an economic or personal hardship to the subject party and which is not relevant to the work of the agency requesting or maintaining it, may constitute an unwarranted invasion of personal privacy (see section 89(2)(b)(iv) of the Freedom of Information Law). In my view, disclosure of the subpoenas would not reveal information which would pose a personal or economic hardship. Moreover, as you point out, the fact that the subpoenas were served on the teachers apparently requires the District to compensate them without loss to sick time benefits. Thus, the subpoenas are apparently relevant to the obligations of the District.

In sum, since the subpoenas likely include no personal information, other than the identities of the two teachers, and the subpoinas are relevant to the obligations of the District, I do not believe that a basis exists for denying access to the subpoenas.

I hope 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3892

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

October 25, 1985

Mrs. A. Salvemini
[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. Salvemini:

I have received your letter of October 10, in which you sought advice concerning the disclosure of information.

As requested, enclosed are copies of the Freedom of Information Law and an explanatory brochure on the subject that may be useful to you. In relation to the Freedom of Information Law, you raised a question about "Citizen Protection Rights" as such rights might "apply to a person who makes a complaint against someone in the village - protecting them from retaliation from the person complained about." You also raised a question concerning action that a village can take against an employee who "unlawfully discloses information and/or who does not follow through on actions required by summonses that are issued".

In this regard, I 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 section 87(2)(a) through (i) of the Law.

Second, one of the grounds for denial in the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy". With respect to written complaints submitted to an agency, it has been consistently advised that the substance of the complaint is available, but that identifying details regarding a complain-

ant may be withheld on the ground that disclosure would result in an "unwarranted invasion of personal privacy" under section 87(2)(b) of the Freedom of Information Law. Additionally, section 89(2)(c)(i) permits disclosure of records containing personal information when "identifying details are deleted". Therefore, in my view, the substance of complaints should be made available, but the agency may first delete identifying details.

It is emphasized that the Freedom of Information Law, as it pertains to a village, for example, permits an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Nevertheless, a village would not be required to withhold. Consequently, if you forward a complaint to the village, there would be no guarantee or requirement that your name must be withheld, even though the agency could withhold identifying information. It is suggested that you might want to consider transmitting a complaint without identifying yourself.

Your final area of inquiry concerns unlawful disclosure by a village appointee and action that might be taken when a village employee fails to carry out particular duties. Please be advised that those questions do not fall within the area of the Committee's expertise or jurisdiction. However, section 806 of the General Municipal Law requires that the governing body of a village must adopt a code of ethics. It is possible that a village code of ethics refers to unauthorized disclosure. With respect to a public officer who fails to carry out a duty that he or she is required to accomplish, the hiring officer or body could likely initiate disciplinary action, or a lawsuit could be initiated under Article 78 of the Civil Practice Law and Rules. In such a situation, a court could compel a public officer to carry out duties that are required to be performed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3893

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 28, 1985

Ms. Barbara Gilman-Ottey
[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. Gilman-Ottey:

I have received your letter of October 12 in which you requested an advisory opinion.

According to your letter and its attachments, you requested information about a particular employee in the Elmira office of the Department of Environmental Conservation. In your request to the Department, you asked nine questions concerning the individual. In response, you received a letter stating the employee's name, business address, title and salary. The letter also stated that disclosure of the remainder of the information sought would be an unwarranted invasion of personal privacy. You would like to know whether you are entitled to answers to the remainder of your questions and whether there is a penalty for false responses under the Freedom of Information Law.

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law provides rights of access to records maintained by an agency, rather than access to information known to the agency. In other words, the Law generally requires an agency to make records in its possession available for review and/or copying. The law does not, however, require an agency to answer questions posed to it by an individual. Nonetheless, to the extent that your questions identify records which would reveal the information requested, I believe that such records would be available pursuant to the provisions of the Freedom of Information Law.

Second, it is difficult to advise as to whether disclosure of the personal information would result in an unwarranted invasion of personal privacy. Expectations of personal privacy differ from individual to individual. However, the courts have found in various contexts that public employees enjoy a lesser degree of privacy than others, reasoning that public employees are to be held more accountable.

Specifically, it has been held 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 Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Onondaga Cty., August 17, 1981; Capital Newspapers v. Burns, 490 NYS 2d 651 (A.D. 3 Dept. 1983)]. On the other hand, if records or portions of records are irrelevant to the performance of one's official duties, it has been held that those records may be withheld as an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

In my view, records reflecting a public employee's official duties and responsibilities would be available under the Freedom of Information Law. Likewise, records, or portions thereof, which would indicate that the individual meets the requisite qualifications for the position would be available. Thus, a public employee's title, job description, salary and length of service would be relevant to his or her official duties and would not, in my view, constitute an unwarranted invasion of personal privacy. Nor would disclosure of records reflecting that the employee has met the qualifications of his or her position result in an unwarranted invasion.

Conversely, records indicating information which is not relevant to the employee's official duties or qualifications need not be made available. For example, while a particular job title may require a college degree, it is not necessarily relevant from which school an employee received such a degree. Similarly, the courses taken at such school and dates attended might also be withheld as an unwarranted invasion of personal privacy.

Third, the availability of records often depends on whether such records exist. That is, if the agency does not maintain records which would indicate the information sought, the agency need not create a record. Thus, if a job announcement regarding an employee's position is no longer maintained, the agency is not required to create a record detailing the circumstances regarding the advertisement of the position.

Finally, the Freedom of Information Law does not provide a penalty for disclosing false information. Upon your request, however, an agency must certify to the correctness of a copy of a record.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3894

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

October 28, 1985

Mr. Robert F. McDermott
County Attorney
Madison County
Department of Law
112 Farrier Avenue
Oneida, NY 13421

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

Dear Mr. McDermott:

I have received your letter of October 11 in which you requested an advisory opinion under the Freedom of Information Law. Please accept my apologies for the delay in response.

In your capacity as Madison County Attorney, you received a request for records from the County's Personnel Officer, who is also the County's designated Records Access Officer. The records sought, which are likely voluminous, pertain to a variety of expenditures made by County employees, including "all records of telephone calls made from County telephone instruments located in County owned or leased premises for the period January 1 to present", as well as other records concerning expenditures during specific periods, such as expense vouchers submitted and paid for specified County officers and employees, including the District Attorney and his assistants, disability insurance bills received and paid, information concerning disability claims other than the nature of the claims, vouchers pertaining to a leased automobile assigned to the District Attorney, vouchers submitted and paid by the County Clerk for all "personal services Agreements", and vouchers "submitted and paid for by the County for equipment and contractual services received by or provided to the Madison County Treasurers Office...".

In this regard, I offer the following comments.

First, the Freedom of Information Law requires that an applicant must request records "reasonably described" [see section 89(3)]. Here I point out that the Court of Appeals has determined that, if, on the basis of the terms of a request, an agency can locate the records sought, the applicant has met the requirement of "reasonably describing". Since in this instance the applicant's request involves particular types of records prepared or "submitted and paid" within specific periods of time, it appears that, despite its breadth, the request has reasonably described the records 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 section 87(2)(a) through (i) of the Law.

Third, as a general matter, records involving the expenditure of public monies have long been available, not only under the Freedom of Information Law, but in conjunction with other statutes as well [see e.g., General Municipal Law, section 51, County Law, section 208(4)]. Consequently, most, if not all of the records sought should in my view be made available.

However, I believe that attention should be focused upon three types of the records in question.

As you may be aware, section 87(2)(b) permits an agency to withhold records, or portions thereof, when disclosure would result in "an unwarranted invasion of personal privacy". Although the standard in the Law is subject to conflicting interpretations, 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; Capital Newspapers v. Burns, 490 NYS 2d 651 (A.D. 3 Dept. 1983)].

From my perspective, bills, vouchers, contracts and similar records involving payments to or expenditures by public employees are relevant to the performance of their official duties. As such, those types of records would in my view be available on the ground that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. There may be some aspects of those records that could be deleted as an unwarranted invasion of personal privacy, such as public employees' home addresses or social security numbers, for example, which may have no relevance to the performance of one's official duties.

Questions have arisen in the past concerning telephone bills that list the numbers called. It has been contended that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to an employee who initiated the call but rather with respect to the recipient of the call. Since there are no judicial decisions of which I am aware that pertain specifically to the issue, it is not clear what the judicial response might be. From my perspective, the numbers called are likely available, for they would not necessarily indicate who in fact was called. Further, an indication of the phone number would not disclose the nature of a conversation. Consequently, despite the privacy considerations, it would be difficult in my opinion to meet the burden of proof when attempting to justify a denial [see Freedom of Information Law, section 89(4)(b)]. A possible middle ground, a method of ensuring disclosure relative to governmental expenditures and dealing with privacy considerations would merely involve deleting the last four digits of a phone number, while making available the area code and the first three digits of a phone number.

Another aspect of the request where privacy considerations might arise involves records of payment of disability claims. Once again, the applicant specified that he is not interested in "the nature of the claim itself", but rather the names of employees and the amounts of disability payments made to them. Without knowledge of the nature of the County's disability program, I cannot offer specific advice. However, the facts of a recent determination rendered by the Appellate Division, Third Department, may be somewhat analogous. Specifically, in Capital Newspapers v. Burns, supra, the Appellate Division granted access to sick leave records. The records did not indicate the nature of any illness or the reason for using sick time, but rather merely factual information concerning the use of sick leave. In so holding, it was found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the right of an employee to properly use sick leave available to him or her. In the instant case, intervenor has an obligation to report for work when scheduled along with a right to use sick in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus, it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of personal privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access (Matter of Scott, Sardano & Pomeranz v. Records Access Officer, City of Syracuse, __NY 2d__, __NYS 2d __, __ NE 2d __ [June 4, 1985]; Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra, 62 NY 2d pp. 79-80, 476 NYS 2d 69, 464 NE 2d 437)" (id., 653).

Assuming that the appalicant is seeking information other than that which describes the nature of an illness or medical problem associated with a disability claim, it would appear that the information sought is available.

The last area in which rights of access may be questionable pertains to records involving the District Attorney and other members of his office. It might be argued that disclosure of particular phone numbers or vouchers could be used to idnetify informants or identify people whose safety

might be jeopardized by means of disclosure. In those situations, deletions might appropriately be made on the grounds that disclosure would result in an unwarranted invasion of personal privacy or "endanger the life or safety of any person" pursuant to section 87(2)(f) 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-AD-3895

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

October 31, 1985

Jonathan Slosser, D.M.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. Slosser:

I have received your letter of October 13, as well as the materials attached to it.

The focus of your inquiry is a document labeled "Exhibit #8", which you obtained from the Committee on Cable Television pursuant to the Freedom of Information Law. You apparently attempted to use it as an exhibit during a hearing conducted by the Commission. However, during the hearing, Counsel to the Commission "instructed the hearing officer to cleanse the record of [your] exhibit" on the ground that the document was "an intra-agency communication" that was "exempt" from the Freedom of Information Law. Counsel added that the document in question was given to you in error.

Based upon other documentation that you have received, it is your contention that Exhibit #8 "contains facts and policies" upon which the Commission relied. In view of the foregoing, you have raised the following questions:

> "(1) Is Exhibit #8 exempt from the FOIL? Is it exempt even after reading the enclosed documents that reveal Commission policy in 1976 and before?

(2) If a document is exempt from the FOIL, and if I obtain the document from the agency's Records Access Officer, can I not use the document in an agency hearing or in a court of law? Is the fact that the document is exempt from the FOIL, a legitimate reason to cleanse the record of that document?

(3) If the Records Access Officer grants me access to a record, does that not mean that the record is not deniable? Are there any provisions in the law for a Records Access Officer who has made a mistake?"

In this regard, I offer the following comments.

First, it is emphasized that the Committee is authorized to advise with respect to the Freedom of Information Law. As a general matter, the Committee does not review particular records to determine rights of access. As such, even though you have supplied the record at issue, my comments should be viewed as advisory.

Second, from my perspective, while I am unaware of the circumstances surrounding the disclosure of the document characterized as Exhibit #8, it appears that it could justifiably have been withheld. Having reviewed the document, which is marked as a "draft", it appears that the former Counsel to the Commission was offering his opinion with respect to a particular issue. It does not appear that he suggested a particular course of action, but rather a variety of alternatives. It may be that the Commission later adopted its policy in conjunction with some aspects of suggestions made in Exhibit #8; nevertheless, the document in question appears to be advisory in nature and does not appear to contain "policy" adopted by the agency. In addition, it is possible that the document might be considered either attorney work product or a communication made in conjunction with an attorney-client relationship. If either of those circumstances was present, I believe that there would be an additional basis for withholding.

Third, while intra-agency materials may be withheld in appropriate situations, there is nothing in the Freedom of Information Law that requires a denial of access to such materials. Stated differently, even though section 87(2)(g) of the Freedom of Information Law could be cited to deny access, an agency may choose to disclose.

In conjunction with your last question, there are no provisions in the Freedom of Information Law concerning a situation in which a records access officer mistakenly discloses. I would think, however, that disclosure would not necessarily establish a right on the part of others who might seek a document that was erroneously disclosed.

The remaining question involves your capacity to use the record in question in an agency hearing or a court . I cannot answer that question, for I do not have the authority or expertise to advise with respect to that issue.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Counsel, Commission on Cable Television

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3896

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

November 1, 1985

Mr. D.D. Guttenplan
Senior Editor
The Village Voice
842 Broadway
New York, NY 10003

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

Dear Mr. Guttenplan:

I have received your letter of October 16, as well as the correspondence attached to it.

On October 9, you submitted requests to both the Urban Development Corporation (UDC) and the New York City Public Development Corporation for:

> "a copy of the letter submitted by Mr. George Klein (or his agents) as part of his response to the city's Request for Proposals on the 42nd Street Development Project. Developers responding to the RFP were required to state, in writing, their willingness to abide by both the affirmative action guidelines and the design guidelines for the 42nd Street Development Project."

You added that you are interested in Mr. Klein's response as it relates to "design guidelines", and that "RFP's were issued in June , 1981, and developers were chosen in April, 1982..."

On October 11, Ms. Gail S. Port, Deputy General Counsel to UDC, denied the request under section 87(2)(c) of the Freedom of Information Law on the ground that the document in question "is part of our on-going negotiations with designated developers, and its release would impair those negotiations".

I have contacted Ms. Port in order to obtain additional information concerning the situation and the denial. She informed me that negotiations are currently being carried out with developers for the project sites, including Mr. Klein, using a "memorandum of terms" as the framework. Ms. Port also informed me that the letter that you are seeking refers to particular aspects of the memorandum of terms being used to form the framework for the lease negotiations. Stated differently, the record you are seeking apparently pertains, at least in part, to issues that relate to negotiations that have not yet been completed.

In view of the foregoing, I 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 section 87(2)(a) through (i) of the Law.

Second, the introductory language of section 87(2) of the Law refers to the capacity to withhold "records or portions thereof" that fall within the scope of one or more of the grounds for denial. Based upon the quoted language, it is clear in my opinion that the Legislature envisioned situations in which a single record or report might be both accessible and deniable in part. Further, I believe that an agency is obliged to review records sought in their entirety to determine which portions, if any, might justifiably be withheld.

Third, the basis for denial offered by Ms. Port was section 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..."

From my perspective, the key word is "impair", and the question, therefore, involves the extent, if any, to which disclosure would "impair present or imminent contract awards..." As I understand the situation, the 42nd Street Development Project is being carried out in a variety of stages. If, for example, the documentation or portions of the documentation pertain to a transaction that has been completed, it would be doubtful in my view that a denial would be proper, for disclosure in that circumstance would no longer "impair" contract negotiations. On the other hand, to the extent that the documentation pertains to unconcluded negotiations and disclosure would "impair" the negotiation process that leads to the award of one or more contracts, it would appear that a denial is appropriate. In short, rights of access would be dependent upon specific facts and the effects of disclosure as described in section 87(2)(c) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gail Port, Deputy General Counsel
Joel Mandelbaum, Associate Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3897

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

November 4, 1985

Mr. William M. Cullen
Behrens, Loew & Cullen
Attorneys at Law
801 Walt Whitman Road
Melville, NY 11747

Dear Mr. Cullen:

I have received your letter of October 31.

You wrote that your firm represents several school districts and school district libraries in Nassau and Suffolk Counties. You indicated that you have prepared "forms for access to records" for use by your clients. However, you wrote that it is your understanding that the forms have been updated. As such, you have requested the most recent materials on the subject.

In this regard, the Committee on Open Government (formerly the Committee on Public Access to Records) never prescribed any particular form for use by agencies relative to requests made under the Freedom of Information Law. I point out that section 89(3) of the Law enables an agency to require that a request be made in writing and that such a request must "reasonably describe" the records sought. In view of the foregoing, the Committee has consistently advised that any request made in writing that reasonably describes the records sought should suffice. It has also been advised that, although an agency may prepare a form for purposes of convenience, a failure on the part of a member of the public to use a form prescribed by an agency should not serve to delay or deny access to records.

Enclosed for your consideration are copies of the regulations promulgated by the Committee under the Freedom of Inforamtion Law, model regulations designed to assist agen-

cies in complying with the procedural aspects of the Law, and an explanatory brochure, "Your Right to Know". The brochure contains sample letters of request and appeal.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3898

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

November 4, 1985

Mr. Frank Gennuso
85-C-127
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. Gennuso:

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

According to your letter and the attached memorandum, your request for "the title and account numbers of all bank and trust accounts established in the name of Clinton Correctional Facility and such other records deemed necessary in order to fully account for the cash receipts and disbursements from accounts established in the name of Clinton Correctional Facility or its Superintendent" was denied. The Inmate Records Coordinator stated that the Freedom of Information Law does not require the release of the information that you requested. In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. In other words, all records of an agency are available unless they can be withheld under one or more of the grounds for denial listed in section 87(2)(a) through (i) of the Law. The grounds for withholding are designed to protect an agency or individuals from certain harmful effects of disclosure.

Second, disclosure of the bank account records that you requested would not, in my opinion, fall within any of the grounds for denial listed in the Law. Moreover, I am not aware of any other state or federal statute which requires such records to be kept confidential.

Section 115(1) of the Correction Law, however, requires that:

> "The superintendent of each correctional facility shall maintain books of entry and such other records as may be deemed necessary by the commissioner of correction in order to fully account for cash receipts from all sources and all cash disbursements from accounts established in the name of the facility or the superintendent. Such books and records shall be in a form prescribed by the commissioner of correction and shall be open at all times to the commissioner and the comptroller or their authorized representatives" (emphasis added).

In my view, section 115(1), while requiring such records to be made available to named individuals, does not provide that those records are at the same time "specifically exempted from disclosure" to others as contemplated by section 87(2)(b)(1) of the Freedom of Information Law. Thus, I do not believe that the Department can withhold the bank account records under any of the grounds listed in the Law.

Finally, I note that the Committee's regulations promulgated under the Freedom of Information Law require that a denial of a request for records be in writing and explain the reasons therefor [21 NYCRR section 1401.2(b)(ii)]. The reasons for denying access to a record must set forth one or more of the grounds listed in the Freedom of Information Law.

You may wish to appeal the denial to Counsel for the Department of Correctional Services.

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

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive Director

CAM:jm
cc: Rodney Moody, Inmate Records Coordinator II

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3899

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

November 4, 1985

Mr. Victor B. Norman
County Administrator
and Appeals Officer
Herkimer County Legislature
P.O. Box 471
County Office Building
Herkimer, NY 13350

Dear Mr. Norman:

Thank you for sending a copy of your determination following an appeal made under the Freedom of Information Law.

According to the materials attached to your letter, a request was made by the President of the Union for "data regarding the employees who were employed by the county of Herkimer but whose wages were funded under other programs." You upheld an initial denial on three grounds:

> "1. The records if disclosed would constitute an unwarranted invasion of personal privacy under the statute;
>
> 2. The records requested are inter-agency materials;
>
> 3. The records requested would impair present and on-going bargaining negotiations between the unit of which you are president and the County of Herkimer."

From my perspective, if I understand the situation correctly, it is unlikely that any of those grounds for denial could be justified.

First, it does not appear that the information sought would contain any personal details about employees whose wages might be funded by sources other than Herkimer County. Further, records generally indicating those sources of fund-

If my assumptions regarding the facts are inaccurate, I would appreciate hearing from you.

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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3900

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

November 4, 1985

Mr. Charles A. Hickmann
Attorney at Law
83 Prospect Street
Huntington, LI, NY 11743

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

Dear Mr. Hickmann:

I have received your letter of October 21, as well as the documentation attached to it.

In brief, you requested from the Records Access Officer of the Elwood Union Free School District in Huntington a copy of a letter of resignation submitted to the District by its former internal auditor. Following an initial denial of your request on the ground of "confidential disclosure", you appealed to the Superintendent of Schools, Joseph A. Laria. Mr. Laria affirmed the denial stating that "The Board of Education has determined that the requested document is an intra-agency material and as such is exempt from disclosure under the Freedom of Information Law".

You indicated that you are bringing the matter to the attention of this office and asked that I inform you of "any action" that might be taken.

In this regard, I offer the following comments.

First, the Committee has the authority to advise with respect to the Freedom of Information Law. As such, this office does not have the capacity to take "action" that is binding on an agency. It is hoped that the ensuing comments, which are in the form of an advisory opinion, will be useful. A copy of the opinion will be sent to Superintendent Laria and the Board of Education.

Second, with respect to the substance of the issue, I would agree that the letter of resignation could be characterized as "intra-agency" material. Further, although the Freedom of Information Law contains a basis for denial concerning intra-agency materials, due to the structure of that provision, it often requires that intra-agency materials be made available in whole or in part, depending upon their contents.

It is noted as a general matter that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more among nine grounds for denial appearing in paragraphs (a) through (i) of section 87(2). The quoted language in my opinion represents a recognition on the part of the State Legislature that a single record might be both accessible and deniable in part. Moreover, I believe that the language imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Section 87(2)(g) of the Freedom of Information Law states that an agency may withhold records that:

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

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

Although I am not familiar with the specifics of the letter of resignation, if, for example, the auditor described issues that arose in conjunction with the performance of his duties in a factual manner, or referred to particular events that are or may be a matter of public record (i.e., the books, accounts, ledgers or vouchers kept by the School District pertaining to its expenditures), those aspects of the letter would likely be available under section 87(2)(g)(i). Other aspects of the letter reflective of the auditor's opinion or recommendation, for instance, could in my view be withheld.

As suggested earlier, even though a single record might contain facts and opinions intertwined with one another, that fact would not permit an agency to withhold a record in its entirety. As stated in Ingram v. Axelrod:

> "Petitioner here claims that she should be granted access to the entire report on the basis that it is factual data. 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. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b].) Additionally, pages 7-11 (ambulance records, list of interviews, and reports of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 AD2d 176, 181, mot for lv to app den 48 NY2d 706). 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, the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 Ad 2d 568, 569 (1982)].

In sum, without familiarity with the contents of the record that was denied, I cannot provide specific direction. Nevertheless, it is reiterated that District officials are in my opinion obliged to review the entire record in order to determine which portions, if any, may justifiably be withheld.

I note in passing, too, that certain aspects of the District's request form appear to be out of date. For instance, the phrases "confidential disclosure" and "Part of Investigatory Files" appeared in the Freedom of Information Law as originally enacted in 1974. Those phrases have not been part of the Law since 1978, when the current version of the Freedom of Information Law became effective. In addition, the form indicates that a denial may be appealed "within 10 days". However, section 89(4)(a) of the Freedom of Information Law states that a person "may within thirty days appeal in writing such denial..."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph A. Laria, Superintendent
School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3901

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

November 6, 1985

Ms. Lark J. Shlimbaum
Shlimbaum and 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:

As you are aware, I have received your letter of October 24.

According to your letter, on June 11, your client's son submitted written requests to the officials of the Town of North Hempstead for records concerning the "mechanics of the creation of the New Hyde Park and Garden City Park Garbage District". The requests were granted. You later also submitted a request, and you received the same records that had previously been made available. Thereafter, your client initiated a suit against the Town "based on its failure to perform certain acts in connection with the creation of the New Hyde Park and Garden City Garbage District, such failure to act being premised on the non-existence of records concerning such actions."

Following the commencement of the suit, the Town produced a record showing that it had taken action regarding the creation of the Garbage District. The record apparently was in the files maintained by the Office of the North Hempstead Attorney, but it was not among the documents made available pursuant to previous requests. You have asked whether the Freedom of Information Law or any other statute provides "a remedy or sanction for this situation".

In this regard, at the present time, it is unlikely that any statute provides the type of remedy that you are seeking. However, a proposal by the Committee and a bill introduced in 1985 in the Assembly would deal, at least tangentially, with the type of situation that you described.

The Committee's proposal grew out of a situation in which records were requested and denied by an agency. Following the initiation of a lawsuit, but before any judicial determination could be rendered, the records sought were made available. Since the controversy was moot, it was determined by the Court that the applicant did not "substantially prevail" and that, therefore, attorney's fees could not be awarded [Kline v. Fallows, 478 NYS 2d 524 (1984)].

As a consequence, the Committee recommended an amendment to the Freedom of Information law, which, if enacted, would permit a court to award attorney fees when the record sought is substantially disclosed following the initiation of a judicial proceeding but prior to a judicial determination.

The bill to which I referred earlier was introduced as A. 2405 by Assemblyman Saul Weprin. The bill would deal with a situation in which an agency official "knowingly and falsely thwarts the public's access to records", i.e., by neither granting nor denying access to records, but rather failing to acknowledge the existence or maintenance of the record by the agency. In such situations, the provisions of sections 175.20 and 175.25 of Penal Law would be referred to in the Freedom of Information Law. Those provisions pertain to "tampering with public records", and it is suggested that you review those statutes. Enclosed is a draft copy of the bill 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.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3902

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

November 6, 1985

Mr. Hank Purcell
84-C-357
Attica Correctional Facility
Box 144
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. Purcell:

I have received your letter of October 21. To be honest, I had great difficulty in reading the letter, but I hope that my responses will be useful to you.

You have raised a series of questions regarding denials of access. The first apparently pertains to records maintained by a committee of the State Senate. Please be advised that the State Legislature operates under different provisions of the Freedom of Information Law than other entities of government. As a general matter, the Freedom of Information law is based upon a presumption of access, stating that all records are accessible, except to the extent that the records fall within one or more grounds for denial listed in the Law.

However, with respect to records of the State Legislature, section 88(2) lists categories of accessible records, to the exclusion of all others. Without greater information regarding the nature of the record sought, I cannot provide specific direction. However, I believe that an appeal concerning records of the State Senate may be sent to Mr. Stephen Sloan, Secretary of the Senate, State Capitol, Albany, New York 12247.

You also questioned denials by the Office of Mental Health and Pilgrim State Hospital, which I believe is a facility run by the Office of Mental Health. You were apparently informed that patient records maintained by the Office of Mental Health and Pilgrim State Hospital fall outside the scope of the Freedom of Information Law. Here I point out that the first ground for denial appearing in the Freedom of Information Law, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is section 33.13 of the Mental Hygiene Law, which generally requires patient records by mental hygiene facilities to be kept confidential, unless disclosure is permitted under one of the exceptions to confidentiality listed in that statute.

You referred to the State Commission of Investigation. While the Commission is required to respond to requests made under the Freedom of Information Law, I believe that its records are also considered confidential by statute pursuant to section 7505 of the Unconsolidated Laws.

You asked who is the records access officer at the New York City Department of Correctional Services. I am unaware of the identity of the designated records access officer. However, when making a request, it is suggested that you address it to the records access officer and that you indicate on the outside of your envelope that the contents involve a "Freedom of Information Request".

Next, according to our records, the records access officer for the New York State Police is Colonel Carl Baker, New York State Police, State Campus, Albany, New York 12226.

Lastly, you asked who is the custodian of old records kept by a particular hospital that apparently closed several years ago. I could not read the name of the hospital in question, and I would conjecture that the State Health Department might know where a particular hospital's records may be stored.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3903

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

November 6, 1985

Mr. Carl S. Van Wagenen
[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. Van Wagenen:

I have received your letter of October 26 in which you explained that you are having difficulty gaining access to records from the Town of Rosendale relative to genealogical research.

More specifically, you indicated that the Town Clerk in Rosendale has "at least three large volumes of birth, death & marriage records dating from the late 1800's thru the early 1900's". Although you have asked to view those books, you have been refused access and were told that the information is on file in Albany. You have asked whether there is any way under the Freedom of Information Law that you can gain access to those books.

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

First, although the Freedom of Information Law generally governs rights of access to records, other statutes pertain specifically to birth, death and marriage records. A problem relative to those statutes is that rights of access are generally conditioned upon a showing that a request is made for judicial or other "proper purposes". The problem with that standard is that it is unclear and subject to conflicting interpretations . I have been informed, for example, that a genealogist may seek to review old vital records in several offices and that some clerks grant access, while others insist upon maintaining confidentiality.

Second, it is true that another set of vital records is kept at the Bureau of Vital Records at the State Health Department in Albany. In addition, and perhaps important to your research, the Health Department has established various rules and policies to be carried out by local registrars of vital records concerning access to those records. I believe that rules or policy directives concerning the genealogical research have been distributed to municipal clerks. Therefore, it is suggested that you call or write to the Bureau of Vital Records in Albany for the purpose of raising the issue and learning exactly what policy has been established regarding the disclosure of genealogical records by local clerks. If you wish to call that office, it is suggested that you attempt to speak with Mr. Peter Carucci, who may be reached at (518) 474-3038. In the alternative, the address of that office is:

New York State Department of Health
Bureau of Vital Records
Corning Tower Building
Empire State Plaza
Albany, New York 12237

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3904

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

November 6, 1985

Mr. Charles DaForno
82-A-1447
Clinton Correctional Facility
P.O. Box B
Dannemora, New York 12929

Dear Mr. DaForno:

I have received today your request of October 30 for records concerning your transfer to a particular unit at the Clinton Correctional Facility.

Please be advised that the Committee on Open Government (formerly the Committee on Public Access to Records) is responsible for advising with respect to the Freedom of Information Law. As a general matter, the Committee does not maintain possession of records, nor does the Committee have the authority to compel an agency to grant or deny access to records. In this instance, the Committee cannot provide access to the records sought, because the records are not maintained by this office.

I point out that a request should be directed to the agency that maintains the records sought. In this case, it appears that a request should be directed to the Clinton Correctional Facility. Further, under the regulations promulgated by the Department of Correctional Services, a request may be directed to the superintendent of the facility with respect to records kept at the facility. As such, it is suggested that a request be sent to the 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3905

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 277

November 6, 1985

Ms. Jane E. Love
City Attorney
City of Dunkirk
Department of Law
City Hall
Dunkirk, NY 14048

The staff of the Committee on 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. Love:

I have received your letter of October 29 in which you requested that I reconsider an advisory opinion addressed to Mr. Bill Dill on October 21.

Mr. Dill indicated that the City of Dunkirk is in the process of developing its harborfront and that it has been acquiring land near the harbor over the course of several years. He wrote that:

> "Earlier this year, the city moved to condemn those properties in the harborfront area that it could not acquire through outright purchase. The State Supreme Court approved the city's eminent domain petition and since that time, the city has taken title to the land and has forwarded checks to the property owners based on property appraisals that were done at the direction of the city."

Mr. Dill's request for an opinion followed a denial of his request for a list of payments based upon property appraisals. I suggested in the opinion that the records should be available, for it appeared, based upon information provided by Mr. Dill, that the records sought pertained to

transactions that had been consummated. You wrote, however, that under section 304 of the Eminent Domain Law "advance payments are based upon these appraisals and are interim payments pending the outcome of the acquisition litigation". You added that, "While the statute allows the property owners to accept advance payments as payments in full, none have as yet." In your letter, you pointed out that negotiations are continuing and that disclosure of appraisal prices would create speculation and "impair the negotiation process", for the records of payments do not pertain to "consummated" transactions.

In this regard, I offer the following observations.

First, I appreciate your thoughtful and illuminating description of the situation. In all honesty, on the basis of Mr. Dill's letter, I mistakenly believed that the records withheld from Mr. Dill related to transactions that had been completed. If I understand the situation correctly, the records in question relate to interim payments made during the negotiation process. As such, it does not appear that transactions concerning those properties have been "consummated".

Second, as a general matter, it is my view that the grounds for denial listed in the Freedom of Information Law [section 87(2)(a) through (i)] are intended to permit government to withhold records when disclosure would be damaging to the work of an agency, or an individual, for example.

As you aware, section 87(2)(c) may be asserted with respect to situations in which there are potentially harmful effects of disclosure relative to some types of contractual negotiations. The cited provision permits an agency to withhold records when disclosure would "impair present or imminent contract awards...".

Under the circumstances, in reconsidering the issue based upon the information that you have supplied, it would appear that section 87(2)(c) could justifiably be asserted to withhold records which, if disclosed, would "impair" the negotiation process in a manner analogous to denials upheld in Murray v. Troy Urban Renewal Agency [Sup. Ct., Rensselaer Cty., April 24, 1980, rev'd 84 AD 2d 612, 56 NY 2d 888 (1982)]. Once again, my response to Mr. Dill was based on my impression that the records denied pertained to properties for which negotiations had been completed.

Please accept my apologies for the misunderstanding. I trust that you realize that my response to Mr. Dill was made in good faith.

I hope that 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: Bill Dill

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1226
FOIL-AO- 3906

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

November 6, 1985

Mr. James F. Fix
[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. Fix:

I have received your letter of October 28 in which you indicated that you are involved in difficulties relative to the "Zoning Code" in the Town of Eastchester. Specifically, you wrote that you have faced problems "trying to find out why certain court summons were withdrawn and who did the withdrawing". In this regard, I offer the following comments and suggestions.

First, since you asked whether the Committee has representation locally, I point out that the only office of the Committee is located in Albany. Further, the staff of the Committee is small, consisting of four employees.

Second, the nature of the records or information that you are seeking is not clear. 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 section 87(2)(a) through (i) of the Law.

From my perspective, records indicating action taken by a municipal board or official would likely be available, for such records would represent agency determinations. If, for example, action was taken by the Town Board or Zoning Board of Appeals, the information sought would likely appear in minutes of meetings. With respect to the contents of minutes, section 106(1) of the Open Meetings Law states that:

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

Based upon the language quoted above, action taken by a public body must be indicated in minutes of meetings. If action is taken by a building inspector, zoning code enforcement officer, or an official in a similar position, similarly, I believe that records indicating that action was taken would likely be available.

If you could provide additional information concerning the specific nature of the information that you are seeking, perhaps I could provide more specific advice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

COMMITTEE ON OPEN GOVERNMENT

OML-AO-1228
FOIL-AO-3907

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

November 7, 1985

Mr. Abraham Sheinfeld
[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. Sheinfeld:

I have received your letter of October 31 in which you raised questions concerning the applicability of the Freedom of Information and Open Meetings Laws to the Caring Community, Inc., and a Senior Center located at 27 Washington Square North. You added that Caring Community is funded by private sources and is considered a "non-profit organization" and that the Senior Center is funded entirely by the New York City Human Resources Administration.

In this regard, I have made numerous telephone inquiries on your behalf in an effort to learn more about the organizations in question. Based upon information given to me, it appears that neither the Caring Community nor the Senior Center would be subject to the Freedom of Information or Open Meetings Laws. Nevertheless, for reasons that will be explained later, it is likely that you can obtain significant amount of information regarding those entities.

The scope of the Freedom of Information Law is determined in part by the term "agency", for the Law applies to "agency" records. Specifically, 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."

Although the Caring Community operates the Senior Center at 20 Washington Square North (your letter referred to 27 Washington Square North), it appears that that corporation and the Senior Center are not "governmental" entities. If that is so, their records would not fall within the scope of the Freedom of Information Law.

I point out, however, that the Human Resources Administration maintains records about the Caring Community and the Senior Center. Those records maintained by the Human Resources Administration would be subject to rights granted by the Freedom of Information Law and would be accessible or deniable based upon their contents. Enclosed is a copy of the Freedom of Information Law and "Your Right to Know" which describes the provisions of the Freedom of Information and Open Meetings Laws.

The Freedom of Information Officer for the Human Resources Administration is Ms. Doris Robinson, who can be reached at 433-6646. If it is necessary to submit a request for records in writing, I am sure that Ms. Robinson can provide you with the appropriate address.

With respect to the Open Meetings Law, it does not appear that meetings of the entities in questions would be subject to that statute. The Law includes within its scope meetings of public bodies, and the phrase "public body" is defined in section 102(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."

From my perspective, it does not appear that the board of Caring Community, for example, conducts public business, even though it contracts with a City 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

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3908

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ROBERT J. FREEMAN

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

November 7, 1985

Mr. William Goldman
Attorney and Counselor at Law
P.O. Box 417
407 Metclaf Plaza
144 Genesee Street
Auburn, NY 13021-0417

The staff of the Committee on Open 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 October 31 in which you seek an advisory opinion under the Freedom of Information Law.

You wrote that NYSUT is requesting information from many school districts in the Rochester area. Attached to your letter are two such requests, both of which involve the same information. Some aspects of the requests pertain to records routinely produced and made available, such as payroll records. While you expressed a willingness "to give a copy of any record" maintained by the District you represent, you added that "we do not feel it is our obligation to put someone to work to gather the information..." for the applicant.

In this regard, I offer the following comments.

First and perhaps most important, the Freedom of Information Law pertains to existing records. As a general rule, an agency is not required to create or prepare a new record in response to a request [see Freedom of Information Law, section 89(3)]. For instance, one aspect of the request involves "an index on the extra-curricular and/or coaches' salaries". Ir was added that, if such an index exists, "please translate that into dollar amounts." If such an index or similar record is maintained by an agency, but no

"translation" or tabulation has been prepared, the agency would not be obliged to create a new record containing the figures sought. Similarly, if a "printout" contains teachers' salaries and related information, but does not include graduate credit, that additional information would not in my view be required to be included as notations, for example, on the printout.

In short, while I believe that your clients are required to "gather" existing records that fall within the scope of the request, they would not in my view be required to create or prepare new records in response to the request.

I point out that one of the few instances in which a record must be prepared involves a payroll record. Section 87(3) of the Freedom of Information Law states 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..."

I hope that 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

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3909

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

November 7, 1985

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, except as othewise indicated.

Dear Mr. Greenberg:

I have received your letter of October 22 in which you asked that I review correspondence concerning a request made under the Freedom of Information Law.

Your inquiry concerns "Step III decisions as they are signed on a daily basis by the Chancellor..." of the New York City Board of Education within particular time periods.

In order to learn more of the situation, I have contacted officials of the Board on your behalf. According to our conversation, your request was granted by means of a letter sent to you by Ms. Ruth Bernstein on January 31, 1985 and later confirmed on February 27 by John Nolan, Secretary to the Board. It was suggested then that you contact Mr. Jack Schloss to review or copy the records. I was told that Mr. Schloss is no longer at his former office, but that you can contact the Office of Labor Relations to gain access to the records.

One of the problems, as I understand the method by which the records are kept, is that they are not filed chronologically, but rather alphabetically. As such, it may be difficult to pull Step III decisions rendered within particular dates. If the records cannot be located by means of dates, it is possible that a request made on that basis would not "reasonably describe" the records sought as required by section 89(3) of the Freedom of Information Law. However, as indicated earlier, it is suggested that you contact the Office of Labor Relations, for I believe that you may review and/or copy the records in question at that office.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3910

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

November 8, 1985

Mr. Thornton F. Blaauboer
[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. Blaauboer:

I have received your letter of November 1 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns the "availability and price of photographs taken by the New York State Police" in conjunction with an investigation of an accident in which your son was killed. Having requested photographs taken by the State Police, your attorney was informed that "your cost would be $300 plus for 31 photographs". It is your view that the fee is excessive.

In this regard, I offer the following comments.

First, section 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, section 87(1) requires each agency to adopt its own regulations consistent with those of the Committee and in conformity with the Law, pertaining to several topics, including:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

As indicated above, in the case of records that may be photocopied, an agency may charge up to twenty-five cents per photocopy, unless a different statute permits the assessment of a higher fee. In the case of records that cannot be photocopied, such as photographs, the Law permits an agency to charge a fee based upon "the actual cost" of reproduction, unless a different fee is prescribed by statute.

Under the circumstances, I believe that the State Police is permitted to assess a fee for reproducing photographs based on the actual cost for reproduction. Further, the Committee's regulations state that such a fee "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" [21 NYCRR section 1401.8(3)].

In sum, if the fee sought to be assessed by the State Police is based upon the actual cost of reproduction as described above, I believe the fee would be appropriate. However, if the fee that the State Police seeks to charge is above the actual cost of reproduction, such a fee would not in my view be consistent with the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1229
FOIL-AO- 3911

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

November 8, 1985

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 November 1 in which you requested an advisory opinion concerning "a Commission formed under the Moreland Act." According to your letter, you were informed that meetings of the Commission are not subject to the Open Meetings Law and that "no information will be available" until a "final report" is prepared.

In this regard, I offer the following comments.

It is noted initially that having performed research regarding the Commission, I learned that its official title is the "Commission on Criminal Justice and the Use of Force". As you suggested, it is a "Moreland Act" Commission, having been created by the Governor by means of an executive order issued pursuant to section 6 of the Executive Law.

As you are aware, this office has generally advised that entities such as commissions and similar entities are public bodies subject to the Open Meetings Law. However, a careful review of Executive Order No. 65, which pertains to the appointment of the members of the Commission, indicates that the Open Meetings Law might not apply to the Commission. The Open Meetings Law is applicable to meetings of "public bodies", and the phrase "public body" is defined in section 102(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."

Based upon the language quoted above, one of the conditions necessary to determine that an entity is a public body involves a finding that a "quorum is required in order to conduct public business". Here I point out that section VI of the Executive Order states in part that:

> "I [the Governor] hereby give and grant to the commissioners all and singular the powers and authorities which may be given or granted to persons appointed by me for such purpose under authority of section six of the Executive Law."

In view of the language quoted above, it does not appear that a quorum is required for the Commission to conduct public business. Rather, it appears that members of the Commission enjoy certain powers individually and that various duties may be carried out singly by a member of the Commission. In short, if there is no quorum requirement, it would appear that the Commission is not a "public body" and that, therefore, it would not be subject to the Open Meetings Law.

With respect to "information", the Freedom of Information law is applicable to "agency" records, and the term "agency" is defined in section 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."

From my perspective, the Commission constitutes an "agency" that falls within the scope of the Freedom of Information Law.

Although I am not familiar with the particular records that may be kept by the Commission, I would conjecture that many could be withheld in accordance with one or more of the grounds for denial appearing in the Freedom of Information Law. Since it appears that the records of the Commission would pertain to law enforcement investigations, criminal investigative techniques, and advice offered to units of state and local government, once again, many of those records would likely fall within the scope of two of the grounds for denial in particular, sections 87(2)(e) and 87(2)(g) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3912

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 8, 1985

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 1, in which you requested an advisory opinion concerning certification of records under the Freedom of Information Law.

You raised the follcwing questions:

> "When a request is made that copies of records be certified under the F.O.I. Law, if each record is of a different category, must each copy be individually certified, or can a cover letter be used? If a cover letter is used, must the letter give a list, itemized with a description or identification of the separate records that are being sent?"

In this regard, there are no specific regulations or judicial determinations of which I am aware that pertain to the issue. However, it has been advised in the past, particularly when certification is requested with respect to a voluminous number of records, that a single certification, asserted by means of a "cover letter", for example, would be appropriate. As such, I do not believe that each copy of records made available under the Freedom of Information Law must be stamped or "certified" separately. Further, while it might be good practice to describe records that have been certified in a cover letter or similar document, I know of no requirement that such action be taken.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerald S. Koszer

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3913

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

November 12, 1985

Mr. Matthew C. Villano
#80-A-4557
Clinton Correctional Facility
Box B
Dannemora, NY 12929

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

Dear Mr. Villano:

I have received your letter of October 30 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you have encountered difficulty in obtaining a copy of your "probation report", which I assume is also known as the "pre-sentence report".

In this regard, I offer the following comments. Although the Freedom of Information Law grants substantial rights of access to records, the first ground for denial of access in the Law, section 87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute...". Relevant under the circumstances is section 390.50 of the Criminal Procedure Law concerning pre-sentence reports. Subdivisions (1) and (2) of section 390.50 state that:

> "1. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sen-

> tence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court."
>
> "2. Pre-sentence report; disclosure; general principles. Not less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination and for copying 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 and copy the report or memoranda. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are not disclosed, the court shall state for the record that a part or parts of the report or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to appellate review. The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case, including an appeal under this subdivision."

In view of the foregoing, it appears that a pre-sentence report may be made available only by a court, and only under the circumstances described in section 390.50. As such, it it 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 quesitons arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3914

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 12, 1985

Ms. Janet Rosenblatt
[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. Rosenblatt:

I have received your letter of October 28 in which you requested a further response to your letter of September 24 in light of several court opinions which you cited.

In your letter, you indicated that your interpretation of Pooler v. Nyquist, 392 NYS 2d 948, Blecher v. Board of Education, City of New York, NYLJ Oct. 25, 1979, and United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823, seems to support full disclosure of lesson observation and school visitation reports. Furthermore, you believe that those opinions tend to contradict portions of my October 15 advisory opinion written to you. Having reviewed the above cited opinions along with other court opinions, I believe that my advisory opinion regarding final agency determinations is well founded.

First, I do not believe that any of the opinions mentioned above dealt directly with the lesson observation or school visitation reports about which you inquired. In the Pooler case, the court found that:

> "liberally interpreted, a complaint is a 'case' and the action or non-action taken thereon can be considered a 'final opinion'. Furthermore, drop-out and placement rates, as well as field inspection reports, are 'statistical or factual tabulations made by or for the agency'".

It is unclear from the language quoted above precisely what type of information the records contained. It appears, however, that the "complaints" and "field inspection reports" are easily distinguishable from the observation reports, the former requiring some type of investigation and the latter containing factual information. The Pooler decision is silent regarding the availability of teacher evaluations, for it did not apparently deal with that type of record.

Second, in United Federation of Teachers v. New York City Health and Hospitals Corporation, the Court found that grievances filed by employees of an agency and the ensuing decisions or dispositions would be available under the Freedom of Information Law but with the personal identifying details of the records redacted. The court balanced the interests of the individuals seeking disclosure with the privacy interests and expectations of the grievants.

Third, in Blecher v. Board of Education, City of New York, the Court broadly stated that:

> "Evaluations of teachers and criticism of their ability to teach are certainly relevant to the work of respondents (information sought by request 8 of petitioner and are discoverable).
>
> "The complaints made regarding this principal and the correspondence relating to same are also discoverable (Walker v. City of New York, 64 AD 2d 980; Farrell v. Village Board of Trustees, 83 Misc. 2d 125; Pooler v. Nyquist, 89 Misc. 2d 705). These cases clearly indicate that complaints, reprimands and evaluations contained in a personal file are 'final determinations' not exempted by section 87(2)(g) of Freedom of Information Law."

In my view, the decisions cited by the Court do not support the unqualified disclosure of any and all evaluations, complaints or reprimands. Moreover, the Appellate Division, Second Department, with the affirmance of the Court of Appeals, has more closely addressed the issue of the availability of evaluations and recommendations. In McAulay v.

Board of Education, City of New York, 61 AD 2d 1048, aff'd 48 NY 2d 659, a teacher's appeal from an unsatisfactory rating was heard by a hearing panel. The Chancellor reviewed the panel's evaluation of the facts and its recommendations and and sustained the appeal. In denying the teacher access to the records of the panel, the Court stated:

> "The hearing panel documents or report sought are not final agency determinations or policy. Rather, they are predecisional material, prepared to assist an agency decision maker (here the Chancellor) in arriving at his decision. Only the latter has the legal authority to decide whether the rating should stand. ... [The Freedom of Information Law does not] permit us to substitute therefor a compilation of non-final recommendations which may be based upon reasoning rejected or never adopted by the ultimate decision maker, the disclosure of which might not only impinge upon the agency's predecisional process but affirmatively mislead the public" [id., 61 AD 2d 1048].

In my view, the language quoted above reflects a careful distinction between evaluations and final agency determinations under the Freedom of Information Law. Moreover, I believe that the McAulay case would support my opinion that evaluations rendered upon a lesson observation are not final agency determinations that are available under section 87(2)(g)(iii) of the Law.

Finally, you asked whether anything in the Education Law supersedes or supplements the Freedom of Information Law regarding the availability of records maintained by local school districts or by the State Education Department. While there may be a few provisions in the Education Law which deem certain records confidential, the most far reaching confidentiality statute pertaining to school district records is the federal Family Educational Rights and Privacy Act (the Buckley Amendment). That law generally requires educational agencies to maintain the confidentiality of education records

which would tend to identify students. You may wish to contact Mr. Peter Sherman, an attorney with the State Education Department, for more information concerning the Education Law. He can be reached at (518) 474-1789.

I hope 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

COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3915

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EXECUTIVE DIRECTOR
ROBERT J FREEMAN

November 13, 1985

Ms. Christine Flynn
President
Staten Island Federation of
Parent-Teacher Associations
120 Sterling Avenue
Staten Island, NY 10306

The staff of the Committee on 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. Flynn:

I have received your letter of October 30 in which you requested an advisory opinion.

According to your letter, the New York City Board of Education, Office of the Auditor General, has denied a request to review a particular letter received by the City Comptroller and forwarded to the Auditor General. You believe that the letter "alleges massive misappropriation of school and P.T.A funds all over Staten Island." You also believe that the letter is "anonymous" and "does not name a specific school". Based upon this letter, you wrote, the Auditor General has requested financial statements from all of the elementary and intermediate schools in Staten Island. As the president of the Staten Island Federation of Parent-Teacher Associations, you asked:

> "1. Does a letter to a public official (the City Comptroller) fall into the category of records of government and are we being denied our right to view that record?

> 2. Since it is our understanding that the 'letter' is anonymous and does not name any specific school or persons, are we correct in assuming that a breech of personal confidentiallity is not a factor in this issue?
>
> 3. Does the Board of Education have the right to the financial statements of P.T.A.'s."

In this regard, I offer the following comments.

As you may be aware, the Freedom of Information Law provides that all records of an agency are available to the public unless the records, or portions thereof, can be withheld under one or more of the grounds for withholding listed in section 87(2)(a) through (i) of the Law. A record is broadly defined in section 86(4) 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, microfilms, computer tapes or discs, rules, regulations or codes."

Thus, a letter received by the Board of Education or the City Comptroller would be a record subject to the provisions of the Freedom of Information Law. In my view, only two grounds for denial would be relevant as bases for withholding the letter which you described.

Section 87(2)(b) permits an agency to withhold records when disclosure would constitute an unwarranted invasion of personal privacy. While an unwarranted invasion of personal privacy is often a difficult notion to define, if

the letter is indeed anonymous and it does not identify other individuals in its allegations of misconduct, then no invasion of personal privacy would exist. Nonetheless, even if the letter identified particular individuals, disclosure of the letter would not likely result in an unwarranted invasion of personal privacy if the identifying details were deleted.

Section 87(2)(g) provides that intra-agency or inter-agency materials may be withheld if such materials are not factual or statistical tabulations or data, instructions to the staff that affect the public, or final agency policy or determinations. Thus, if the letter was written by an employee of the Board or of another agency in his or her official capacity, the letter may be considered as inter-agency or intra-agency material. To the extent that the letter includes opinions, recommendations suggestions or advice, such portions could be withheld, while the factual information must be made available. Of course, section 87(2)(g) would not apply if the letter was not written by a representative of an agency since the letter could not then be considered intra-agency or inter-agency materials.

In short, it appears that if the letter does not identify any person and it was not prepared by an agency official or employee, no ground for withholding the letter exists. Therefore, I believe that the letter should be made available by the Auditor General to the member associations and to any other interested party.

Finally, I am unable to address your question concerning the Board's authority to review the financial statements of parent-teacher associations. I suggest that you contact Counsel's Office at the New York State Department of Education for guidance in this matter. The telephone number for Counsel's Office is (518) 474-6400.

I hope 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

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3916

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 15, 1985

Mr. Stephen O'Loughlin
[redacted]

Dear Mr. O'Loughlin:

I have received your letter of November 8, as well as the correspondence attached to it.

You wrote that you "would like to appeal before the Committee the denial of the right to photocopy [your] transcripts in [your] personnel file in the Wappingers Central School District".

Please be advised that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, the Committee does not have the authority to render a determination on appeal.

Further, I point out that 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 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, I believe that an appeal of a denial of access to records may be directed to either the Board of Education or whomever has been designated by the Board to make determinations on appeal.

Lastly, it is noted that an advisory opinion was prepared regarding the same subject recently at the request of Harry Fairbank, NYSUT Field Representative. In that opinion, it was advised that the individual to whom the transcript pertains would have a right of access. The note sent to you by Joanne Sereda of the District expressed the view that "Transcripts are considered property of the colleges..." From my perspective, while a transcript might have been prepared by a college and sent to the District, once the transcript is in the possession of the District, it constitutes a "record" subject to rights of access granted by the Freedom of Information Law. Enclosed is a copy of that opinion for your review.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Lawrence A. Gilmour, Superintendent

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3919

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

November 19, 1985

Mr. Gregory Prather
#85-A-3653
Great Meadow Correctional
Facility
P.O. Box 51
Comstock, NY 12821

Dear Mr. Prather:

I have received your letter of November 18 in which you requested information "on how attain a copy of the N.Y.S. Law and Guidelines (Minimum Standards), for the State Correctional Facilities."

In this regard, I 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 of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, the Freedom of Information Law requires each agency to promulgate regulations concerning the procedural implementation of the Law. Further, those regulations must include a designation of a person to whom a request may be directed.

Third, the regulations of the Department of Correctional Services indicate that a request made under the Freedom of Information Law concerning records kept at a correctional facility may be directed to the facility superintendent. With regard to records kept at the Department's central office in Albany, a request may be sent to the Deputy Commissioner for Administration.

Lastly, when making a request, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, it is suggested that your request include as much detail as possible in order to enable agency officials to locate the records in which you are interested.

Enclosed is a copy of "Your Right to Know", which describes the provisions of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3918

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 20, 1985

Ms. Cynthia Hazelnis
President
Fallsburg Teacher's
Association
Fallsburg Central Schools
Fallsburg, New York 12733

The staff of the Committee on 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. Hazelnis:

I have received your letter of November 2 in which you requested an advisory opinion.

You wrote that your request for "copies of warrants that were going to be discussed at Board Meetings" were denied by the Fallsburg School Superintendent, Mr. Robert Palguta. Mr. Palguta explained that the warrants were "working documents" and considered "board business" and would not be made available to the public until they were approved by the Board of Education. You would like to know whether the warrants should be available to you.

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information law is based upon a presumption of access. All records of an agency are presumed to be available unless the records, or portions thereof, may be withheld under one or more of the grounds for withholding listed in section 87(2)(a) through (i) of the Law.

Second, a record is defined in section 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 statutory definition, I believe that a "warrant" is clearly a record subject to the Freedom of Information Law.

Third, while none of the grounds for withholding broadly include "working documents" or "board business matters" as records which may properly be withheld, section 87(2)(g) may be relevant to the availability of the warrants. That section permits inter-and intra-agency materials to be withheld to the extent that they do not include:

> "i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

Stated differently, inter-agency and intra-agency materials which consist of opinions, suggestions, recommendations or advice need not be made available, while factual information, instructions to staff that affect the public, or final agency policy and determinations cannot be withheld under section 87(2)(g).

In my view, the warrants, which would reflect a statement of money owed for goods or services, would consist of factual information which could not be withheld under section 87(2)(g). Moreover, if the warrants were prepared and submitted by someone other than an official of a governmental agency, section 87(2)(g) would not be applicable. Since I do not believe that any other statutory basis for withholding the warrants could be cited, the warrants, in my opinion should be made available to you regardless of whether the Board has taken action on the matter.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3919

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 26, 1985

Mr. Gene Russianoff
Staff Attorney
Straphangers Campaign
9 Murray Street
New York, NY 10007

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

Dear Mr. Russianoff:

I have received your letter of November 4 in which you requested an advisory opinion under the Freedom of Information Law concerning a denial of a request by the New York City Transit Authority.

According to your letter, on July 24, you requested "1. The names, work addresses and work telephone numbers of the 'line superintendents' for the 23 NYCTA rapid transit subway lines". The receipt of your request was acknowledged by letter on the same day by Corinne A. McCormick, the Authority's Freedom of Information Officer. Having received no further response, you wrote that you telephoned Ms. McCormick on several occasions, and that she indicated that the information would be made available. Nevertheless, on October 18, Michael Heller notified you that your request would be denied. An ensuing letter confirmed the denial but offered no statutory basis for withholding the information sought.

In this regard, I offer the follwing 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 section 87(2)(a) through (i) of the Law.

Second, as a general matter, the Freedom of Information Law pertains to existing records, and section 89(3) states in part that an agency need not create a record in response to a request, except as otherwise provided. One of those exceptions concerns a payroll record required to be compiled and made available. Specifically, section 87(3) of the Freedom of Information Law states 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..."

As such, one of the few instances in which an agency must create a record involves the payroll record required to be maintained pursuant to section 87(3)(b) of the Law. Assuming that the Authority has complied with the cited provision, its payroll record would include reference to the names and work addresses of line supervisors.

If no separate list of line supervisors exists, I do not believe that the Authority would be required to prepare such a list. On the other hand, if a separate list containing the information sought has been prepared, I believe that it would be accessible, for none of the grounds for denial could in my opinion be asserted. As an alternative, if no separate list of line supervisors exists, you could review the Authority's payroll record maintained pursuant to section 87(3)(b) in order to derive from that list the names and work addresses that you are seeking.

Lastly, it is noted that the Freedom of Information and the regulations promulgated by the Committee (21 NYCRR Part 1401 et seq.) contain prescribed time limits for responses to requests. Specifically, section 89(3) of the Freedom of Information Law and section 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 addi-

tional 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, section 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, section 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 section 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:ew

cc: Corrine A. McCormick
Michael Heller

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3920

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

COMMITTEE MEMBERS

R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
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BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 26, 1985

Mr. Elbert Welch
#76-C-567
Attica Correctional
Facility
Attica, NY 14011-0149

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

Dear Mr. Welch:

I have received your letter of November 2 in which you requested further assistance.

In your letter, you again requested a copy of the court order of release stemming from an alleged November, 1979 appellate court reversal and the date of your release. In my letter to you of October 28, I wrote that the Department of Correctional Services does not have a copy of any court order of release pertaining to you.

Moreover, the Committee does not maintain or retrieve any records held or filed by other agencies. Requests for records must be directed to the records access officer for the agency which maintains the records sought. If the agency claims that the records sought are not in its possession, you may request that the agency "certify that it does not have possession of such record or that such record cannot be found after diligent search" (see section 89(3) 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

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3921

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

COMMITTEE MEMBERS
R. WAYNE DIESEL
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GAIL S. SHAFFER
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 22, 1985

Mr. Kevin Brown
#85-A-4809
G-14-8Cell
Box 500
Elmira Correctional
Facility
Elmira, New York 14902-500

Dear Mr. Brown:

I have received your letter of October 20, which, for reasons unknown, only recently reached this office.

According to your letter, your application for temporary release was denied due to a charge allegedly pending against you. You asked that I send you a copy of the charge or conform that such a charge was made.

Please be advised that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As a general matter, this office does not maintain custody or control of government records. In short, since this office does not maintain the information you are seeking, I can neither confirm nor deny that a charge exists.

To seek records under the Freedom of Information law, a request should be directed to the "records access officer" at the agency or agencies that you believe maintain the records sought. Further, since the Law requilres that a request "reasonably describe" the records, it is suggested that a request include as much detail as possible in order to enable agency officials to locate the records sought.

The agency that is the general repository of arrest and conviction information is the Division of Criminal Justice Services. As such, it is suggested that you write to:

Division of Criminal Justice Services
Stuyvesant Plaza
Executive Park Tower
Albany, New York 12203

You might also want to submit requests to the Clinton County Sheriff's Office or the police agency making the charge.

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law more fully.

I hope that 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-3922

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

November 27, 1985

Ms. Joyce D. Long
Deputy Town Attorney
Town of Huntington
Town Hall
100 Main Street
Huntington, NY 11743-6990

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

Dear Ms. Long:

I have received your letter of November 13, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, the Purchasing Department of the Town of Huntington "has long maintained a policy of withholding the identities of potential bidders from the public before bids are opened." You indicated that the Department recently has received numerous requests for a "list" of potential bidders regarding a sewage treatment plant. Although no "list" exists, the Department maintains a receipt book that contains the equivalent of the contents of such a list, for it refers to of "receipts for fees submitted by interested parties to obtain specifications concerning certain projects". You added that:

> "A potential bidder who pays for specifications will receive a refund of half of his payment upon return of the specifications if he does not bid on the project. If he does bid, he receives a refund of 100% of his specs fee upon his presenting a voucher for such refund. The receipt book,

> therefore, is necessary for determination of proper refunds after the bids are opened, if such specifications are returned."

Concern has arisen within the Department "about permitting perusal of its receipt book before the bids are opened because of a possible charge of contributing to or facilitating collusion". As such, it is your view that the information might justifiably be withheld under sections 87(2)(b) and 89(2)(b) of the Freedom of Information Law on the ground that the information will be used for commercial purposes. You also alluded to section 87(2)(c) as a possible basis for denial.

In this regard, I 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 section 87(2)(a) through (i) of the Law. Further, from my perspective, as a general matter, the Law is intended to ensure that records are available, except when disclosure would result in harm to an individual or some governmental activity.

Second, it is doubtful in my view that sections 87(2)(b) or 89(2)(b), which deal with unwarranted invasions of personal privacy, could be asserted to withhold the information in question. I believe that the privacy provisions are intended to enable an agency to withhold records, under appropriate circumstances, when the records pertain to natural persons. If, for example, the entries in the receipt book refer to firms, rather than natural persons, the grounds for denial concerning the protection of personal privacy would not in my opinion apply.

However, it appears that section 87(2)(c) could be asserted to withhold the information, when it is sought prior to the opening of bids. The cited provision states that an agency may withhold records or portions thereof which:

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

For the reason expressed in your letter, the avoidance of possible collusion, or even in the absence of that factor, premature disclosure of the information sought might "impair" the Town's capacity to engage in an optimal contractual agreement based upon the bids and which firms submit bids. Similarly, within an industry, where competitors are familiar with each other's practices, it is possible that disclosure of the identities of potential bidders would subvert or have an adverse impact on the Town's capacity to attract the lowest possible bid. Under any of those circumstances, it would appear that disclosure would "impair present or imminent contract awards." Therefore, if those circumstances are present, a denial would likely be justified on the basis of section 87(2)(c) 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-3923

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

November 27, 1985

Mr. Charles A. Hickmann
Attorney at Law
83 Prospect Street
Huntington, L.I., NY 11743

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

Dear Mr. Hickmann:

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

According to your letter, you were a member of the Board of Education of the Union Free School District No. 1 in Huntington from July 1, 1982 to June 30, 1985. Beginning in 1983, the Superintendent "instituted a practice of sending communications to school board members on a regular basis of matters he thought should be brought to their attention." Those communications were characterized as "Boardgrams". Although you are no longer a member of the Board, you noted that you continue to maintain an interest in education. Further, since there is "no indication that such Boardgrams were of a confidential nature, or that the information contained therein was meant not to be disclosed to the public" (emphasis yours), you asked "whether there is any basis for the Elwood School District to deny [you], as a member of the general public, access to such Boardgrams that may have been sent in the past to Elwood Board of Education members."

In this regard, I 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 section 87(2)(a) through (i) of the Law.

Second, as a general matter, the Freedom of Information Law is permissive. While an agency may withhold records based upon the grounds for denial, there is no obligation to deny access to those records, unless a different statute requires confidentiality. Having reviewed the sample Boardgram attached to your letter, I believe that the District could disclose similar records.

Third, one of the grounds for denial pertains to "inter-agency or intra-agency materials" [see section 87(2)(g)]. Under the circumstances since the communications in question are sent by the Superintendent to Board members, I believe that they would constitute "intra-agency" materials. However, due to the structure of section 87(2)(g), it often provides significant rights of access. 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 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. Concurrently, those portions of intra-agency materials reflective of advice, opinion or recommendation, for instance, could in my view be withheld under section 87(2)(g) of the Freedom of Information Law.

Based upon the sample Boardgram, much of it consists of factual information that is accessible to the public under section 87(2)(g)(i). However, other aspects of the sample contain recommendations that could likely be withheld.

In sum, while the District could make the Boardgrams available to the public, there may be portions of those communications that could be denied.

I hope that 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- 1232
FOIL-AO- 3924

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

November 27, 1985

Mr. A. Foster
[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. Foster:

I have received your letter of November 11 in which you raised a series of questions concerning "open government on the local level".

Your questions generally pertain to the degree of control that citizens have over an elected board. For instance, you asked how the public can "stop the board from passing themselves raises or passing an increase in town taxes", or whether there is "a percentage of towns people who must be against passing a specific budget". Your final question is: "Who or what does a town board answer to?"

In all honesty, I believe that you answered those questions in a portion of your letter, where you expressed the understanding that "the only way to stop this type of board's behavior is to vote them out one by one".

Under the Town Law, Article 8, a town board must hold a public hearing prior to the adoption of the budget by the board. During the hearing, "any person may be heard in favor of or against the preliminary budget as compiled or for or against any item or items therein contained" (Town Law, section 108). From my perspective, the public hearing is supposed to provide the public with the opportunity to let a town board know of the views of the public regarding any aspect of the budget. I would hope, too, that if many members of the public express opposition to a preliminary budget, a town board would revise the budget to reflect the

views of the public. If a board ignores the views of the people it represents, I agree with your suggestion that the only way of stopping that type of behavior would involve the election of new board members who better represent your point of view.

Further, although the Freedom of Information and the Open Meetings Laws do not directly provide a remedy to the situation described, I believe that both laws provide rights that can be asserted to ensure that government is accountable. For instance, under the Freedom of Information Law, virtually all records concerning the expenditure of public monies by a town board are available to the public. In addition, section 29(4) of the Town Law states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

Under the Open Meetings Law, any vote involving the expenditure of public monies must be made during an open meeting [Open Meetings Law, section 105(1)]. Further, meetings of a town board, including so-called "work sessions", where there may be merely a discussion of public business, but no intent to take action, must be conducted open to the public [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

While I would like to provide a more direct response that would enable you and others to maintain greater control over the town board, I am unaware of a better method than expressing your sentiments at the polls. However, I believe that optimal use of rights granted by the Freedom of Information and Open Meetings Laws can help to ensure accountability.

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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3925

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279-

December 2, 1985

Ms. JoAnn Silverstein
[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. Silverstein:

I have received your letters of November 10 and 19, as well as the correspondence attached to them. You have requested an advisory opinion concerning unanswered requests directed to the Downstate Medical Center, a unit of the State University.

According to your correspondence, you requested "records or portions thereof" pertaining to a named physician employed by the Downstate Medical Center, including the individual's title, salary, hours required to be performed in his position, and any rules concerning "extracurricular work".

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an "agency", a term defined in section 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 indicated in a letter in which the receipt of your request was acknowledged, Downstate Medical Center is part of the State University. Consequently, I believe that you are seeking agency records subject to rights granted by the Freedom of Information Law.

Second, I point out that section 87(3)(b) of the Freedom of Information Law states in relevant 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..."

As such, a payroll record must be maintained that includes two aspects of the information you are seeking, the salary and job title.

Third, with respect to rules concerning the hours that an employee must work or outside employment, for example, to the extent that such records exist, I believe that they would be available. One of the grounds for denial, due to its structure, would require disclosure of those types of records. Specifically, section 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 policy or determinations must be made available. Those portions of a agency's administrative manual or similar

documents or policies adopted by an agency pertaining to attendance, outside employment and the like would in my opinion be available under section 87(2)(g)(ii) of (iii), for they would constitute either "instructions to staff that affect the public", or "final agency policy".

Lastly, the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401 et seq.) contain prescribed time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 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: Raymond Belsky, Vice President for University Affairs
Mary Piccione, Executive Director

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3926

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

December 2, 1985

Ms. Eleanore A. Brent
District Clerk
Business Administration
Kenmore - Town of Tonawanda
Union Free School District
1500 Colvin Boulevard
Buffalo, NY 14223-1196

The staff of the Committee on 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. Brent:

As you are aware, I have received your letter of November 13 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a request "for a list of agency fee payers to [your] teachers union, the Kenmore Teachers Association."

In this regard, I 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 section 87(2)(a) through (i) of the Law.

Second, having researched the case law, there is a judicial decision which appears to deal squarely with the issue that you raised. In brief, it was held that the information in question could be denied on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, sections 87(2)(b) and 89(2)(b)].

Specifically, in Matter of Wool, Supreme Court, Nassau County (NYLJ, November 22, 1977), the applicant requested a list of employees of a town "whose salaries were subject to deduction for union membership dues payable to Civil Service Employees Association...". In determining the issue, the Court held that:

> "...the Legislature has established a scale to be used by a governmental body subject to the 'Freedom of Information Law' and to be utilized as well by the Court in reviewing the granting or denial of access to records of each governmental body. At one extreme lies records which are 'relevant or essential to the ordinary work of the agency or municipality' and in such event, regardless of their personal nature or contents, must be disclosed in toto. Al the other extremity are those records which are not 'relevant or essential' - which contain personal matters wherein the right of the public to know must be delicately balanced against the right of the individual to privacy and confidentiality.
>
> "The facts before this Court clearly are weighted in favor of individual rights. Membership or non-membership of a municipal employee in the CSEA is hardly necessary or essential to the ordinary work of a municipality. 'Public employees have the right to form, join and participate in, or to refrain from forming, joining or participating in any employee organization of their choosing.' Civil Service Law section 202. Membership in the CSEA has no relevance to an employee's on-the-job performance or to the functioning of his or her employer."

Based upon the decision rendered in Wool, supra, and the similarity of the facts presented in that case and the request that you described, I believe that the information could 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1233
FOIL-AO- 3927

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

December 2, 1985

Mr. M. Davis
[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. Davis:

I have received your recent letter in which you sought assistance concerning requests made under the Freedom of Information Law.

You wrote that you requested information from the Monroe-Woodbury School District last month. As of the date of your letter to this office (which is not indicated), the receipt of your request had not been acknowledged, even though a certification indicates that the request was received. The request involved minutes of meetings, "letters to and from the school to Albany", and "financial information". You asked that this office help to obtain the records sought.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee has no authority to compel an agency to grant or deny access to records, nor does it have the capacity to obtain records on behalf of the public.

Second, the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401 et seq.) prescribe time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 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 the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, section 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, section 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 section 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 section 87(2)(a) through (i) of the Law.

Minues of meetings of a board of education are in my view clearly available. Moreover, section 106(3) of the Open Meetings Law states in relevant part that:

> "Minutes of meetings of all public bodies shall be available to the pulbic in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting..."

With respect to letters between the school and "Albany", it is assumed that you are referring to correspondence between the District and a state agency, such as the State Education Department. Although you did not specify the subject matter of the letters, if they involve communications between the District and a state agency, section 87(2)(g) of the Freedom of Information Law is likely of particular relevance. The cited provision states that an agency may withhold records that:

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

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

The final aspect of your request involves "financial information". Again, it is unclear exactly what kinds of records you requested. However, records reflective of revenues or the expenditure of public monies are generally available, for they would consist of "statistical or factual tabulations or data" accessible under section 87(2)(g)(i) of the Freedom of Information Law.

Lastly, since I am unfamiliar with the terms of your request, I point out that section 89(3) of the Law requires that, when making a request, the records sought must be "reasonably described". If, for instance, your request to the District involved "financial information" without greater detail, such a request would not likely have "reasonably described" the records sought. If, however, the request described the records in such a way the District officials could locate them, I believe that such a request would have met the standard of reasonably describing the records sought.

In an effort to enhance compliance with the Law, a copy of this opinion will be sent to the District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Superintendent, Monroe-Woodbury School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3928

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

December 3, 1985

Mr. Richard J. Warren
Attorney and Counselor at Law
105 Main Street
Boonville, New York 13309

The staff of the Committee on Open 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 November 22 in which you requested an advisory opinion.

In your capacity as attorney for the Adirondack Central School, you indicated that several requests for "directory information" have been made by the United States Marine Corps Recruiting Office. You have asked "whether school officials are required and also whether they are allowed to provide directory information to the military recruiting offices" (emphasis yours), particularly in view of Chapter 786 of the Laws of 1984. That provision states in relevant part that a school district cannot withhold directory information from the armed forces "where access to, and release of, directory information concerning such pupils is offered to representatives of other institutions for the purposes of informing such pupils of educational or occupational opportunities in such institutions".

From my perspective, Chapter 786 of the Laws of 1984 does not alter prior rights of access to directory information on the part of any person, including military recruiters.

By way of background, it is noted that the issue in my view must be determined not on the basis of the New York Freedom of Information Law, but rather pursuant to the provisions of the federal Family Educational Rights and Privacy Act (20 USC section 1232g), which is commonly known as the Buckley Amendment.

Further, I would like to emphasize that the issue has arisen in the past and that I have discussed it on several occasions with representatives of the United States Department of Education, which, as you are aware, is responsible for administering and advising with respect to the Buckley Amendment.

In brief, the Buckley Amendment is applicable to any educational agency or institution that receives funding directly or indirectly through a program administered by the United States Department of Education. As such, virtually all public educational agencies or institutions in the nation, as well as many private institutions of higher education, are subject to the provisions of the Act. Further, the Buckley Amendment states that "education records" identifiable to a particular student or students are confidential to all but the parents of students under the age of eighteen years and that only the parents may waive confidentiality.

However, there are provisions concerning disclosure of what is known as "directory information". The phrase "directory information" is defined in section 99.2 of the regulations promulgated by the then United States Department of Health, Education and Welfare to include the following information relating to a student:

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

While "directory information" may be disclosed by an educational agency or institution subject to the provisions of the Buckley Amendment, such an agency or institution may do so only after having followed procedures specified in the regulations cited earlier. Section 99.37 of the regulations, entitled "conditions for disclosure of directory information", states that:

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

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

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

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

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

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

Based upon discussions with officials of the U.S. Department of Education as well as a review of the Act and the regulations, an educational agency or institution subject to the Act cannot in my view disclose directory information unless and until it has met the conditions for disclosure of directory information prescribed in section 99.37 of the regulations.

In short, under both the federal regulations and Chapter 786 of the Laws of 1984, I believe that military recruiters have the same rights to directory information as others. If a school district has not established a policy on directory information, in my opinion, it remains confidential, even if requested by military recruiters. On the other hand, if a school district has opted to adopt a policy concerning the disclosure of directory information, the contents of the directory would in my view be equally 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: Pat Ballinger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3929

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

December 3, 1985

Ms. Irene C. Bordenka
[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. Bordenka:

I have received your letter of November 18 in which you complained that the Richmond County Clerk's office has failed to make records available to you under the Freedom of Information Law.

According to the correspondence attached to your letter, you submitted a request to the records access officer of the Richmond County Supreme Court under the Freedom of Information Law for a variety of materials concerning divorce actions. As of the date of your letter to this office, you had not received any response to your request.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records of an "agency", a term which is defined in section 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, section 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."

Based upon the provisions quoted above and the facts described in your letter, it appears that you are seeking court records that are not subject to the Freedom of Information Law.

Second, with respect to the types of records that you are seeking, there is a statute that specifically deals with access to those records. Subdivision (1) of section 235 of the Domestic Relations Law states that:

> "An officer of the court with whom the proceedings in a matrimonial action or a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination of perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

As such, as a general matter, the details of a divorce proceeding, for example, are considered confidential.

However, subdivision (3) of section 235 states that:

> "Upon the application of any person to the county clerk or other officer in charge of public records within a county for evidence of the disposition, judgment or order with respect

> to a matrimonial action, the clerk or other such officer shall issue a 'certificate of disposition', duly certifying the nature and effect of such disposition, judgment or order and shall in no manner evidence the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such action."

Therefore, any person may request a "certification of disposition" which indicates that a divorce has been granted.

In sum, unless you are a party to the proceeding, records maintained by the court concerning a divorce proceeding are generally considered confidential, except with respect to the certificate of disposition described earlier.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3930

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

December 9, 1985

Mr. Carl Kruger
84-A-5436
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. Kruger:

I have received your letter of November 25 in which you requested assistance concerning the use of the Freedom of Information Law.

According to your letter, you have requested from the warden of the Suffolk County Jail records indicating "all the names and dates of all the attorney and doctor visitors [you] received while incarcerated in the Suffolk County Jail in 1977". As of the date of your letter to this office, you received no reply.

In this regard, I offer the following comments.

First, section 89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Further, it has been held that if an agency can locate requested records, the applicant has met the requirement that records be reasonably described [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. As such, I believe that the capacity to locate records is dependent, in part, upon the means by which records concerning visitors are compiled, as well as the volume of such records. For instance, if visitor logs do not identify the inmate who is being visited, there may be no way of locating the information you are seeking. On the other hand, if a separate card or record is kept concerning each inmate and his visitors, it would likely be easy to locate the records. In short, without knowledge of the means by which records are kept, I cannot provide specific direction. It is suggested,

however, that a written request include as much detail as possible, such as names, dates, identification numbers and similar details that would enable agency officials to locate the records.

Second, assuming that the records can be located, I believe that they would be available to you. One of the grounds for denial permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". However, section 89(2)(c)(iii) provides that disclosure would not constitute an uwnarranted invasion of personal privacy "when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Third, the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401 et seq.) prescribe time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 Rules [Floyd v. McGuire, 108 Misc. 2d 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In the event of a denial, I believe that the appeals officer for 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

cc: Sheriff, Suffolk County

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3931

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

December 9, 1985

Ms. Nancy R. Crowley
[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. Crowley:

I have received your letter of November 21 in which you requested that I review your correspondence with Joseph McGovern, Assistant Superintendent of the Palmyra-Macedon Central School District.

By letter of November 15, you requested:

> "...all correspondence, records, test results (preliminary and other) pertaining to the analysis of core samples taken in the high school building. (This is to include correspondence from Palmyra-Macedon Central to Wiss, Jannay, Elstner, Erlin and Hyme, as well as any documented phone conversations from Wiss, Jannay, Elstner, Erlin and Hyme to the district and vice versa.)"

On November 19, Mr. McGovern indicated that he discussed the matter with the school attorney and wrote that:

> "Regarding the analysis of the High School samples, the only preliminary correspondence of which I am aware is a brief letter from the architect concerning the request for such an

> analysis and a copy of the letter of the architect to the firm in Illinois, describing the situation and authorizing the analysis of the samples. This preliminary correspondence would not fall within the requirements of the Freedom of Information Law. Further, I do not know whether the phone calls were documented, and if they were, they would not constitute a record within the Law.
>
> "We do not presently have a written report from the Illinois firm, and upon receipt of the report, John Nesbitt will advise the school district in terms of the requirements of the Freedom of Information Law."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to "records" of an agency. It is emphasized that the term "record" is defined broadly in section 86(4) of the Freedom of Information Law to mean:

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

As such, the "preliminary correspondence" to which Mr. McGovern alluded would in my view constitute "records" subject to rights granted by the Freedom of Information Law.

Further, if there is documentation concerning phone calls between District officials and the firm in Illinois, they, too, would be "records" that fall within the framework of the Law. In addition, I believe that it would be the duty of Mr. McGovern or the District's designated records access officer to determine whether such records exist (see attached regulations, 21 NYCRR Part 1401.2).

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 section 87(2)(a) through (i) of the Law.

Third, to the extent that records exist that fall within the scope of your request, there appears to be one ground for denial of relevance. Specifically, section 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 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.

If the firm with which the District has correspondended was hired as a consultant for the purpose of advising the District, the communications between the District and the firm would consist of "intra-agency" materials [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)]. However, analyses would likely consist of "statistical or factual data" available under section 87(2)(g)(i). A letter to a consultant "describing the situation and authorizing the analysis of the samples" would appear to be reflective of factual information available under section 87(2)(g)(i) and/or "instructions to staff that affect the public" available under section 87(2)(g)(ii).

On the other hand, if the firm is not a consultant, but rather a firm designated to provide goods or something other than advice, section 87(2)(g) could not in my view be asserted to withhold the correspondece.

With respect to notations regarding phone calls, such records, if they exist, would also constitute "intra-agency" materials. To the extent that they indicate a factual rendition of conversations, they should likely be made available. To the extent that they are reflective of advice, opinion, and the like, I believe that they could 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

RJF:jm

Enc.

cc: Joseph McGovern

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3932
PPOG-AO-28

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

December 11, 1985

Mr. Felix Cotto
[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. Cotto:

As you are aware, I have received your letter of November 22 in which you requested assistance.

According to your letter, when you were an employee of the Emergency Medical Services unit, which is apparently a division of the New York City Health and Hospitals Corporation, you were accused of drug use and submitted to a urine test. You have since been terminated and have unsuccessfully sought copies of your "personnel record", and particularly the results of the urine test. The correspondence attached to your letter indicates that your request was made pursuant to the Personal Privacy Protection Law.

In this regard, I offer the following comments.

First, the Personal Privacy Protection Law is applicable only to records maintained by state agencies. Specifically, for the purposes of that statute, section 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 district attorneys."

As such, the Personal Privacy Protection Law does not apply to records of a unit of local government or a private firm, for example. Therefore, if the records that you are seeking are maintained by a unit of the New York City Health and Hospitals Corporation, which is part of New York City government, the Personal Privacy Protection Law would not be applicable.

If, however, the records in question are maintained by a unit of state government, they would likely be available in great measure, if not in toto, pursuant to the Personal Privacy Protection Law, section 95(1). Assuming that the Personal Privacy Protection Law does apply on the basis of the facts that you described, as a general matter, records pertaining to you would be available to you, except to the extent that portions of the records that identify others (i.e., a complainant) might be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see section 96(1)].

Second, if the records are maintained by the New York City Health and Hospitals Corporation or a unit of that agency, the Freedom of Information Law would apply.

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

Assuming that the Freedom of Information Law is applicable, one of the grounds for denial would likely be particularly relevant. Section 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 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. Concurrently, those portions of inter-agency or intra-agency materials reflective of advice, opinion recommendation and the like could in my view be withheld.

Under the circumstances, if the Freedom of Information Law is applicable, the contents of your personnel file would be determinative of rights of access. For instance, if an evaluation is purely advisory, I believe that it could be withheld. On the other hand, the results of a urine test would be reflective of "statistical or factual" information that should be made available to you on the basis of section 87(2)(g)(i) and section 89(2)(c)(iii) of the Freedom of Information Law.

Third, if your former employer is the New York City Health and Hospitals Corporation, it is suggested that you submit a new request to the agency's "records access officer"at the agency's central office. The records access officer is designated to coordinate an agency's response to requests made under the Freedom of Information Law.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3933

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

December 12, 1985

Mr. William Randall
#78-A-1777
Box 149
Attica, NY 14011

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

Dear Mr. Randall:

I have received your letter of November 25, as well as a copy of a request sent to the Division of Parole during the first week of November.

Although you did not so specify, it appears that your request has not been answered, and you asked whether your "next step" involves the initiation of an Article 78 proceeding.

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

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) states in part that, as a general rule, an agency is not required to create or prepare a record in response to a request. In the context of your request, in several instances you asked for figures or totals. If records have not been prepared that contain the statistical data that you requested, the Division would not be obliged to create or compile such tabulations on your behalf.

Second, assuming that you have received a written denial, or that you have been constructively denied due to a failure to respond in a timely manner, the next step is not a judicial proceeding but rather an appeal made pursuant to section 89(4)(a) of the Freedom of Information Law. 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, I point out that the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401) contain prescribed time limits for responses to requests and appeals.

Specifically, section 89(3) of the Freedom of Information Law and section 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 the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, section 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, section 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 section 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1238
FOIL-AO-3934

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

December 16, 1985

Mr. Peter La Grasse
[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. La Grasse:

I have received your letter of November 26 in which you asked several questions regarding volunteer fire companies.

You would like to know how the Freedom of Information and Open Meetings Laws affect the public's right to information concerning a volunteer fire company. In this regard, I offer the following comments.

First, the Court of Appeals has held that a volunteer fire company is an agency subject to the provisions of the Freedom of Information Law [Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575]. Since local governments rely on the volunteers for an essential public service, the Court reasoned that the company should be accountable to the public.

Therefore, I believe that the records maintained by a volunteer fire company are available to the public pursuant to the provisions of the Law. For example, records of receipts and expenditures held by the company would be accessible to the public. Minutes of a meeting held by the governing body of the company would likewise be available. Moreover, if records reflecting the specifications of equipment ordered by the company are maintained, I believe that they, too, would be available.

Second, the Court did not address the issue of whether the Open Meetings Law was applicable to volunteer fire companies. In my view, however, the Court's rationale in extending the provisions of the Freedom of Information Law to volunteer fire companies would likewise apply in extending the Open Meetings Law to the companies. Thus, I believe that meetings of the governing body, and committees and subcommittees, of a volunteer fire company, must be held in compliance with the provisions of the Law.

For instance, you asked whether the officers of the company could meet to select a fire engine without disclosing "the specific nature of such a selection". In my view, if the gathering of the officers constituted a quorum of the governing body of the fire company or one of its committees or subcommittees, and the discussion involved public business, i.e., the purchase of a fire engine, the meeting would be subject to the Open Meetings Law. The meeting must be held open to the public, with notice to the media and notice posted in a pre-designated public location. In addition, minutes of the meeting must be prepared in accordance with section 106 of the Law. The right to attend meetings granted under the Open Meetings Law is the same whether or not the individual who seeks access is a member of the fire company.

Finally, you asked whether bids are required for "large purchases" of the fire department and whether the purchase would be a proper subject for a public hearing. The Committee lacks the knowledge and the authority to address such questions as they are outside the scope of the Freedom of Information and Open Meetings Laws. I suggest that you contact an attorney in the Legal Unit of the Department of State for information regarding these matters. The phone number is (518) 474-6740 or you can use the hotline number which is 800-828-2338.

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

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3935

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 16, 1985

Mr. Carl Strock
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. Strock:

I have received your letter of November 27 in which you requested an advisory opinion. Specifically, you asked "whether reprimands entered in the personnel files of public employees are subject to the New York Freedom of Information Law.

In this regard, I offer the following comments.

It is noted at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

While two of the grounds for denial may be relevant to the issue, neither in my opinion could justifiably be asserted to withhold reprimands of public employees.

The initial ground for denial of relevance is section 87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Although subjective judgments must often be made regarding the extent to which one's privacy might be invaded, the courts have provided

significant direction, particularly with respect to the privacy of public employees. Under the Freedom of Information Law and other areas of law, the courts have found that public employees enjoy a lesser right to privacy than the public generally, for public employees have a greater duty to be accountable than others. Further, it has been held on several occasions that records that are relevant to the performance of public employees' official duties are available, for disclosure in such cases would consititute a permissible rather than an unwarranted invasion of personal privacy, [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905, (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Capital Newspapers v. Burns, 109 AD 2d 92 (1985)]. Contrarily, if information concerning a public employee is irrelevant to the performance of his or her official duties, a denial may be proper, for disclosure might indeed result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977; Miverva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981).

Based upon case law, I believe that disclosure of written reprimands would result in a permissible as opposed to an unwarranted invasion of personal privacy, for the reprimand is relevant to the manner in which a named public employee performs his official duties. This contention is bolstered by the decisions cited above, at least one of which dealt specifically with reprimands. In Farrell, supra, it was held that reprimands were available, for they were relevant to the performance of the official duties of the public employees involved and because the reprimands essentially constituted "final determinations" of an agency.

The other ground for denial which could apply to the situation is section 87(2)(g), which states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

It is important to emphasize that the provision quoted above contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records.

A reprimand might be considered "intra-agency" material. Nevertheless, as indicated earlier, I believe it may also be characterized as a "final determination" required to be made available.

I hope that I have beem 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-3936

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 16, 1985

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, except as otherwise indicated.

Dear Mr. Greenberg:

I have received your letter of November 25, in which you criticized both the New York City Board of Education and an earlier opinion of this office concerning your requests for "Step III" decisions.

It was suggested in an opinion of November 7 that a request for Step III decisions by date might not "reasonably describe" the records sought as required by the Freedom of Information Law, for the records are not filed chronologically, but rather by name.

You recommended a solution to this "intolerable situation". Specifically, you wrote that the Board of Education "routinely sends all Step III decisions to the United Federation", and that the problem could be resolved by sending you copies of Step III decisions when they are sent to the UFT and others.

In this regard, first, having reviewed my earlier opinion, I do not believe that there is any need for its revision.

Second, there is no provision in the Freedom of Information Law concerning prospective applications for records, i.e., requests for records that may be prepared, but which do not exist at the time a request is made. If an

agency chooses to agree to such an arrangement, I believe that it may do so, irrespective of the Freedom of Information Law. However, in my view, the Law does not require that an agency agree to supply records that do not yet exist.

Third, based upon a discussion with an official of the Board, the Step III decisions are routinely sent to the UFT, because the UFT is a party to the proccedings. It is assumed that you are not a party to the proceedings.

Lastly, I was informed that a Step III decision, when it is initially signed and sent to the UFT, is not necessarily reflective of a final determination. It is my understanding that the subjects of those decisions have the right to seek arbitration within a certain period following the issuance of a Step III decision. If no appeal or request for arbitration is made, the decision becomes "final" and, therefore, presumably available under section 87(2)(g)(iii) of the Freedom of Information Law. However, it appears that there is no way knowing whether a Step III decision is indeed "final" when it is issued or sent to the UFT.

I hope that 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-3937

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 17, 1985

Mr. Gregory Rheubottom
79-A-3730
Green Haven Correctional Facility
Drawer B
Stormville, New Yrok 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. Rheubottom:

I have received your letter of November 29 in which you described difficulties in obtaining information concerning a "surprise complainant witness" who you named.

In this regard, I offer the following comments and suggestions.

First, it is not stated in your letter whether you requested records from the District Attorney pursuant to the Freedom of Information Law. If you have not done so, it is suggested that you submit a formal request. Enclosed is an explanatory pamphlet that contains a sample letter of request.

Second, section 89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. As such, when making a request, as much detail as possible should be included, such as names, dates, docket or identification numbers, and similar information that might enable agency officials to locate the records.

Third, it is possible that the information in question is maintained by a court. I point out that the Freedom of Information Law specifically excludes the courts and court records from its coverage [see Freedom of Information Law, definitions of "agency" and "judiciary", sections 86(3) and

86(1) respectively]. However, other statutes often grant significant rights of access to court records (see e.g., Judiciary Law, section 255). As such, it is suggested that you request the records, again, with as much detail as possible, from the clerk of the appropriate court.

Lastly, it is suggested that you seek the services of an attorney.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3938

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 17, 1985

Mr. Barry Walker
85-A-3094
Block D-4-27
Box 51
Comstock, NY 12821

Dear Mr. Walker:

I have received your letter of November 30 in which you requested assistance concerning the scope of the Freedom of Information Law.

In this regard, enclosed are copies of the Freedom of Information Law, an explanatory pamphlet on the subject that contains a sample letter of request and, since you expressed interest in records kept at your facility, the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law.

The Freedom of Information Law applies to records of an "agency", a term defined in section 86(3) of the Law to include entities of state and local government in New York. You referred to financial records concerning money owed to a creditor. From my perspective, it appears that the Freedom of Information Law would not apply to those records, for they are not maintained by an agency. Further, it is suggested that you discuss that issue with your counselor or an attorney.

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 of the grounds for denial appearing in paragraphs (a) through (i) of section 87(2) of the Law. It is recommended that you review section 87(2) in order to become familiar with the grounds for denial.

A request should be sent to the "records access officer" at the agency or agencies that you believe maintain records in which you are interested. I point out that, according to the regulations of the Department of Correctional Services, a request for records kept at a facility may be directed to the facility superintendent.

Lastly, section 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, identification numbers, descriptions of events, and similar information that would enable agency officials to locate the records.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 1239
FOIL-AO - 3939

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 17, 1985

Mr. Edward J. Harrington
[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. Harrington:

I have received your letter of November 26 in which you requested an advisory opinion.

With respect to the first area of difficulty described in your letter, you enclosed six requests directed to the records access officer for the City of Oswego. One, which involved a request for a list of contractors doing business with the City Community Development Department, was denied; the others have not been answered. You were also informed by the City Clerk that the City does not maintain a subject matter list.

The other problem pertains to a meeting of the Zoning Board of Appeals held in October. City officials were apparently "notified in advance that there would be a larger than usual number of people attending..." Nevertheless, a request to move the meeting "to the Common Council chambers on the floor below", where everyone could have been seated, was rejected. As a consequence, some who wanted to attend the meeting were effectively precluded from attending.

In this regard, I 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 of the grounds for denial appearing in paragraphs (a) through (i) of the Law.

Second, as a general rule, the Freedom of Information Law pertains to existing records and does not obligate agency officials to create a record in response to a request [see Freedom of Information Law, section 89(3)]. For instance, if no list of contractors exists, there would be no requirement that a list be prepared on your behalf. On the other hand, assuming such a list does exist, I believe that it would be available, for none of the grounds for denial could justifiably be asserted.

Other records that you requested, leases, contracts and similar documents would in my opinion also be available, for none of the grounds for denial would be applicable.

Third, one of the exceptions to the general rule that an agency need not create records under the Freedom of Information Law pertains to the subject matter list. Section 87(3) of the Law states in relevant part that:

> "Each agency shall maintain...
>
> (c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

As such, the City is required to prepare and make available a subject matter list in conjunction with the provisions quoted above. Moreover, the regulations promulgated by the Committee, which have the force and effect of law, state that the designated records access officer is responsible for assuring that the agency maintains an up to date subject matter list [21 NYCRR 1401.2(b)(1)].

Fourth, the Freedom of Information Law and the Committee's regulations contain prescribed time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regulations provide that an agency must respond to a request within five business day 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 acknowledgement of the receipt of a request, the request is considered "constructively denied" [see regulations, section 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, section 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 section 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 Rules [Floyd v. McGuire, 108 Misc. 2d 87 Ad 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The remaining areas of inquiry pertain to the Open Meetings Law.

It is suggested initially that all laws, including the Open Meetings Law, should be carried out in a manner that gives effect to the intent of those laws.

With respect to the situation that you described involving the location of a meeting, I point out that section 103(a) of the Open Meetings Law states that any person may attend an open meeting of a public body. From my perspective, if a public body has the choice of holding its meetings in two rooms within a building, one of which would accommodate those who seek to attend the meeting, and one of which would not, it would be unreasonable to choose the latter. In addition, you mentioned that the larger meeting room is located on a floor below the actual site of the meeting. Here I point out that section 103(b) of the Open Meetings Law states that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities the permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

If, for example, the site of the meeting was a second floor room accessible only by means of a stairway, a reasonable effort to permit barrier-free access to physically handicapped persons, and, therefore, compliance with the Law, would in my opinion have required the board to hold its meetings in the first floor meeting room.

Lastly, one of the unanswered requests involves minutes of a meeting held on August 29. Here I point out that section 106(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks. If action is taken during an executive session, minutes must be made available within one week.

To attempt to enhance compliance with the Law, copies of this opinion will be sent to Robert Riggio, the City Clerk and records access officer, as well as the Zoning Board of Appeals.

Enclosed for your review are copies of the Freedom of Information Law, the Open Meetings Law and an explanatory pamphlet that may be useful to you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Robert Riggio
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3940

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1985

Mr. Adrian Kelly
#84-B-0669
Great Meadow Correctional
Facility
Box 51
Comstock, New York 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kelly:

I have received your letter of December 5 pertaining to the use of the Freedom of Information Law.

You expressed interest in knowing how you may obtain "a disciplinary tape of a Superintendent's hearing that was held over 18 months ago". You also asked about "the address of the place and the approximate cost".

In this regard, I offer the following comments.

First, with respect to "the address" to which a request can be sent, it is assumed that the type of hearing in question involved a proceeding conducted at a correctional facility by the superintendent of the facility. For records kept at a facility, requests made under the Freedom of Information Law may, according to the regulations of the Department of Correctional Services, be directed to the facility superintendent.

Second, for records that cannot be photocopied, such as tape recordings, section 87(1)(b)(iii) of the Freedom of Information Law states that an agency may assess a fee based upon the actual cost of reproducing the record. Without knowing the length of the tape, I cannot estimate what the cost of reproduction might be.

Third, in terms of rights granted by the Freedom of Information Law, 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 section 87(2)(a) through (i) of the Law.

From my perspective, rights of access would be dependent upon the facts that relate to the proceeding. For instance, if you were the subject of the hearing and were present during the hearing, the tape would likely be available. However, if the hearing involved people other than yourself, one or more among the grounds for denial might apply. Section 87(2)(b), for example, permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy"; section 87(2)(e) permits the withholding of records "compiled for law enforcement purposes" under circumstances specified in the Law. Without additional information concerning the hearing, I could not advise as to the extent to which those or other grounds for denial might apply.

Lastly, section 89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. Therefore, when making a request, it is suggested that it include as much detail as possible, such as names, dates, descriptions of events, and similar information that would enable agency officials to locate the records.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3941

182 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1985

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 3 in which you requested an advisory opinion.

According to your letter, you sent two requests to the Binghamtom Fire Department for copies of reports. In response, the Department sent you an "Application for Public Access to Records" form which you were asked to complete. You advised the Department that you would not complete the form and that you wanted the copies or a denial of your request. Apparently, because you have not completed the form, your request has gone unanswered.

In this regard, I offer the following comments.

Section 89(3) of the Freedom of Information Law provides that a request for a record be in writing and reasonably describe the records sought. The Law does not require that a particular form be used when requesting records. At the same time, the Law does not prohibit the use of forms.

In my view, an agency may use request forms so long as their use does not impair the rights granted under the Freedom of Information Law. For instance, if the requirement that a form be completed prevents the requested records from being made available within five business days of the initial written request, I believe that the requirement is unnecessarily restrictive. Moreover, if the agency fails or refuses to respond to an individual's request merely because a form is not completed, I believe that it is acting in violation of the Freedom of Information Law.

In sum, a failure to complete a form prescribed by an agency does not, in my view, constitute a valid basis for denying access to records or delaying a response to a request. Further, I believe that any written request that reasonable describes the records sought should suffice.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Cheryl A. Mugno

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Chief, Binghamton Fire Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3942

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1985

Ms. Ida R. Talalla
[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. Talalla:

I have received your letter of November 26 in which you requested assistance from this office.

Attached to your letter was a letter written to Ms. Mary Hays of the Council of the Arts by you on November 12. That letter appeared to appeal the determination on appeal written by Ms. Hays on October 31. Ms. Hays determined that one of the records that you requested could not be found after a diligent search. You believe, and memoranda in your correspondence indicate, that the record you requested did exist prior to your request. In addition, you were told that one of your requests did not provide sufficient specificity to enable the agency to locate the record. In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law grants rights of access to records maintained by an agency. The Personal Privacy Protection Law grants additional rights of access to individuals to records which pertain to the individual and are maintained by a state agency. For example, since the records you requested from the Council on the Arts pertain to you, I believe that you have rights to review and obtain copies of those records under the Privacy Law, in addition to those rights granted by the Freedom of Information Law.

Second, if an agency states that a requested record cannot be found after a diligent search, the agency must, if requested, certify to the same. Thus, if the record cannot be found with the aid of your additional explanation of November 12, I believe that you could ask Ms. Hays to certify in writing that it cannot be found.

Third, Ms. Hays described another of your requests as lacking sufficient specificity to enable the agency to locate the record. You explained that the record was "waved" in front of you during your performance evaluation in 1985 and was placed in a folder. You explained that you saw the word "Hines" on the record.

While section 89(3) of the Freedom of Information Law requires that a requested record be "reasonably described", the Court of Appeals has held that a record need only be described so as to enable an agency to locate it (M. Farbman & Sons v. New York City, 62 NY 2d 75). If the record cannot be located with the additional information that you have provided, again, you may request that Ms. Hays certify that it cannot be located.

Finally, I have included our pamphlets, Your Right to Know and You Should Know, which describe the Freedom of Information law and the Personal Privacy Protection Law, respectively. I do not have any information regarding Article 78 proceedings and suggest that you speak with an attorney concerning that 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3943

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1985

Ms. Sandra L. Brokaw
[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. Brokaw:

I have received your letter of November 27, which concerns rights of access to your personnel file.

According to your letter, you recently resigned from a firm which employed you for three years. You indicated that you have asked to review the contents of your personnel folder, but that the company denied access. The question is whether you can obtain copies of the records under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records of an "agency", a term defined in section 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, as a general matter, rights granted by the Freedom of Information Law are applicable to records of state and local government; rights granted by the Law do not extend to records kept by private firms, such as your former employer, for example.

Second, there is no law of which I am aware that requires a private firm to disclose personnel records to current or former employees.

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-3944

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1985

Mr. Michael James
#85-A-1212
Attica Correctional
Facility
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. James:

I have received your letter of November 26 in which you asked for assistance.

According to your letter, you requested a number of records from the Kings County District Attorney's office. The response from that office stated that several of the records would be made available to you upon payment of the copying fee but that the remaining records in your request were not maintained by that office. You want to know how to obtain the remaining records.

In this regard, I offer the following suggestions.

It is probable that the court in which you were convicted has transcripts of the proceedings and various related documents. Although courts are not subject to the provisions of the Freedom of Information Law, many of the records maintained by the courts are available to the public. I suggest that you write to the court clerk and request the transcripts and court documents. When making a request, it is suggested that you include as much detail as possible such as docket and indictment numbers, dates and similar information.

You might also want to submit a request to the "records access officer" at the New York City Police Department , 1 Police Plaza, New York, New York 10038. The Police Department is subject to the Freedom of Information Law. Again, when making a request, as much specificity as possible should be included.

Enclosed is a copy of our pamphlet Your Right to Know, which generally describes the scope of the Freedom of Information Law. The pamphlet includes a sample letter of 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

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-3945

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1985

Ms. Helen Prusinski
[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. Prusinski:

I have received your letter of November 30 in which you requested assistance concerning the use of the Freedom of Information Law.

According to the correspondence attached to your letter, you wrote to Ms. O'Connor of the Sullivan County Department of Social Services on November 12 and requested a copy of a regulation concerning a lien placed on your property. As of the date of your letter to this office, you received no response to your request.

In this regard, I offer the following comments.

First, you apparently spoke with Ms. O'Connor about the problem prior to the submission of a written request. It is unclear whether Ms. O'Connor agreed to respond or what her duties are. In any case, the Freedom of Information Law requires that each agency, including a county, adopt procedural rules and regulations concerning compliance with the Freedom of Information Law. Such rules and regulations must be consistent with the Freedom of Information Law and the general regulations promulgated by the Committee (21 NYCRR Part 1401). One of the aspects of the Committee's regulations pertains to the designation of one or more "records access officers" responsible for coordinating the agency's response to requests. Ms. O'Connor's role in terms

of the Freedom of Information Law is not indicated in your letter. If she is not responsible for dealing with requests, I believe that the request should have been forwarded to the appropriate agency official. If she is responsible, I believe that she has failed to respond in a timely manner.

Second, the Freedom of Information Law and the regulations prescribe time limits for responses to requests.

Specifically, section 89(3) of the Freedom of Information Law and section 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 the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, section 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, section 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 section 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, although I am not knowledgeable with respect to the issue relating to your request, enclosed is a copy of section 106 of the Social Services Law, which appears to deal with the issue.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Ms. O'Connor.

I hope that 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: Ms. O'Connor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3946

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1985

Ms. Edythe Wolfson
[redacted]

Dear Ms. Wolfson:

I received today your letter of December 14 in which you appealed a denial of access to records by the New York City Board of Education.

Please be advised that the Committee on Open Government does not have the authority to render determinations on appeal, nor is the Committee empowered to compel an agency to grant or deny access to records.

When a records access officer denies a request, an appeal may be made pursuant to section 89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within 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..."

Further, if the appeals officer upholds a denial, section 89(4)(b) 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 subdivision two."

Lastly, the allegations expressed in your letter are not sufficiently specific to enable me to provide advice regarding the propriety of the denial. If litigation has not been initiated, perhaps I could provide guidance with greater information concerning the nature of the records that were denied and the reasons for the denial.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1240
FOIL-AO - 3947

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1985

Mr. George M. Clark
Zoning Enforcement Officer
The City of Oswego
Office of Zoning and
Planning
Oswego, NY 13126

The staff of the Committee 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 Mr. Clark:

I have received both of your letters of November 26. One appears to pertain to the Open Meetings Law; the other concerns the Freedom of Information Law. You have asked that an "independent investigation of the City of Oswego" be initiated.

It is noted at the outset that the Committee on Open Government is responsible for advising with respect to the Freedom of Information and Open Meetings Laws. This office has neither the authority nor the resources to conduct an "investigation". Nevertheless, I offer the following comments.

The first letter concerns "a recent Zoning Board of Appeals public hearing which resulted in police officers prohibiting people from entering the hearing...with the approval..." of the Mayor, the City Attorney and the Chairman of the Zoning Board of Appeals. You added that the "police turned away approximately fifty people from the public hearing."

First, I point out that there may be a distinction between a "hearing" and a "meeting". In some instances, a hearing might fall outside the scope of the Open Meetings Law.

Second, I have received other complaints about what may have been the event that you described. That situation involved a gathering held in a small room on the second floor, even though a larger room located on the first floor was available and could have accommodated all who sought to attend.

It is suggested initially that all laws, including the Open Meetings Law, should be carried out in a manner that gives effect to the intent of those laws.

With respect to the location of a meeting, section 103(a) of the Open Meetings Law states that any person may attend an open meeting of a public body. From my perspective, if a public body has the choice of holding its meetings in two rooms within a building, one of which would accommodate those who seek to attend the meeting, and one of which would not, it would be unreasonable to choose the latter. Here I point out that section 103(b) of the Open Meetings Law states that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities the permit barrier-free physical access to the phsyically handicapped, as defined in subdivision five of section fifty of the public buildings law."

If, for example, the site of the meeting was a second floor room accessible only by means of a stairway, a reasonable effort to permit barrier-free access to physically handicapped persons, and, therefore, compliance with the Law, would in my opinion have required the board to hold its meeting in the first floor meeting room.

Further, even if it could be assumed that the Open Meetings Law did not apply, a provision similar to that quoted above likely would have been applicable. Section 74-a of the Public Officers Law states that:

> "It shall be the duty of each public officer responsible for the siting of any public hearing to make reasonable efforts to ensure that such hearings are

> held in facilities that permit barrier-free physical access to the physically handicapped, defined in subdivision five of section fifty of the public building law."

As such, if the facts are the same as those related by others, there may have been an absence of compliance with either the Open Meetings Law or section 74-a of the Public Officers Law.

The other letter pertains to a "hinderance of public access". By means of example, you wrote that the Chairman and another member of the City Planning Board were told "that a form would have to be signed and approved by the City Attorney, James McCarthy, before they could obtain a Planning and Zoning Board file that had previously been before both boards at their public meetings."

In this regard, I offer the following comments.

First, although the Freedom of Information Law [see section 89(3)] permits an agency to require that a request be made in writing, the Law does not refer to any particular form that must be used or that can be prescribed by an agency. In short, it has consistently been advised that any written request that reasonably describes the records sought should suffice, and that a failure to complete a form prescribed by an agency cannot serve to delay or deny access.

Second, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation, such as the City Council of the City of Oswego, to adopt its own procedural regulations in conformity with the Law and consistent with the Committee's regulations.

In relevant part, section 1401.2 of the regulations promulgated by the Committee states that:

> "(a) 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."
>
> (b) The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list;
>
> (2) Assist the requester in identifying requested records, if necessary;
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) Make records available for inspection; or
>
> (ii) Deny access to the records in whole or in part and explain in writing the reasons therefor..."

If the City Attorney is the designated records access officer, he would have the responsibility of "coordinating agency response to public requests for access to records". However, if a different person is the designated records access officer, I believe that he or she would have such responsibility.

Lastly, in the example that you gave, it is questionable in my view whether the Freedom of Information Law should be a consideration. As a general matter, I believe that the Freedom of Information Law and the procedures adopted pur-

suant to the Law are intended to deal with requests by members of the public. Your example, however, appears to deal with requests by public officers for records that they need, acting as public officers rather than as members of the public, in order to carry out their official duties. While I am unaware of the powers conferred upon such officers by means of local enactments, it would likely serve the public to enable them to obtain the documentation they need to carry out their duties without resorting to the Freedom of Information Law or completing forms.

I hope that 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: William S. Cahill, Jr., Mayor
James W. McCarthy, City Attorney
Frank Barilla, Zoning Board of Appeals Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3948

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 19, 1985

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 December 7 in which you requested an advisory opinion under the Freedom of Information Law.

Your question involves rights of access to a "Site Visit Report", a form completed by staff development specialists in conjunction with a high school math skills program. You were apparently told that the completed forms are "for office use" and would not be made available. As such, you asked for my opinion based upon a review of a blank form attached to your letter.

In this regard, I offer the following comments.

From my perspective, there is but one ground for denial in the Freedom of Information Law that is relevant. As you are aware, section 87(2)(g) permits the withholding of "inter-agency or intra-agency materials" depending upon the contents of such materials. Specifically, the cited provision states that an agency may deny access to records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

In my view, the form in question could clearly be characterized as "intra-agency" material. The top half of the form, which identifies the school that was visited, the dates of visits, the numbers of "funded positions", and teachers, as well as the grid below, would constitute "statistical or factual" information available under section 87(2)(g)(i). The remaining three sections, entitled "Instruction", "Staff Development Efforts" and "Workshops/ Conferences", each contain several lines for comments. It is unclear on the basis of your letter or the form what the contents of those sections are supposed to be when they are completed. As such, rights of access to those aspects of the reports are also unclear. For instance, if those sections contain the opinions or recommendations of the staff development specialists who complete the forms, it appears that they could be denied. On the other hand, if they describe the nature of "hardware" that was used or which workshops were attended, those types of comments would likely consist of factual information that would be available.

You also asked whether the "factual data" within an "advisory" document is available. Based upon the language of the Freedom of Information Law, which in section 87(2) permits an agency to withhold "records or portions thereof" in accordance with the grounds for denial, as well as Ingram v. Axelrod, [App. Div., 90 AD 2d 568 (1982)], I believe that factual data within inter-agency or intra-agency materials should be made available, unless a different ground for denial is applicable.

Lastly, there are no recent judicial decisions of which I am aware that would alter the holding in McAulay.

As requested, enclosed is a copy of "Your Right to Know". A copy of the Committee's annual report will be sent to you as soon as it becomes 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3949

182 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 19, 1985

Mr. Burt Schapiro
Tri-Lakes
T102 FM
Box 1030
Tupper Lake, NY 12986

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schapiro:

I have received your letter of December 11 in which you raised questions concerning records relating to an apparent hit-and-run investigation.

According to a news article attached to your letter, a warrant was about to be issued for the arrest of a named individual as a result of a "two-week investigation" of the incident. Also enclosed is a copy of a request for the accident report concerning the incident that was sent to Horace Pratt, the Lake Placid Police Chief. In response to your request, Chief Pratt wrote that no accident report was filed with the Lake Placid Police Department.

You requested assistance and asked whether any state agency would have such a report.

In this regard, I offer the following comments.

First, there are several provisions in the Vehicle and Traffic Law that may be relevant, for they pertain to reports of accidents transmitted to the Commissioner of the Department of Motor Vehicles. Section 603 states in part that:

> "Every police or judicial officer to whom an accident resulting in injury to a person shall have been reported, pursuant to the foregoing provisions of this chapter, shall immediately investigate the facts, or cause the same to be investigated, and report the matter to the commissioner forthwith; provided, however, that the report of the accident is made to the police officer or judicial officer within five days after such accident."

Section 604 provides that:

> "Reports of accidents required under the preceding section, or under the rules and regulations of the commissioner, shall be upon forms prepared by him and contain such information as he shall prescribe. Blank forms for such reports shall be printed by the commissioner and a supply sent to all city, town and village clerks and to the chief officer of every city police department for general distribution use as herein provided. Reports of accidents, required under the preceding section, shall be sent to and filed with the commissioner at the main office of the bureau of motor vehicles in the city of Albany, except as otherwise provided by the rules and regulations of the commissioner."

As such, if an accident report was prepared, it appears that it would be maintained by the Department of Motor Vehicles in Albany, as well as the local police department.

Second, with respect to rights of access, the Freedom of Information Law and section 66-a of the Public Officers Law are generally consistent. Section 66-a states that:

> "Notwithstanding 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."

Similarly, section 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, under both statutes quoted above, accident reports are generally available, except to the extent that disclosure would "interfere" with an investigation. Based upon the news article that you enclosed, it appears that the investigation may have been completed.

Third, assuming that no accident report was prepared, but that other documentation concerning the incident is maintained by the Police Department, I believe that the Freedom of Information Law would govern.

In brief, 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 section 87(2)(a) through (i) of the Law.

Without knowledge of the contents of any documentation that might have been prepared concerning the incident, clear direction regarding rights of access cannot be offered. However, it is noted that the introductory language of section 87(2) refers to the authority of an agency to withhold "records or portions thereof" that fall within one or more of the grounds for denial. The quoted language in my view represents a recognition on the part of the Legislature that a single record or report might be both available and deniable in part. I believe that it also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Lastly, if you are unsuccessful in obtaining an accident report regarding the incident, it is suggested that a request be made for any records pertaining to that event, without giving the records any particular characterization. It is noted that the Freedom of Information Law does not require that an applicant identify records sought with particularity; rather section 89(3) states that an applicant must "reasonably describe" the records in a request. Further, the state's highest court has indicated that if an agency can locate the requested records, the applicant has met the requirement of "reasonably describing" the records [see Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Enclosed for consideration is a copy of the Freedom of Information Law and "Your Right to Know", which may be useful to you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Encs.

cc: Horace Pratt, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3950

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 20, 1985

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.

Dear Ms. Alu:

As you are aware, I have received your letter of December 9, in which you requested guidance.

You wrote that, unknown to each other, you and another person requested the same expense voucher from the Elwood School District under the Freedom of Information Law. Copies of the voucher were made available to you, but their contents differed. You noted that "The dollar amounts seem to be same but the paid stamps, notes and apparent justification of expenses are quite different". In view of the foregoing, you expressed uncertainty as to the "validity" of documents made available in the future. You also expressed the belief that you should be able to expect that records made available to you should not be different from those made available to others.

In this regard, I offer the following comments.

First, from my perspective, the Freedom of Information Law is relevant to your inquiry in only one respect. As a general matter, rights granted by the Freedom of Information Law are equally applicable, irrespective of the person who requests records, or his or her motive. Stated differently, if a record is available under the Law, it 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; see also, Farbman & Sons v. New York City, 65 NY 2d 75 (1984)].

Second, although I am not familiar with the District's procedures concerning reimbursement following the submission of vouchers, the distinctions between the documents may be explainable. For instance, when the voucher was submitted on March 6, the individual seeking reimbursement had not yet been paid, and no "paid" stamp would have appeared if the voucher was copied at that time. If, however, it was copied following payment, an indication of payment would be stamped on the voucher. Similarily, notations might be made on the voucher if questions were raised regarding expenses claimed.

Lastly, enclosed are copies of provisions dealing with the alteration of records. I would conjecture that they would be relevant only in unusual cases.

I hope that 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-3951

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 23, 1985

Mr. James F. D'Arcangelo
[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. D'Arcangelo:

As you are aware, I have received your letter of December 12, which concerns access to records of the Justice Court of the Town of Wheatfield.

According to your letter, you believe that there was a court stenographer present at a proceeding in which you were involved. However, having requested a copy of the transcript, the Court Clerk wrote that no stenographer was present and that, therefore, there is no transcript available. The Court Clerk added that "there is a 30 day time limit for appeals".

In this regard, I offer the following comments.

First, in my opinion, the Freedom of Information Law is not applicable to the records in which you are interested, whether or not they exist. The Freedom of Information Law pertains to records of an "agency", a term defined in section 86(3) to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, section 86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Therefore, the Freedom of Information Law does not apply to the courts or court records.

Second, there are other statutes that often grant broad rights of access to records and impose certain responsibilities upon court clerks. For instance, sections 255 of the Judiciary Law and 2019-a of the Uniform Justice Court Act generally grant rights of access to records maintained by a Justice Court. Further, under section 255 of the Judiciary Law, it appears that the clerk of the court must certify as to the result of a search for records. Enclosed is a copy of 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

cc: Joanne Tobey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3952

182 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 24, 1985

Mr. Raymond Smith
#83-A-8102
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. Smith:

I have received your letter of December 17 concerning a "problem" that has arisen under the Freedom of Information Law.

Specifically, you wrote that you are interested in obtaining a copy of a particular court decision.

In this regard, I offer the following comments and suggestions.

First, it appears that the decision is likely maintained by both the office of the District Attorney and the clerk of the court in which the decision was rendered. If that is so, I believe that it would be accessible from either the District Attorney or the court.

Second, the Freedom of Information Law is applicable to records of the District Attorney, and it is therefore suggested that a request be sent to the "records access officer" at the office of the District Attorney. Further, since the Freedom of Information Law [section 89(3)] requires that a request "reasonably describe" the records sought, a request should include as much detail as possible, such as names, dates, indictment and docket numbers and similar information that will enable agency officials to locate records that you seek.

Third, it is noted that the Freedom of Information Law specifically excludes the courts and court records from its coverage [see attached, Freedom of Information Law, definitions of "agency" and "judiciary", sections 86(3) and 86(1) respectively]. Nevertheless, other statutes often grant significant rights of access to court records (see e.g., Judiciary Law, section 255). As such, as an alternative to submitting a request to the District Attorney, a request may be sent to the clerk of the appropriate court, again, including enough detail to permit the clerk to locate the record.

Lastly, it is suggested that you confer 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3952

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 24, 1985

Mr. Raymond Smith
#83-A-8102
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. Smith:

I have received your letter of December 17 concerning a "problem" that has arisen under the Freedom of Information Law.

Specifically, you wrote that you are interested in obtaining a copy of a particular court decision.

In this regard, I offer the following comments and suggestions.

First, it appears that the decision is likely maintained by both the office of the District Attorney and the clerk of the court in which the decision was rendered. If that is so, I believe that it would be accessible from either the District Attorney or the court.

Second, the Freedom of Information Law is applicable to records of the District Attorney, and it is therefore suggested that a request be sent to the "records access officer" at the office of the District Attorney. Further, since the Freedom of Information Law [section 89(3)] requires that a request "reasonably describe" the records sought, a request should include as much detail as possible, such as names, dates, indictment and docket numbers and similar information that will enable agency officials to locate records that you seek.

Third, it is noted that the Freedom of Information Law specifically excludes the courts and court records from its coverage [see attached, Freedom of Information Law, definitions of "agency" and "judiciary", sections 86(3) and 86(1) respectively]. Nevertheless, other statutes often grant significant rights of access to court records (see e.g., Judiciary Law, section 255). As such, as an alternative to submitting a request to the District Attorney, a request may be sent to the clerk of the appropriate court, again, including enough detail to permit the clerk to locate the record.

Lastly, it is suggested that you confer 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3953

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 24, 1985

Mr. Richard Behrens
[redacted]

Dear Mr. Behrens:

I have received your letter of December 11, as well as the materials attached to it.

You raised questions about a denial based upon section 87(2)(g) of the Freedom of Information Law and an appeal following a denial of access.

This cited provision is one of the grounds for denial appearing in the Freedom of Information Law. It 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. Concurrently, those aspects of inter-agency or intra-agency materials consisting of opinion, advice, recommendation and the like may be withheld.

In the event of a denial on the basis of section 87(2)(g) or any other ground for withholding, the person denied access may appeal the denial pursuant to section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within 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 records sought..."

As requested, enclosed is a copy of the full text of the Freedom of Information Law, which includes both of the provisions quoted earlier.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3954

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 24, 1985

Mr. Russell V. Gladieux
Executive Deputy
Director
New York State Lottery
Swan Street Building
Empire State Plaza

Dear Mr. Gladieux:

Thank you for sending correspondence concerning a request made under the Freedom of Information Law.

In brief, a Florida firm requested a list of "on-line" lottery agents for an obviously commercial purpose. You affirmed an initial denial on the basis of section 87(2)(d) of the Freedom of Information Law, stating that "There certainly would be substantial injury to the competitive position of the subject enterprise if our agents were exposed to possible criminal activity because of the large sums of money they handle daily".

For the following reasons, I believe that it is unlikely that you would prevail if the denial is challenged in court.

First, the provision that you cited, section 87(2) (d), states that an agency may withhold records that:

> "are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

As a general matter, I believe that the exception quoted above usually pertains to records of a commercial nature submitted to an agency by a firm, rather than a list prepared by an agency [see section 89(5)]. Further, it is difficult to envision how disclosure of the name and address of a lottery agent could affect the agent's competitive position.

Second, your rationale for withholding appears to mix the language of section 87(2)(d) with a different exception, section 87(2)(f). The latter permits an agency to withhold records when disclosure "would endanger the life or safety of any person". From my perspective, section 87(2)(f) could not likely be cited to withhold a list of agents and their addresses. Lottery agents post signs on storefronts that prominently indicate that lottery tickets are available. Further, lottery agents' names and addresses are often listed in telephone books.

A third potential ground for denial is section 89(2)(b)(iii) of the Freedom of Information Law, which states that an unwarranted invasion of personal privacy includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

In my view, the provisions concerning privacy in both the Freedom of Information Law and the Personal Privacy Protection Law are intended to pertain to records that identify natural persons [see Personal Privacy Protection Law, section 92(3); also Freedom of Information Law, section 89(2-a)]. The addresses of the requested list would presumably be business addresses. Moreover, those addresses likely identify entities rather than individuals. For those reasons, as well as those noted earlier concerning signs and advertising, I do not believe that exceptions to rights of access concerning the protection of personal privacy could justify a denial.

Lastly, it is noted that, unlike most proceedings initiated pursuant to Article 78 of the Civil Practice Law and Rules, in such a proceeding brought under the Freedom of Information Law, the burden of proof is on the agency [see Freedom of Information Law, section 89(4)(b)]. As suggested at the outset, that burden could not in my opinion likely be met if the Division's denial is challenged.

I hope that I have been of assistance. If you would like to discuss the matter, 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-3955

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 26, 1985

Ms. Helen Prusinski
[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. Prusinski:

I have received your letter of December 18, which again concerns a request directed to the Sullivan County Department of Social Services. It is assumed that you received my earlier letter which was sent to you on December 18. If you have not received it, please let me know.

Attached to your latest letter is a copy of correspondence sent to you by Steven H. Kurlander, Assistant County Attorney. Mr. Kurlander wrote that information "should be obtained through your attorney". You wrote that you do not consider Mr. Kurlander's comment tc be responsive to your request, and you added that, since you know the nature of the information sought, you should not have to partake in "the expense of utilizing the services of an attorney".

I agree with your contention and offer the following comments.

First, an attorney has no special rights or entitlement to special treatment with respect to the use of the Freedom of Information Law. A request may be made under the Freedom of Information Law by anyone, and it has been held that records accessible 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; see also M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Second, under the circumstances, it appears that your request has been constructively denied. If that is so, you have the right to appeal the denial pursuant to section 89(4)(a) of the Freedom of Information Law. 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."

Should you seek to appeal, it is suggested that you contact the County Attorney's office in order to learn of 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

cc: Steven H. Kurlander

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3956

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1985

Mr. Jose Felton
#E-4-20
Auburn Correctional
Facility
135 State Street
Auburn, NY 13024-9000

Dear Mr. Felton:

I have received your letter of December 12, which reached this office on December 23.

You have requested assistance in obtaining records from the Supreme Court, Bronx County. Attached to your letter is correspondence from the court indicating that "public records are open for perusal by you, your agent or members of your family during the regular business hours..."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which pertains to records of agencies subject to the Law. The term "agency" is defined in section 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, section 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 records in which you are interested fall outside the scope of the Freedom of Information Law.

Second, under the circumstances, it is suggested that you discuss the matter with your counselor or an attorney. It is likely that a legal aid group or Prisoners' Legal Services could help you.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1244
FOIL-AO-3957

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1985

Mr. John E. Montreal
Councilman
Town of Geddes
409 Walberta Road
Syracuse, NY 13219

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Montreal:

I have received your letter of December 20 in which you requested an advisory opinion concerning minutes of meetings of the Zoning Board of Appeals of the Town of Geddes.

Specifically, according to your letter:

> "conversations with the Geddes Zoning Board of Appeals Chairman Russell Miller indicate that Geddes Zoning Board of Appeals Meetings are not being documented on paper in every case. The ZBA Chairman feels that the tape recording of Zoning Board meetings, which can be made available to the public, is sufficient to comply with the intent of the Freedom of Information Laws. He feels it is not always necessary to document meetings and there results, such as, Zoning Board Member Voting Records and related meeting history."

It is your view that "there should be minutes documented on paper for all Zoning Board Meetings kept on file and available for public inspection."

In this regard, I offer the following comments.

First, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 106(1) concerning minutes of open meetings 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."

While a tape recording would likely contain the elements of minutes, I agree with your contention that they should be reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, the Town might need a permanent written record readily accessible to Town officials who must refer to or rely upon the minutes in the performance of their duties.

Second, in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

Third, there also appears to be an intent expressed in section 267(1) of the Town Law concerning zoning boards of appeals to keep paper records of the type to which you referred. The cited provision states in part that "Such board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official action.

Lastly, I direct your attention to the Freedom of Information Law, which contains a requirement analogous to that described in section 267 of the Town Law. Section 87(3) states in relevant part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes."

In sum, based upon the foregoing, I believe that written minutes constitute the official record of meetings of the Zoning Board of Appeals, and that such minutes must be prepared.

As you requested, a copy of this opinion will be sent to Russell Miller, chairman of the Zoning Board of Appeals.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

cc: Russell Miller, Chairman, Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3958

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 27, 1985

Mr. Leo R. Notari
[redacted]

Dear Mr. Notari:

I have received your letter of December 20.

You expressed interest in determining "just how much less federal income tax New Yorkers pay because they are allowed to deduct state and local taxes from their Federal returns". You have asked how you may go about obtaining that information from the IRS.

In this regard, it is noted at the outset that the Committee on Open Government is responsible for advising with respect to the New York Freedom of Information Law, which applies to records maintained by entities of state and local government in New York. As such, the information that you are seeking lies beyond the scope of the Committee's jurisdiction and the New York Freedom of Information Law.

I point out, however, that there is a federal counterpart. The Freedom of Information Act pertains to records maintained by federal agencies. Therefore, a request may be directed under the federal Freedom of Information Act to the IRS or other federal agencies that maintain the records sought.

To determine the name and address of the person to whom a request may be sent, it is suggested that you contact the "federal information center", which is listed in your phone book under "United States Government".

Further, the Freedom of Information Act requires that a request "reasonably describe" the records sought. Therefore, when making a request, sufficient detail should be included to enable agency officials to locate the records.

Lastly, as an alternative to contacting the IRS or submitting a request under the Freedom of Information Act, I would conjecture that either Senator Moynihan, Senator D'Amato or perhaps your congressman could readily provide 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
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3959

182 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 30, 1985

Mr. Merton J. Grogin
[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. Grogin:

I have received your letter of December 13 in which you requested advice from this office.

In your letter, you explained that you have suffered several injuries while working for the City of New York. You have been trying to collect compensation for several years without success. You have been told that records dating back to 1964 have been destroyed and are thus not available to you. You believe that to be untrue. You would like to know how to seek redress under the Freedom of Information and Personal Privacy Protection Laws. In addition, you want to know how to prove that you have been libeled and slandered.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice regarding the Freedom of Information, Open Meetings, and Personal Privacy Protection Laws. The Committee does not, however, provide legal advice regarding matters outside of the scope of those laws. Thus, you may want to contact an attorney concerning a libel or slander action.

Second, the Freedom of Information Law provides you with rights of access to records maintained by governmental agencies. The Personal Privacy Protection Law grants additional rights of access to records which pertain to you and are maintained by State agencies. In your situation, I believe that the Freedom of Information Law would alone apply since the records that you seek are maintained by a City agency.

Third, while the accident and injury reports may be available under the Freedom of Information Law, it is probable that they have been destroyed or discarded because they are over twenty years old. The Freedom of Information Law does not include provisions regarding retention schedules for records. However, other state agencies do recommend retention schedules. I recommend that you contact Local Government Record Services at the State Archives for information regarding retention schedules of city records. Their address is Cultural Education Center, Empire State Plaza, Albany, New York 12230.

Finally, pursuant to section 89(3) of the Freedom of Information Law, you may request that the agency certify that the records which you requested are not in the agency's possession or that they 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

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- 3960

182 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 30, 1985

Mr. Daniel Hale
[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. Hale:

I have received your letter of December 20 and the correspondence attached to it.

Having reviewed the correspondence, on November 7, you submitted a request under the Freedom of Information Law to Theodore Surowka, Business Administrator for the Batavia City School District, for "a list of dates that time off work was granted or used by" a named individual "during the '84-'85 school year". Mr. Surowka responded on November 13, stating that "We will not search for a list of dates that time off work was granted or used" by the individual in question. He added that "If you will indicate the dates requested we will provide you with copies of the claim submitted...for those dates." On November 19, you again wrote to Mr. Surowka and informed him that he neither provided the reason for a denial of your request, nor did he identify the person or body to whom you could appeal. As of the date of your letter to this office, you received no further response.

In this regard, I offer the following comments.

First, I would conjecture that Mr. Surowka did not consider his letter of November 13 as a denial, but rather as a request for additional specificity.

Second, however, it appears that his response was inconsistent with the requirements of the Freedom of Information Law. By way of background, the original Freedom of Information Law enacted in 1974 required an applicant to request "identifiable"

records [see original Freedom of Information Law, section 88(6)]. That standard resulted in problems, for often a person seeking records was not sufficiently familiar with the records to "identify" them. In 1977, the Freedom of Information Law was repealed and replaced with the current Law, which became effective on January 1, 1978. Instead of requiring that an applicant request "identifiable" records, section 89(3) now merely requires that an applicant "reasonably describe" the records sought. Further, the court of Appeals, the state's highest court, has held that a request "reasonably describes" the records sought when the "agency may locate the records in question" [Farbman v. NYC Health and Hospitals, 62 NY 2d 75, 83 (1984)].

In view of the foregoing, I do not believe that you can be required to do what may be impossible without specific knowledge, that is, to indicate particular dates, as suggested by Mr. Surowka. On the contrary, I believe that a request for the claims submitted by the individual in question for the 1984-85 school would "reasonably describe" the records that you are seeking.

Third, 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 section 87(2)(a) through (i) of the Law.

Moreover, a recent Appellate Division decision granted access to similar information. Although the agency withheld records indicating dates of sick leave used by a particular employee on the ground that disclosure would result in "an unwarranted invasion of personal privacy", the court found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the right of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure

> of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 490 NYS 2d 651, 653, __AD 2d__ (1985)].

Lastly, it is noted that you requested a "list of dates that time off work was granted or used". Here I point out that the Freedom of Information Law pertains to existing records, and that as a general matter, an agency need not create a record in response to a request [see Freedom of Information Law, section 89(3)]. If, for example, no "list" of dates of absences exists, the District would not, in my opinion, be required to prepare a list on your behalf. On the other hand, if such a list does exist, I believe it would be available in accordance with the rationale expressed earlier. As an alternative to seeking a "list", as suggested previously, a request could be made for records indicating dates of absence of a particular person during the school year.

Enclosed for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you.

In addition, in an effort to enhance compliance with the Law, a copy of this opinion will be sent to Mr. Surowka.

I hope that 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: Theodore Surowka, Business Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 3961

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 30, 1985

Mr. Zul-Qarnain Abdu Shahid
79-A-3005
354 Hunter Street
Ossining, NY 10562

Dear Mr. Shahid:

I have received your letter of December 17, which reached this office today.

You have requested 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 a general matter, this office does not maintain custody or control of government records. In short, since this office does not maintain the information you are seeking, we can neither grant nor day the records in which you are interested.

To seek records under the Freedom of Information Law, a request should be directed to the "records access officer" at the agency or agencies that you believe maintain the records sought. Further, since the Law requires that a request "reasonably describe" the records, it is suggested that a request include as much detail as possible in order to enable agency officials to locate the records sought.

The agency that is the general repository of arrest and conviction information is the Division of Criminal Justice Services. As such, it is suggested that you write to:

Division of Criminal Justice Services
Stuyvesant Plaza
Executive Park Tower
Albany, New York 12203

For records kept at the facility, the regulations of the Department of Correctional Services indicate that a request may be directed to the facility superintendent.

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law, and the regulations promulgated by the Department of Correctional Services 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3962

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 30, 1985

Ms. Linda Scavetti
[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. Scavetti:

I have received your recent note and the correspondence attached to it.

In brief, it is your contention that you have been unjustly "passed over" in your attempts to obtain government employment. You asked how this office might help you "to get full names of those appointed" to positions for which you applied.

In this regard, I 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 authority to compel an agency to grant or deny access to records.

Second, however, I believe that the Freedom of Information Law can be useful in seeking and obtaining the information sought. 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 section 87(2)(a) through (i) of the Law.

Third, in terms of procedure, under the regulations promulgated by the Committee (21 NYCRR Part 1401), each agency should have a "records access officer" to whom a request may be directed. The records access officer has the duty of coordinat-

ing an agency's response to requests for records. Further, when making a request, an applicant must "reasonably describe" the records sought [Freedom of Information Law, section 89(3)]. Therefore, while a request need not identify with specificity the record in which you are interested, it should describe the record to the extent that agency officials can locate it.

Fourth, one possible method of identifying employees by name and title involves a payroll record required to be compiled by each agency. Specifically, section 87(3) states in relevant part that:

> "Each agency shall maintain:
>
> (b) a record setting forth the name, public office address, title and salary or every officer or employee of the agency..."

Another method would involve obtaining eligible lists for certain titles that identify those who are qualified to be employed in those titles. Eligible lists would likely be maintained by the State Department of Civil Service, perhaps a county civil service office, or the agency that filled a position. Eligible lists would in my opinion be available from any of those sources.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Therefore, when a request is made, it should not appear in the form of a question. An agency is not required to answer questions in response to a request made under the Freedom of Information Law; it is, however, required to respond to a request for a record or records.

Enclosed are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you, for it contains sample letters of request and appeal.

I hope that I 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-1246
FOIL-AO-3963

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 30, 1985

Mr. Martin Halpert
[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. Halpert:

I have received your letter of December 21, as well as the materials attached to it.

According to your letter, at a meeting of the Board of Education of the Ticonderoga Central School District held on November 19, you asked what it cost to rebuild an outdoor running track earlier in the year. The acting superintendent responded that he did not know the cost, but that a "full report" would be presented at the next meeting of the Board. At that meeting, the President of the Board, Dr. Brennan, announced that the issue would be discussed in executive session. When you asked Dr. Brennan why the cost of the track would not be revealed, you wrote that "He responded by stating that a Board member had requested that this matter be discussed only in executive session. Further that it is a matter of his (President) policy that whenever a Board member requests an open agenda matter be discussed only in executive session he always agrees to same". You apparently then stated that you would seek records concerning the track under the Freedom of Information Law.

At this juncture, I offer the following comments.

First, it may be "policy" of the President of the Board to permit executive sessions to be held at the request of a member of the Board; nevertheless, that policy, in my opinion, is inconsistent with a statute enacted by the State Legislature, the Open Meetings Law (Public Officers law, Article 7). Further, with regard to the validity of such a policy, I point out that section 110(1) of the Open Meetings Law states that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

From my perspective, the "policy" or "rule" described by the President is "more restrictive with respect to public access" than the Open Meetings Law and, therefore, is void to that extent.

Second, paragraphs (a) through (h) of section 105(1) of the Open Meetings Law specify and limit the topics that may appropriately be considered during an executive session. Unless one or more of those topics is the subject of discussion, a public body cannot enter into an executive session.

Third, under the circumstances, I do not believe that the executive session in question was properly held, for none of the grounds for entry into executive session would have applied, based upon the facts presented in your letter.

The second issue raised in your correspondence pertains to a request made under the Freedom of Information Law on December 18 and sent to Rudolph T. Meola, Administrative Assistant. On December 20, Mr. Meola rejected your request, stating that the District requires that its application form must be completed.

Under section 89(3) of the Freedom of Information law, an agency may require that a request be made in writing. That provision also requires that such a request "reasonably describe" the records sought. There is nothing in the Freedom of Information Law, however, concerning the use of a form prescribed by an agency that must be completed in order to make a request. As such, it has been consistently advised that a failure to complete a form prescribed by an agency cannot serve to delay a response to a request or deny access to records. In short, I believe that any written request that reasonably describes the records sought should suffice. Therefore, in my opinion, Mr. Meola should have responded to your request of December 18 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:jm
cc: Board of Education
Rudolph T. Meola