STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3964

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

January 6, 1986

Mr. Andrew B. Roth
Hayt, Hayt & Landau
600 Northern Boulevard
Great Neck, NY 11021

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

Dear Mr. Roth:

I have received your letter of December 24 in which you requested an advisory opinion under the Freedom of Information Law.

You indicated that your firm is counsel to a large number of hospitals in New York. The focus of your inquiry is section 405.37 of the regulations promulgated by the Commissioner of Health, which pertains to reports of incidents by hospitals to the Department's Office of Health Systems Management. The regulations require that various types of incidents, several of which deal with patients, be reported.

It is your view that records relating to the four types of incidents required to be reported pursuant to section 405.37(b)(1) through (4) could be withheld as an unwarranted invasion of personal privacy in conjunction with sections 87(2)(b) and 89(2)(b)(ii) of 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. 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, I point out 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. Based upon 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 quoted language also 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.

Moreover, section 89(2)(a) of the Freedom of Information Law states in part that "an agency may delete identifying details" to protect against unwarranted invasions of personal privacy, "when it makes records available".

From my perspective, to the extent that the reports in question identify a particular patient or patients, those aspects of the reports could justifiably be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Nevertheless, assuming that identifying details have been or can be deleted, I believe that the remainder of the incident reports would be accessible under the Freedom of Information Law.

In sum, it is my view that the incident reports required to be submitted by hospitals to the Health Department pursuant to section 405.37 are accessible to the public, except to the extent that they identify patients, in which case, patients' names or other identifying details could be deleted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 3965

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

January 6, 1986

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 December 17 in which you requested an advisory opinion.

According to your letter, you appealed a denial of access to records to the Port Jervis School District's Records Access Appeals Officer. Five days later, you received copies of the two subpoenas that you sought from the records access officer. You have not, however, received a response from the Appeals officer or any "explanation why it took almost two months to get these documents". You would like to know whether the access officer is required by the Freedom of Information Law to provide an explanation of the original denial. In this regard, I offer the following comments.

First, it appears that Mr. Moscati's letter of November 4 to you was intended to respond to your October 31st appeal to the Superintendent. Mr. Moscati, the records access officer, states that "as per your letter" and "in light of the comments from Mr. Freeman's office" the subpoenas were provided to you. As I recall, the subpoenas were originally denied to you as an unwarranted invasion of personal privacy. In my view, the school district reconsidered its original position and, as a result, made the records available to you.

Second, I do not believe that the Freedom of Information Law requires an agency to respond to an appeal in any greater detail than was offered by Mr. Moscati when making records available after initially denying access to them. If you believe that the school district intended to delay access to the sub-

poenas by its actions, I would agree that the letter and spirit of the Law had been compromised. There does not, however, appear to be any evidence that such a delay was intended by the school district.

Finally, I have enclosed a copy of the Committee's 1985 annual report. Also, I have given the Department's Information Services unit your name and address. When the Department of State's annual report is published, a copy will be sent to you.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-3966

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

January 7, 1986

Mr. James F. Littrell
[redacted]

Dear Mr. Littrell:

I have received your letter of January 2, in which you asked for a "request form" that you can use to obtain information from state agencies about yourself.

Please be advised that there is no specific form that must be used when requesting records. However, I have enclosed "You Should Know", which describes the Personal Privacy Protection Law, and which contains a sample letter of request. In addition, I would like to offer the following comments and suggestions.

First, there is no central data bank or computer that contains all information maintained by the state about an individual. Therefore, to seek information about yourself from state agencies, requests should be directed to the agencies that you believe would maintain records about you.

Second, both the Freedom of Information Law [section 89(3)] and the Personal Privacy Protection Law [section 95(1)(a)] require that an applicant "reasonably describe" the record 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 in which you are interested.

Lastly, I point out that the Freedom of Information Law pertains to all units of state and local government in New York. The Personal Privacy Protection Law, however, is applicable only to state agencies. To give you additional information regarding rights of access to records, also enclosed is "Your Right to Know", which describes 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-3967

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

January 8, 1986

Ms. Elizabeth S. Buchanan
[redacted]

The staff of the Committee on 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. Buchanan:

I have received your letter of January 2 concerning a request made under the Freedom of Information Law.

According to your letter, the Salmon River Teachers Association, which you serve as President, has received a request from a newspaper, under the Freedom of Information Law, for a copy of the Association's by-laws. You have asked whether the Association must comply with the request.

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 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 on the language quoted above, rights granted by the Freedom of Information Law are generally applicable with respect to records maintained by state and municipal government.

Second, although the Association has a relationship with a government agency, a school district, I do not believe that it is an "agency" as defined by the Law. If that is so, the Association and its records would not be subject to the Freedom of Information Law.

Lastly, although the Freedom of Information Law might not be applicable, there is no law of which I am aware that would prohibit the Association from disclosing its by-laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-3968

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

January 8, 1986

Mr. Richard R. Behrens
[redacted]

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

Dear Mr. Behrens:

I have received your letter of January 2 in which you requested that I "act on [your] behalf" in having the New York City Board of Education in furnishing you with records that were denied.

In conjunction with an opinion sent to you dated December 24, you wrote that you consider your request "after refusal" as an appeal, and that your "original application is, in effect, an appeal in itself..."

In this regard, I offer the following comments.

First, as you may be aware, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, this office has no authority to obtain records on behalf of an individual or to compel an agency to grant or deny access to records.

Second, although your comments are not, from my perspective, completely clear, it is noted that the regulations promulgated by the Committee [21 NYCRR Part 1401 et. seq.], which govern the procedural aspects of the Law, and section 89(4)(a) of the Law, require that a specific individual or body be designated for the purpose of rendering determinations on appeal following denials of access. The person to whom you referred, Ms. Ruth Bernstein, is not the Appeals Officer for the Board of Education. As such, it is suggested that your original application should be not considered an appeal. Further, the Appeals Officer for the Board of Education is Mr. John Nolan, Secretary to the Board.

Third, as I explained in the earlier letter, section 87(2)(g) of the Freedom of Information Law permits an agency to withhold various aspects of "inter-agency or intra-agency" materials. Although the nature of the materials sought is not described in either your most recent letter or your earlier correspondence, it appears that the records in question relate to proceedings for which no final determination has been rendered. Therefore, it is possible that the denial on the basis of section 87(2)(g) 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3969

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

January 8, 1986

Mr. Lynn J. Morse
Town Supervisor
Town of Erwin
Painted Post, NY 14870

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

Dear Mr. Morse:

I have received copies of correspondence from Alan C. Bailey concerning his requests for records of the Town of Erwin under the Freedom of Information Law. Having reviewed the correspondence, I would like to offer the following comments and suggestions.

The focal point of the request involves payroll information. In this regard, you wrote that "Copies of the payroll will contain information that is private to the employee and are, therefore, not available to the public".

Please be advised that the Freedom of Information Law requires that a payroll record containing particular items must be prepared and made available by every agency. Section 87(3) 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..."

According to Mr. Bailey's request, he did not indicate which "address" concerning public employees was sought. I point out that section 87(3)(b) refers to the "public office address". Further, section 89(7) states that public employees' home addresses need not be made available.

Mr. Bailey also referred to a "certified" list of officers and employees. Assuming that such a list exists, I believe that the information contained within that list would be available. It is understood that, in some instances, payroll lists might contain items of personal information that may not be clearly relevant to the performance of one's official duties. For example, information involving deductions, social security numbers, exemptions claimed, and similar information could in my view justifiably be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)]. However, the fact that a record might contain some information that could be withheld does not render the entire document deniable or confidential. The introductory language of section 87(2) states that all records of an agency are available, except those records or portions thereof that fall within one or more grounds for denial. Therefore, if the payroll record sought by Mr. Bailey contains information that must be made available under the Freedom of Information Law as well as information that can be denied, I believe that the record should be made available after having deleted those items that may be withheld.

Lastly, Mr. Bailey referred to a right to appeal a denial. Here I direct your attention to section 89(4)(a), 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 records the reasons for further denial, or provide access to the record sought."

To provide you with additional background concerning the Freedom of Information Law, enclosed are copies of the Law, regulations promulgated by the Committee that govern the procedural aspects of the Law, model regulations designed to enable agencies to readily comply with procedural requirements, and an explanatory pamphlet.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Alan C. Bailey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3970

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

January 8, 1986

Mr. Everett R. DuPont
#76-C-569
135 State Street
Auburn Correctional Facility
Auburn, New York 13024-9000

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

Dear Mr. DuPont:

I have received your letter of December 26 in which you requested an advisory opinion.

According to your letter, you requested access to your medical records from the records access officer at the Auburn Correctional Facility. You wrote that Mrs. Lourdes Busch, a Correction Counselor, later gave your medical records to certain correction officers who read the records before giving them to you to review. You believe that "by allowing correction officers to review and or hold inmates records without filing a freedom of information act request constitutes an unwarranted invasion of personal privacy."

In this regard, I offer the following comments.

First, as you know, the Freedom of Information Law grants rights of access to records maintained by agencies such as the Department of Correctional Services. Effective since September, 1984, however, is the Personal Privacy Protection Law, which limits a state agency's authority to disclose personal information to persons other than the individual to whom the records pertain. In my view, the authority of the Department to disclose the content of your medical records to persons other than yourself is subject to the provisions of the Privacy Law.

Second, section 96(1) of the Privacy Law provides that no State agency may disclose any record or personal information unless the disclosure is for one or more of the purposes listed in (a) through (n) of that paragraph. Relevant to your situation is section 96(1)(b) and (e). Generally, those provisions permit an agency to disclose personal information to officers or employees of the agency when disclosure is necessary to carry out the statutory duties of the agency. For example, the Freedom of Information and Personal Privacy Protection Laws require State agency officials to review records and make them available, in part or in their entirety, to the requestor.

Third, it is unclear from your letter why the correction officers were given your medical records. If the correction officers were designated by the Department or by the Correction Counselor to review and make the records available to you, I believe that the officers would be performing a duty required of the Department by statute, namely the Freedom of Information and Personal Privacy Protection Laws.

On the other hand, if the correction officers were not designated to review your medical records and make the appropriate portions available to you, or if they did not hold or review the records pursuant to some other statutory purpose, I believe that they could properly review your records only if disclosure would not result in an unwarranted invasion of personal privacy. In most cases, however, disclosure of medical records to someone other than the patient constitutes an unwarranted invasion of personal privacy.

Finally, I have enclosed copies of our pamphlets Your Right to Know and You Should Know which describe the scope of the Freedom of Information and Personal Privacy Protection Laws, respectively.

I hope 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-3971

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

January 9, 1986

Mr. Gerard Donnelly
[redacted]

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

Dear Mr. Donnelly:

I have received your letter of January 2, as well as the materials attached to it.

According to your correspondence, having requested records from the City of Hudson Community Development and Planning Agency, some documentation was made available. However, it appears that other aspects of the information sought do not exist or are not maintained by the agency. Although you attempted to obtain a certification indicating that the Agency does not maintain the records sought, your efforts have been unsuccessful. You added that Linda Davidson, executive director of the Agency told Ms. Mugno of this office that your original request was "unclear".

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records. Stated differently, an agency is not required to create or prepare a new record in response to a request that includes records that do not exist or which are not maintained by an agency. However, as your are aware, section 89(3) of the Law states in part that, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Second, in conjunction with an agency's regulations, its designated "records access officer" is responsible for preparing such a certification on request. 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 that govern the procedural implementation of the Law. The Committee has done so by means of 21 NYCRR Part 1401 (see attached). In turn, section 87(1) of the Law requires each agency to adopt regulations consistent with the Committee's regulations and in conformity with the Law.

Section 1401.2 of the regulations pertains to the designation and duties of an agency's records access officer. Section 1401.2(b)(6) of the regulations indicates that the records access officer is responsible for assuring that the following duties with respect to certification are carried out:

> "Upon failure to locate records, certify that:
>
> (i). The agency is not the custodian for such records; or
>
> (ii) The records of which the agency is a custodian cannot be found after diligent search."

Based upon the provisions described above, if the Community Development and Planning Agency does not maintain the records sought, an official of the Agency is required to prepare a certification to that effect on request. I point out, too, that section 1401.8(a) provides that no fee can be assessed for such a certification.

Lastly, you wrote that Ms. Davidson indicated that your original request was "unclear". Here it is noted that section 89(3) requires that requests "reasonable describe" the records sought. As such, an applicant need not identify particular records in a request. According to a decision rendered by the Court of Appeals, the standard that a request reasonably describe the records sought is met when the "agency may locate the records in question" [Farbman v. NYC Health and Hospitals, 62 NY 2d 75, 83 (1984)]. Further, if indeed a request is unclear, section 1401.2(b)(2) of the regulations provides that the "records access officer is responsible for assuring that agency personnel...assist the requester in identifying requested records, if necessary..."

In an effort to enhance compliance, copies of the Freedom of Information Law, the regulations promulgated by the Committee and an explanatory pamphlet have been enclosed and will be sent to Ms. Davidson.

I hope that 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: Lynda S. Davidson, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3972

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

January 9, 1986

Mr. Harold Mondshein
[redacted]

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

Dear Mr. Mondshein:

I have received your letter of January 2 in which you requested an advisory opinion.

According to your letter, you have been involved in a hearing before the New York City Board of Collective Bargaining. You would like to know whether you are entitled to the following: "the actual order of the Board", "copies of certified or registered letter receipts", "the order or authorization of Mr. Berger's letter", "copies of the Board's minutes of March 29, 1983 order", "the record as to which Board's members voted for the order", and "the date when the Board received DC 37's letter". In this regard, I offer the following comments.

First, the Freedom of Information Law provides that 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) - (i). Clearly, the New York City Office and Board of Collective Bargaining are agencies subject to the provisions of the Freedom of Information Law. Thus, the records that you seek should be made available unless they can be denied pursuant to one or more of the statutory grounds.

Second, one of the grounds for denial which is relevant to your inquiry is section 87(2)(g). That section permits an agency to withhold inter or intra-agency materials which 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, inter-agency or intra-agency materials which consist of advice, evaluations, opinions or suggestions may be withheld. Since the records that you seek appear to be "final agency determinations" or "factual data", including dates and copies of receipts, I do not believe that they can be denied as inter or intra-agency materials under section 87(2)(g).

Third, the Freedom of Information Law does not require an agency to create a record which does not already exist. Section 89(3) states that an entity need not "prepare any record not possessed or maintained by such entity". Thus, to the extent that the Office or Board of Collective Bargaining maintains the records that you seek, I believe that they should be available to you. Moreover, section 87(3)(a) requires an agency to maintain "a record of the final vote of each member in every agency proceeding in which the member votes". Therefore, even if no minutes of the Board's meetings are kept, a record of the final vote of its proceedings must be 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

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-3973

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

January 9, 1986

Mr. Edward Roche
[redacted]

Dear Mr. Roche:

I have received your letter of January 5 in which you requested records from this office.

Specifically, you wrote that you were appointed to the Nassau County Police Department in 1955 and that you voluntarily resigned in 1961. You have requested records concerning promotional examinations given while you were a member of the Department.

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, the Committee does not maintain possession of government records, such as those in which you are interested. Consequently, this office cannot provide access to the records sought.

To seek records under the Freedom of Information Law, a request should be sent to the "records access officer" of the agency that you believe maintains the records. Under the circumstances, it is suggested that you contact either the Nassau County Police Department, or perhaps the County civil service agency.

I point out, too, that the Freedom of Information Law requires an applicant to request records "reasonably described". As such, when making a request, sufficient detail should be included to enable agency officials to locate the records.

Enclosed for your consideration is an explanatory brochure that may be useful to 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:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3974

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

January 10, 1986

Mr. Roland Tucker
#82-A-5222
Great Meadow Correctional
Facility
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Tucker:

I have received your letter of January 6 and the materials attached to it.

Your inquiry concerns a denial of a four page report by the FBI, and you requested assistance in obtaining the report.

Please be advised that the jurisdiction of the Committee on Open Government involves the New York Freedom of Information Law. Rights of access to records maintained by a federal agency, such as the FBI, are governed by the federal Freedom of Information Act. As such, this office has no authority to advise with respect to a denial by the FBI.

In your letter, you referred to information given to members of the Suffolk County Police Department. Of potential relevance, therefore, is that the Suffolk County Police Department is an agency subject to the New York Freedom of Information Law. If you have not done so already, you might want to request records from that agency.

Should a request be directed to the Suffolk County Police Department, it should be sent to its "records access officer". Further, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the record sought. Therefore, when making a request, sufficient detail should be included to enable agency officials to locate the records.

Enclosed is a copy of the New York Freedom of Information Law, as well as 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1253
FOIL-AO-3975

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

January 14, 1986

Mr. Mark Goichman
[redacted]

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

Dear Mr. Goichman:

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

According to your letter and the attached Governance Plan of the City of New York Law School at Queens College, the number of observers permitted to be present at Assembly meetings appears to be limited. The Plan provides that non-members of the Assembly may observe meetings provided that their number does not exceed 10 percent of the number of members in attendance. You want to know whether this provision conflicts with the requirements of the Open Meetings Law. In addition, you asked whether the Freedom of Information Law requires a voting record to be kept for each vote where the Assembly meetings are conducted by consensus.

In this regard, I offer the following comments.

The Open Meetings Law requires that all meetings of a public body be open to the public unless an executive or closed session may be conducted for one or more of the purposes listed in section 105. "Public body" is defined in section 102(2) to include:

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

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

In my view, the Assembly meets the statutory definition of a public body.

First, the Assembly is comprised of more than two persons and appears to act by means of a quorum. According to the Law School Internal Governance Plan, a quorum consists of more than one half of the Assembly members. A proposed change would provide that the Assembly shall act only in the presence of a quorum. In any event, section 41 of the General Construction Law may require the Assembly to act by means of a quorum. Section 41 provides that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority, or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons of officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

In my view, the members of the Assembly are charged with a public duty to be exercised by them jointly. According to the Goverance Plan, the Assembly is responsible for considering or discussing matters affecting the educational program, or the carrying on of the work of the Law School. In addition, it reviews the work of the various committees. Moreover, although it is not clear from the portion of the Governance Plan that you enclosed, you have indicated that the Assembly has the authority to quash the recommendations of the committees. Thus, I believe that the Assembly must exercise its duty pursuant to the quorum requirements set forth in section 41 of the General Construction Law.

In addition, I believe that the Assembly performs a governmental function for the City of New York in that it may discuss and reject proposals with respect to the governance of the City Law School. Several courts have recognized that even advisory bodies may be charged with a public duty or perform a governmental function even though they have no authority to take final or binding action [see i.e., Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, app dis, 55 NY 2d 995 (1982); MFY Legal Services v. Toia, 402 NYS 2d 510 (1977); Pissare v. City of Glens Falls, Sup. Ct., Warren Cty., March 7, 1978]. Based upon the foregoing, I believe that the Assembly meets the definition of "public body" and is thus subject to the provisions of the Open Meetings Law. Likewise, the committees and subcommittees of the Assembly would also be "public bodies" subject to the Law.

Second, assuming that the Assembly is a public body, any gathering of at least a quorum of its members for the purpose of discussing public business constitutes a meeting subject to the provisions of the Open Meetings Law [Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Accordingly, notice of the meetings must be given pursuant to section 104 and minutes must be prepared as required by section 106 of the Law.

Third, section 110 of the Open Meetings Law states that:

> "any provision of a...rule or regulation affecting a public body which is more restrictive 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."

In my view, the Governance Plan is more restrictive than the Open Meetings Law in that it appears to permit the Assembly to limit the number of people who attend its meetings.

Section IIIA of the Governance Plan states that the meetings of "the Assembly are not closed to the members of the Law School community". Moreover, non-members of "the Assembly who are members of committees whose work is to be discussed at a meeting may attend that meeting and participate in discussion". However, the Plan provides that:

> "Other non-members of the Assembly may attend meetings as observers provided that the number of such attenders shall not exceed 10% of the number of members in attendance. When [it is appropriate for members of the Assembly to meet with] larger numbers of the Law School community <u>desire to meet with members of the Assembly, the meeting shall take place as</u> [they shall do so at] an open meeting of the Law School community, <u>following which the Assembly may meet</u>" (proposed amendments in original).

To the extent that this provision permits the Assembly to limit the number of individuals who want to observe its meetings, regardless of whether they are members of the Law School community, I believe that it conflicts with the Open Meetings Law. Moreover, if the proposed language would permit the Assembly to meet in private following an open meeting with "larger numbers of the Law School community", I believe that it, too, would not comply with of the Law. In short, the Open Meetings Law requires public bodies to conduct its meetings open to all interested persons regardless of their number, whenever practicable. Closed or executive sessions may be conducted only for discussions of the enumerated subjects in section 105.

Finally, you asked whether a record must be kept of the vote of the members of the Assembly according to the issues each consented to. In this regard, I note that section 87(3)(a) of the Freedom of Information Law requires all agencies to maintain a record of the final vote of all member in every agency proceeding in which the member votes. However, it appears that the Assembly makes decisions by consensus rather than by voting and it is not clear that each member consents or refuses to consent to every issue before the Assembly. In my view, if each member consents or refuses to consent to a particular issue, a record

similar to a voting record should be prepared and included in the minutes. On the other hand, if only a few members voice support or opposition to an issue and other members remain silent, I do not believe a record of a vote would be appropriate or required by either the Freedom of Information or the Open Meetings Laws. In my view, the Open Meetings Law does not require a public body to alter the way it conducts business. Since the Law requires that minutes include only a summary of "all motions, proposals, resolutions and any other matter formally voted upon", a better practice for bodies that decide by consensus may be to include a more detailed summary of its discussions held during open meetings. A detailed summary would provide interested persons with a better indication of how particular members stand on various issues.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

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-3976

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

January 16, 1986

Mr. Merle R. Raum
85-C-135
P.O. Box 501
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. Raum:

I have received your letter of January 6 concerning the use of the Freedom of Information Law.

Your inquiry concerns your desire to obtain information about your deceased father, who was incarcerated during your childhood. 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, as a general matter, requests should be directed to the "records access officer' at the agency or agencies that you believe would maintain the records in which you are interested. I note that the regulations adopted by the Department of Correctional Services under the Freedom of Information Law indicate that a request for records maintained at a correctional facility should be directed to the facility superintendent; for records kept at the Department's main office, a request should be sent to the Deputy Commissioner for Administration, Department of Correctional Services, Building 2, State Campus, Albany, NY 12226.

Third, it is important to note that section 89(3) of the Law requires that an applicant "reasonably describe" the records sought. Sufficient detail should be included to enable agency officials to locate the records. As such, a request for records concerning a named individual, without more, might not reasonably describe the records sought. To the extent possible, it is suggested that your requests include additional information, such as identification numbers, descriptions of events, dates and similar details.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3977

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

January 16, 1986

Mr. Donald Deubler

[redacted]

The staff of the Committee 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. Deubler:

As you are aware, I have received your letters of January 8, as well as the attached correspondence.

Your inquiry concerns requests for a transcript of a hearing held by the Alcoholic Beverage Control Board and complaints maintained by the Board, and for complaints maintained by a town and a county health department.

Having reviewed the materials, I offer the following comments.

It is noted at the outset that, in your requests, you referred to provisions of the United States Code comprising the federal Freedom of Information and Privacy Acts. Those statutes are applicable only to records maintained by federal agencies. Nevertheless, the New York Freedom of Information Law is applicable to the records that you are seeking, for that statute pertains to records of state and local government.

As you may be aware, the Freedom of Information Law pertains to existing records. As a general rule, an agency is not required to create a record in response to a request. Therefore, if no transcript of the hearing in which you were involved has been prepared, the agency would not be obligated to create a transcript on your behalf. On the other hand, if a transcript has been prepared, based on our telephone conversation, I believe that it should be available to you, for you (or your partner) were present at the hearing.

With respect to 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, section 87(2)(b), section 89(2)(b)]. I point out that the Freedom of Information Law in section 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.

Lastly, an applicant has the right to appeal a denial of access to records. Specifically, section 89(4)(a) of the Freedom of Information Law states that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.

I hope that I have 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 MacCallum
Stanley Holland
Sheldon Robinson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3978

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

January 17, 1986

Mr. Brian Bernard
85-A-0229
Box 8
Otisville, NY 10963

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

Dear Mr. Bernard:

I have received your letter of January 10.

In brief, you indicated that a physician and dentist at the Otisville Correctional Facility told you that the Department of Correctional Services would not provide you with the cosmetic surgery dental work that you requested. You expressed interest in learning of "all of the medical and dental responsibilities that can and must be provided to [you] by the state" by means of the Freedom of Information Law.

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

First, it is assumed that, if such records exist, they would be maintained by the Department of Correctional Services. Further, pursuant the regulations adopted by the Department under the Freedom of Information Law, a request for records kept at a correctional facility should be directed to the facility superintendent; for records kept at the Department's central offices in Albany, a request can be sent to the Deputy Commissioner for Administration.

Second, it is important to note that, when making a request, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, your request should contain sufficient detail to enable agency officials to locate the records in which you are interested.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3979

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

January 21, 1986

Mr. James C. Harberson, Jr.
Corporation Counsel
City of Watertown
Room 200
Watertown Municipal Building
245 Washington Street
Watertown, New York 13601-3380

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

Dear Mr. Harberson:

I have received your letter of January 8 in which you requested an advisory opinion.

You wrote that the "City of Watertown Police Department has been opposed to releasing the names of victims and complainants in criminal cases or other information that could be used to identify them". You have received a letter from the attorneys for the Watertown Daily Times which seeks a clarification of this matter. You are concerned that, in light of the Court of Appeals decision in Scott, Sardano & Pomeranz v. Records Access Officer, City of Syracuse, 65 NY 2d 294, an "expectation of privacy" may exist regarding police reports. In this regard, I offer the following comments.

As you know, the Freedom of Information Law provides that all records of an agency are available for public inspection and copying unless the records, or portions thereof, can be withheld under one or more of the grounds listed in section 87(2). While section 87(2) permits an agency to withhold records which fall within the enumerated grounds, it does not require the agency to withhold such records. With respect to police records which would identify victims or complainants in criminal cases, I believe that section 87(2), subdivisions (a), (b), (e) and (f) are relevant.

First, section 87(2)(a) provides that an agency need not disclose records which are specifically exempted from disclosure by state or federal statute. For example, section 50-b of the New York Civil Rights Law requires that the identity of sex offense victims under the age of eighteen years be kept confidential. Clearly, any portions of the Watertown Police Department's records that would tend to identify such a victim must be withheld.

Second, section 87(2) permits an agency to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy. Whether disclosure constitutes an unwarranted rather than a permissible invasion of personal privacy often requires that subjective judgments be made. Section 89(2) of the Law lists five types of disclosures which would result in an unwarranted invasion of personal privacy. The list is not exclusive, but rather illustrative, and can be helpful in determining whether other types of disclosures constitute unwarranted invasions of personal privacy.

For example, in Matter of Scott, Sardano & Pomeranz v. Records Access Officer, City of Syracuse, supra, the Court of Appeals found that the names and addresses of victims identified in police accident reports should be deleted before the reports are made available to the law firm that sought them. The Court cited section 89(2)(b)(iii) which states that disclosure of lists of names and addresses, when such lists would be used for commercial or fund-raising purposes, constitutes an unwarranted invasion of personal privacy. While the law firm sought reports rather than lists, the Court stated, "In view of petitioner's stated intention - i.e., direct mail solicitation of accident victims - the application of these privacy-protection provisions cannot be gainsaid".

I do not believe that the Scott, Sardano decision should be cited as authority for routinely withholding the identities of victims and complainants included in police reports. For instance, a newspaper typically seeks the names and addresses of victims or criminal complainants for the purpose of reporting the news. In my view, that purpose is distinguishable from the commercial purposes rejected by the Court in Scott, Sardano.

Section 89(2)(b)(v) provides that a "disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency" would constitute an unwarranted invasion of personal privacy. This provision and several court decisions recognize that an individual's expectation of privacy or desire for confidentiality, without more, is an improper basis for denying records [see Washington

Post v. Insurance Department, 61 NY 2d 557 (1984); Johnson Newspaper Corp. v. Call, __ AD 2d __, Nov. 15, 1985; Niagara Environmental Action v. City of Niagara Falls, 100 AD 2d 742 (1984)]. Nevertheless, if the personal information sought is not relevant to the work of the agency and an individual expresses an expectation of privacy, I believe that the records may be withheld as an unwarranted invasion.

Moreover, the relevance of the personal information to the work of an agency is often determinative in deciding whether disclosure would be a "warranted" versus an "unwarranted" invasion. For instance, the identity of crime victims and criminal complainants is relevant to the work of a police department. Moreover, the identities of those individuals will often be disclosed during public proceedings. Thus, in my opinion, disclosure of their identities does not alone result in an unwarranted invasion of personal privacy. Disclosure of intimate details relating to those individuals, however, might result in an unwarranted invasion.

Third, section 87(2)(e) may provide a proper basis for denying portions of police records which identify victims and complainants. That section permits an agency to withhold certain records compiled for law enforcement purposes. For example, to the extent that disclosure would interfere with a criminal investigation or identify a confidential source, I believe that section 87(2)(e) could be cited to deny those portions of the police records.

Fourth, if disclosure would endanger the life or safety of any person, section 87(2)(f) permits records, or relevant portions, to be withheld. Thus, if there is reason to believe that disclosure of a victim's name and/or address would subject that individual to further criminal acts or to possible retaliation, I believe that identifying details may be deleted from the records before making them publicly available.

Finally, determining whether the identities of crime victims or complainants should be disclosed requires a case by case review. In my opinion, disclosure of the names and addresses does not, by itself, result in an unwarranted invasion of personal privacy. Other statutory grounds for denial, however, may be applicable and should be considered.

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-3980

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

January 21, 1986

Mr. George Cardwell
84-A-7325
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. Cardwell:

I have received your letter of January 11 in which you seek advice concerning the Freedom of Information Law.

More specifically, you expressed interest in acquiring information about a trial witness and various other facets of a criminal proceeding. In this regard, I offer the following comments.

First, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you. 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 section 87(2)(a) through (i) of the Law. It is suggested that you closely review those grounds for denial.

Second, the Freedom of Information Law is applicable to records of an "agency", a term defined in section 86(3) of the Law. I point out that the definition specifically excludes the "judiciary", which is defined in section 86(1). As such, the Freedom of Information Law excludes the courts and court records from its coverage. Even though court records are not subject to the Freedom of Information Law, they are often available pursuant to other provisions of law (see e.g., Judiciary Law, section 255). If you request court records, it is suggested that you send the request to the clerk of the court in which the proceeding was conducted. Such a request should contain sufficient detail, such as index, docket or indictment numbers, to permit officials to locate the records.

If you believe that the records in which you are interested are maintained by an agency subject to the Freedom of Information Law, such as a police department or office of a district attorney, the Law requires that you request records "reasonably described" [see Freedom of Information Law, section 89(3)]. Therefore, again, a request should include sufficient detail to permit 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-3981

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

January 21, 1986

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 January 13 and the correspondence attached to it. In conjunction with the circumstances described in the correspondence and materials sent previously to this office, you have asked "what action can be taken to enforce the Freedom of Information Law".

In this regard, I offer the following comments.

First, section 89(1)(b)(iii) if the Freedom of Information Law requires the Committee on Open Government to adopt general regulations concerning the procedural implementation of the Law. In turn, section 87(1) of the Law requires the governing body of a public corporation, in this instance, the Sullivan County Legislature, to adopt its own rules and regulations consistent with those promulgated by the Committee and in conformity with the Law. Those rules should be applicable to "all agencies in such public corporation", including the County Department of Social Services.

The Committee's regulations (see attached), which are found in the New York Code of Rules and Regulations (21 NYCRR Part 1401 et seq.) require that an agency's regulations include the designation of one or more records access officers and an appeals officer or body. Therefore, it is suggested that you contact the County Legislature in order to review its regulations promulgated under the Freedom of Information Law for the purpose of identifying the records access and appeals officers.

It is noted that the Freedom of Information law and the regulations prescribe 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 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)].

Therefore, enforcement of the Freedom of Information Law involves the initiation of a judicial proceeding after administrative remedies have been exhausted, i.e., denials by both the records access and appeals officers. It is noted that, unlike most Article 78 proceedings in which the burden of proof is on the public, the burden of proof in an Article 78 proceeding brought under the Freedom of Information Law is on the agency that denied access.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3982

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

January 21, 1986

Mr. Vincent A. Malito, Esq.
419 South Wellwood Avenue
Lindenhurst, NY 11757

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

Dear Mr. Malito:

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

You wrote that your client's request for records pertaining to an investigation of the Southold Savings Bank was denied by the New York State Banking Department. Subsequently, the denial was upheld on appeal to the First Deputy Superintendent. According to the correspondence enclosed with your letter, the denials were based upon section 87(2)(a) of the Freedom of Information Law and section 36(10) of the Banking Law. You have requested an advisory opinion concerning the applicability of these provisions to your client's request. In this regard, I offer the following comments.

First, as you know, the Freedom of Information Law provides that all records of an agency are available unless the records, or portions thereof, can be withheld under one or more of the grounds for denial listed in section 87(2). Relevant to your request is section 87(2)(a), which permits an agency to withhold records specifically exempted from disclosure by state or federal statute.

Second, section 36(10) of the Banking Law provides, in part, that:

> "All reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations, including any duly authen-

> ticated copy or copies thereof in the possession of any banking organization...or the banking department, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the superintendent, the ends of justice and the public advantage will be subserved..."

In my view, section 36(10) clearly exempts all records pertaining to Department investigations of banking institutions from disclosure. Thus, pursuant to section 87(2)(a) of the Freedom of Information Law, such records may properly be withheld by the Department.

Third, in my opinion, the denial of access and the subsequent determination on appeal sufficiently explained the basis of the Department's denial. Both letters cited section 36(10) of the Banking Law as specifically exempting investigatory records from disclosure. I believe that the assertion of such a statute in response to a request and/or appeal is appropriate.

Fourth, the Committee is without authority and without the expertise to comment on whether section 36(10) requires disclosure in some cases. If it is your position that disclosure is required, you may wish to bring an article 78 proceeding for judicial review of the Department's denial. In that event, section 89(4)(b) of the Freedom of Information Law provides that the agency has the burden of proving that the records fall within section 87(2)(a)-(i) 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

cc: Ernest Kohn, First Deputy Superintendent
NYS Banking Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3983

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

January 22, 1986

Mrs. Margaret Laverty
[redacted]

The staff of the Committee on 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. Laverty:

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

You wrote that you have been trying for several years to obtain housing for your elderly mother. Your specific inquiry concerns your unsuccessful efforts to obtain a copy of a waiting list for Beaveridge, a senior citizen housing community located in the Town of Yorktown. Included in the materials are news clippings involving access to a similar list concerning senior citizen housing in Danbury, Connecticut.

In this regard, I offer the following comments.

First, in terms of rights of access to records, 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."

According to the materials that you enclosed, Beaveridge is managed by the Community Housing Management Corporation. Further, the Town Supervisor wrote that the Town has no connection with Beaveridge. Based upon the foregoing, if my assumptions are accurate, Beaveridge is owned and operated by a private corporation. If that is so, the Freedom of Information Law, which applies to governmental entities, would not be applicable to Beaveridge. I point out that the incidents occurring in Danbury pertained to a complex owned by a public housing authority. While the records maintained by a public housing authority in New York would be subject to the Freedom of Information Law, Beaveridge is different, for it is operated not by a public entity, but rather by a private corporation.

Since Beaveridge must apparently operate under federal guidelines, I can offer but one suggestion. If you believe that there are irregularities, you might want to contact the inspector general at the federal agency responsible for insuring compliance, the Department of Housing and Urban Development. To locate the name and address of the inspector general, in your phone book under "United States Government", a number can be found for the Federal Information Center. The Center can likely provide you with the name of the person to contact.

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-3984

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

January 21, 1986

Ms. Helen S. Rattray
Editor and Publisher
The East Hampton Star
153 Main Street
P.O. Box E
East Hampton, NY 11937

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

Dear Ms. Rattray:

I have received your letter of January 14, as well as the materials attached to it.

A review of the materials indicates that until recently, Uri Berliner, a staff reporter for the Star, could review a rather detailed police log kept by the East Hampton Town Police Department, except for certain deletions made in accordance with law. According to a letter that you sent to Chief Scott of the Police Department, the detailed log will no longer be kept. In an effort to reduce paperwork, a new log will contain brief descriptions of events. You wrote further that:

> "The police have promised to let Mr. Berliner review their reports in order to find out about incidents. However, the new format places Mr. Berliner in the position of having to be omniscient, of having to know which of the items listed by category only will be of interest so that he can ask to review the appropriate arrest or offense report. Furthermore, these reports are not

> public documents, by law, and now even the names of the accused will be revealed only at the discretion of the officer handling the reports.
>
> "This system not only makes the job of police reporting exceedingly more difficult for the press it will inevitably lead to incomplete reporting because it will be impossible for the reporter to go through every report. It also will make stories of interest of a non-criminal nature almost impossible to track down."

You have asked whether "there is any case law or precedent" that may be cited "to obtain the police log as we knew it". In this regard, I offer the following comments.

First, I believe that police blotters or logs are records that have been kept based upon tradition and custom. The phrase "police blotter" is not, to the best of my knowledge, specifically defined in any statute. Further, there is no requirement that a police blotter must be kept. As such, there are no clear guidelines concerning the form or content of what might be characterized as a police blotter. The only judicial decision of which I am aware that pertains to police blotters held that, based upon custom and usage, a police blotter is a log or diary in which any event reported by or to a police department is recorded. The decision indicated that a police blotter analogous to that described is available under the Freedom of Information Law, for it merely summarizes events or occurrences and contains no investigative information [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)]. As such, in response to your specific question, I do not believe that there is any precedent that would enable you to compel the Police Department to maintain its records in a particular format.

Second, although you suggested that your reporter would have to be "omniscient" to know of detailed reports in which he might be interested and stated that certain reports are not public documents, several points should be made that might preserve rights of access and obviate the necessity of having to request particular records.

I point out initially that, under the original Freedom of Information Law enacted in 1974, an applicant was required to seek "identifiable" records [see original Freedom of Information Law, section 88(6)]. Under that standard, without having specific knowledge of the existence or contents of particular records, it was often impossible to identify the records sought. In 1977, the original Freedom of Information Law was repealed and replaced by the current statute, which became effective on January 1, 1978. The Law now states that an applicant must request records "reasonably described" [see Freedom of Information Law, section 89(3)]. Therefore, your reporter need not identify a particular report or reports in which he may be interested. On the contrary, based upon case law, a request reasonably describes the records sought if the agency can locate the records based upon the description of the records requested [see M. Farbman & Son v. New York City, 62 NY 2d 75 (1984)]. From my perspective, a request for arrest reports or similar documents prepared or pertaining to a particular day or week would likely reasonably describe the records sought.

Moreover, the format in which information is kept by the Police Department would not in my opinion serve to alter or diminish rights of access to information that had been made available in the past. 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.

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 among the grounds for denial that follow. From my perspective, the quoted language indicates that the Legislature envisioned situations in which a single record or report might be both accessible or deniable in part. The quoted language in my opinion also imposes an obligation upon agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Therefore, while some aspects of a report might properly be withheld, the remainder might be available after having made the appropriate deletions.

With respect to rights of access, the grounds for denial that most often apply to records maintained by a police department are generally presented in terms of potentially harmful effects of disclosure. For example, perhaps the most important provision concerning police records is section 87(2)(e), which states that an agency may withhold records that:

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

In view of the language quoted above, records may not be withheld solely because they relate to an investigation or an accused. Rather, rights of access must be determined on a case by case basis in accordance with the potentially damaging effects of disclosure described in subparagraphs (i) through (iv) of section 87(2)(e).

Further, as noted earlier, some aspects of a police report pertaining to a crime as yet unsolved might contain information which if disclosed would interfere with an investigation, and a denial of those portions of the report would be appropriate. However, other aspects of the same report might contain information analogous to that which had been made available routinely in the past and which if disclosed would not result in the harmful effects described in the provision quoted earlier or other grounds for denial listed in the Freedom of Information Law.

In sum, I do not believe that there is any method of compelling the Police Department to keep a log in the format in which it was previously maintained. Nevertheless, the new format does not in my opinion necessarily permit the Police Department to withhold more information than it had in the past. Further, I do not believe that your staff is required to request particular reports. So long as a request reasonably describes the records sought in a manner that enables agency officials to locate the requests, such a request should suffice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Scott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3985

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

January 22, 1986

Mr. Roland Tucker
82-A-5222
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 opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tucker:

I have received your letter of January 14 in which you requested assistance from this office.

You are seeking access to a four page FBI report maintained by the Suffolk County Police Department. After your initial request, you received one page entitled "Federal Bureau of Investigation Report of the Latent Fingerprint Section" dated March 16, 1982. You submitted your most recent request for the four page report on January 2.

On you behalf, I contacted Inspector Vincent T. Sullivan who explained to me that the Police Department does not have a four page report from the FBI concerning you and the orange umbrella. He stated that he had sent you a copy of the only document the Department has concerning the FBI fingerprint examination. In this regard, section 89(3) requires an agency to, upon your request, certify that it does not have possession of such record or that such record cannot be found after diligent search.

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

Sincerely,

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-3986

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

January 23, 1986

Mr. Fred Greenberg
[redacted]

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

Dear Mr. Greenberg:

I have received your letter of January 10, which, once again, pertains to requests for "step III decisions" maintained by the New York City Board of Education.

You have asked that I reconsider my letters to you of November 7 and December 16 in which it was suggested that your request might not have reasonably described the records sought as required by section 89(3) of the Freedom of Information Law. Having reviewed the earlier correspondence and contacted the Board of Education again on your behalf, while I appreciate your contention, I do not feel that the opinion should be altered.

Based upon case law, it is clear that an applicant is not required to request records with specificity. It has been held, however, that a request reasonably describes the records sought when the agency can locate the records based upon the description of the records [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

With respect to the records in question, I have been informed that they are not kept or filed in a manner that enables agency officials to locate them in the manner that you have requested them. In short, it appears that your criticisms relate to the Board's system of filing its records. Although the Freedom of Information Law pertains to access to records, it does not provide direction concerning the manner in which records are kept.

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-3987

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

January 24, 1986

Mr. Stephen DelGiacco
Public Information Officer
State Commission of Correction
60 South Pearl Street
Albany, NY 12207-1596

The staff of the Committee 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. DelGiacco:

I have received your letter of January 21 in which you seek assistance concerning a request and an appeal made under the Freedom of Information Law.

According to your letter and our telephone conversation, a broad request was directed to the Commission. Due to the vagueness of the request, you could not determine which records had been requested. The applicant viewed your response as a denial, and thereafter submitted an "appeal".

In this regard, I offer the following comments.

First, as we discussed, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Based upon that standard, a request need not identify or specify with particularity the records sought. However, it has been held that the request must describe the records in a manner that enables agency officials to locate the records [see e.g., M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. If indeed the request does not enable you to locate the records, the applicant, in my opinion, would not have reasonably described the records as required by the Law.

Second, section 89(4)(a) of the Freedom of Information Law permits "any person denied access to a record" to appeal. Under the circumstances, assuming that the request did not reasonably describe the records, I do not believe that your response could be characterized as a denial. In my opinion, if records were not denied, there would be no right to appeal.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3988

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

January 27, 1986

Ms. Lynda M. Zentman
Executive Assistant
Rockland Community Development
Council, Inc.
22 Main Street
Monsey, New York 10952

The staff of the Committee on 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. Zentman:

I have received your letter of January 22.

You wrote that your organization, the Rockland Community Development Council, is "interested in obtaining copies of various proposals submitted by organizations which have received state and local funding during the past year". As such, you are seeking information concerning the "correct method of obtaining the proposals..."

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

First, as you may be aware, the Freedom of Information Law is the vehicle under which records of state and local government are requested and made available. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, requests should be directed to the agency or agencies that you believe maintain the records in which you are interested. I do not believe that there is any central repository where all the records in question would be kept. Therefore, it is likely that you will have to submit requests to units of state or local government individually.

Third, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401 et seq.), which govern the procedural aspects of the Freedom of Information Law, each agency should have designated a "records access officer", a person having the duty of responding to requests made under the Freedom of Information Law. Requests should be addressed to the records access officer at the agency that you feel maintains records you are seeking.

Fourth, section 89(3) of the Freedom of Information Law requires that a request "reasonably describe" the records sought. Therefore, although a request need not specify records with particularity, it should include sufficient detail to enable agency officials to locate the records.

Lastly, enclosed are copies of the Freedom of Information Law and an explanatory pamphlet. The pamphlet may be particularly useful, for it contains a sample letter of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1255
FOIL-AO-3989

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

January 28, 1986

Hon. David Pietrusza
Alderman
The City of Amsterdam
61 Church Street
Amsterdam, NY 12010

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

Dear Alderman Pietrusza:

I have received your letter of January 23 and a news article attached to it, both of which pertain to the activities of the Amsterdam Industrial Development Agency (AIDA).

Specifically, the materials indicate that AIDA engaged in a rental agreement in November that became public on January 16. You wrote that authorization for the agreement on expenditure "was not reached in public session but rather by 'polling' of the members". The article states that the administrative director of AIDA "explained that the decision to pay rent was made by asking individual members for their feelings outside a meeting setting". The Chairman of the AIDA Board said that "approval was given through a 'call-around meeting'."

You have asked whether there were violations of the Open Meetings Law and whether the agreement is void. In this regard, I offer the following comments.

First, pursuant to section 553 of the General Municipal Law, an urban renewal agency is a "corporate governmental agency, constituting a public benefit corporation". AIDA was created by means of section 610 of the General Municipal law.

Second, based upon those provisions of the General Municipal Law, I believe that the Board of AIDA is clearly a "public body" required to comply with the Open Meetings Law. On the same basis, AIDA is also an "agency" subject to the requirements of the Freedom of Information Law.

Third, with respect to the series of telephone conversations among Board members that led to action taken by the Board, there is nothing in the Open Meetings Law that would preclude two members of a public body from conferring by telephone. However, a series of telephone calls that lead to a decision would in my opinion violate the spirit if not the letter of the Law.

From a technical point of view, it is noted that the definition of "public body" appearing in section 102(2) of the Open Meetings Law refers to entities that are required to conduct public business by means of a quorum. In this regard, section 553(3) of the General Municipal Law states that "A majority of the members of an agency shall constitute a quorum". Further, the term "quorum" is defined in section 41 of the General Construction Law, which has existed for decades. The cited provision states that:

> "Whenever three or more public officials are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which that board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body cannot carry out any of its powers or duties unless it conducts a meeting duly held upon reasonable notice to all of the members. As such, it is my view that a public body has the capacity to act only during duly convened meetings.

Moreover, section 102(1) of the Open Meetings Law defines "meeting" to mean "the official convening of a public body for the purpose of conducting public business". In my opinion, the term "convening" means a physical coming together. Further, based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

Based upon the ordinary definition of "convene", I believe that a "convening" requires the assembly of a group in order to constitute a quorum of a public body.

I would also like to direct your attention to the legislative declaration of the Open meetings Law, section 100, which states in part that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

In view of the foregoing, the AIDA in my opinion can take action or vote only at a "meeting" held in accordance with the Open Meetings Law.

With regard to the validity of the agreement, I believe that action taken by a public body generally remains valid unless and until a court renders a determination to the contrary. However, it might be contended that the Board did not take "official" action. Further, in conjunction with section 107 of the Open Meetings Law (see attached), it appears that the agreement may be voidable.

Lastly, in terms of the vote, I point out that section 87(3)(a) of the Freedom of Information law requires each agency to maintain:

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

I hope that I 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: Henry Bray
Lionel Fallows

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3990

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

January 28, 1986

Mr. James Matson
[redacted]

Dear Mr. Matson:

As you are aware, your letter of December 29 addressed to New York Attorney General Robert Abrams has been forwarded to the Committee on Open Government. The Committee, which received your letter today, is a unit of the Department of State.

In response to your inquiry, there are numerous statutes pertaining to public access to records. The major vehicle under which the public seeks government records is the Freedom of Information law. Attached are copies of the Law and an explanatory pamphlet that may be useful to you.

You wrote that you are seeking the information for a genealogical society, and that your primary interest involves "vital statistics and property records".

With respect to "property records", it is assumed that you are referring to assessment information that identifies the owners, locations and assessed valuation of real property. That type of information is maintained by municipalities on assessment rolls. In some instances, the same information is now kept on computer tape. In either case, assessment information is a matter of public record and is available under the Freedom of Information Law [see attached, Szikszay v. Buelow, 436 NYS 2d 558, 107 Misc. 2d 886].

With regard to vital statistics, the Freedom of Information Law is not applicable. Rather, the provisions of the Public Health Law and the regulations of the State Health Department govern access to vital records and genealogical information. To obtain specific information concerning vital statistics or genealogical records, it is suggested that you write to:

Peter Carucci
Bureau of Vital Records
NYS Department of Health
Corning Tower
Empire State Plaza
Albany, New York 12237

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3991

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

January 28, 1986

Mr. Raymond Smith
83-A-8012
Attica Correctional Facility
Box 149
Attica, NY 14011

Dear Mr. Smith:

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

In brief, you have unsuccessfully attempted to obtain "records of a court decision" rendered in Supreme Court, New York County. You wrote that the Court Clerk indicated that no written decision was prepared.

As I advised in an earlier letter to you, the Freedom of Information Law specifically excludes the courts and court records from its coverage. Further, even in situations in which the Freedom of Information Law is applicable, an agency subject to the law is generally not required to create or prepare a record in response to a request [see Freedom of Information Law, section 89(3)].

Having reviewed the correspondence, if you have not already done so, consistent with recommendations made by various court officials, it is suggested that you contact the court stenographers who may have prepared transcripts of proceedings in which you are interested. In addition, it is suggested once again that you confer with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-31
FOIL-AO-3992

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

January 29, 1986

Mr. William J. Rold
Staff Attorney
The Legal Aid Society
15 Park Row - 7th Floor
New York, NY 10038

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

Dear Mr. Rold:

I have received your letter of January 15 in which you requested an advisory opinion.

According to your letter and the attached determination of appeal, the Department of Correctional Services denied a request by your office for the names of inmates currently serving on the Inmate Liaison Committee at the Elmira Correctional Facility. The Department's Appeals Officer upheld the denial of the names of the inmates, stating that, "Release of names and identifying data of Inmate Liaison Committee members would constitute an unwarranted invasion of personal privacy". 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 unless the records, or portions thereof, may be withheld under one or more of the grounds for withholding listed in section 87(2)(a)-(i) of the Law. Section 87(2)(b) permits an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Moreover, sections 96(1)(c) of the Personal Privacy Protection Law and 89(2-a) of the Freedom of Information Law prohibit state agencies from disclosing personal information which would result in an unwarranted invasion of personal privacy.

Second, whether disclosure constitutes an unwarranted rather than a permissible invasion of personal privacy often requires that subjective judgments be made. Section 89(2)(b) of the Freedom of Information Law lists five types of disclosures which would result in an unwarranted invasion of personal privacy. The list is not exclusive, but rather illustrative, and can be helpful in determining whether other types of disclosures would constitute unwarranted invasions of personal privacy.

For example, section 89(2)(b)(iv) states that "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party" constitutes an unwarranted invasion if "such information is not relevant to the work of the agency requesting or maintaining it". Similarly, section 89(2)(b)(v) defines an unwarranted invasion to include disclosure of personal information reported in confidence to an agency and not relevant to the ordinary work of that agency. In my view, these provisions recognize that an individual's expectation of privacy and the relevance of the personal information to the work of the agency are often determinative in deciding whether disclosure is permissible or unwarranted. Considering those factors, I believe that disclosure of the names of the inmates serving on the Inmate Liaison Committee would not result in an "unwarranted" invasion of personal privacy.

According to your letter, the inmates who serve on the Committee run for office and are elected by their fellow inmates. Clearly, the identities of the inmates on the Committee are known, at least, to those individuals within the Elmira facility. Moreover, it does not appear that the inmates who run for office expect that their ambition to serve or actual service on the Committee would be kept confidential.

Furthermore, the Committee apparently serves a significant function for the Department of Correctional Services, for it acts as a liaison for the general inmate population and the administration in matters concerning living conditions in the facility. In my opinion, the identities of the Committee members are indeed relevant to the Department, for those individuals are the voice of all inmates.

In sum, the inmates who serve on the Inmate Liaison Committee are elected and thus do not become Committee members "in confidence". In addition, the role of the Committee is relevant to the administration of the Elmira facility. Moreover, identifying an inmate as a member of such a committee does not, in my view, reveal such an intimate detail of that person's life so as to constitute an unwarranted invasion of personal privacy. For those reasons, I believe that disclosure of the identities of

the inmates serving on the Committee is permissible and not prohibited by the Personal Privacy Protection Law. In my view, records reflecting the composition of the Committee should be made available under the Freedom of Information Law unless another basis for withholding listed in section 87(2)(a)-(i) can be asserted.

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: Robert C. Gaffigan, Department of
Correctional Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 3993

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

January 30, 1986

Ms. Edythe Wolfson
[redacted]

The staff of the Committee on 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. Wolfson:

I have received your letters of January 22, which deal with requests directed to the New York City Board of Education and the State Education Department under the Freedom of Information Law.

First, you indicated that requests sent to the Board of Education have not been processed in a timely manner. In short, if you believe that failures to respond to your requests have resulted in constructive denials of access, you may appeal such denials pursuant to section 89(4)(a) of the Freedom of Information Law.

Second, in a related vein, you alleged that John Nolan, who performs dual functions as Secretary to the Board of Education and Appeals Officer for purposes of the Freedom of Information Law, is engaged in a conflict of interest by virtue of performing those duties. You asked that I "review and investigate this conflict of interest on the part of Mr. Nolan". Here I point out that the Freedom of Information Law does not place limitations concerning the person that may be designated as appeals officer. In relevant part, section 89(4)(a) of the Freedom of Information Law states that:

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

The only limitation is found in the regulations promulgated by the Committee on Open Government, which provides in part that "The records access officer shall not be the appeals officer" [21 NYCRR 1401.7(b)]. It is noted that, as a general matter, the Committee on Open Government has neither the authority nor the resources to "investigate" in relation to issues involving conflicts of interest.

Third, you referred to correspondence between yourself and Mr. Longo and Mr. Snay of the Education Department and indicated that you had not received an appropriate response "respecting items 5, 6, 7, 9, and 10 of the informational request of December 18, 1985". In this regard, on the same day that your letters reached this office, I also received copies of Mr. Longo's response to your request.

Fourth, you questioned Mr. Snay's statement that the Education Department has no inspector general due to your belief that every state department is required to have an inspector general. I believe that Mr. Snay's response is accurate. Further, there are no requirements of which I am aware pertaining to inspectors general in state agencies.

Fifth, you allege that "blatant fraud and irregularities" occurred in conjunction with charges initiated against you relative to a 3020-a proceeding. You wrote that "it is imperative that this matter be referred to the appropriate investigatory state agency". Again, such an allegation falls outside the Committee's expertise or jurisdiction. However, other than the Education Department or perhaps a district attorney, I know of no state agency that is charged with the duty of conducting such an investigation.

Lastly, you asked that the matter be referred to Alfred Gordon of the Office of Ombudsman and requested "all forms and information. This office has no "forms" concerning issues in which the Office of Ombudsman might be of assistance. It is suggested that you call Mr. Gordon at (212) 587-2337 or that you explain your situation by writing to Mr. Gordon at the Department of State, Office of Ombudsman, 270 Broadway, New York, NY 10007.

I hope that I 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- 3994

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

February 3, 1986

[redacted]

The staff of the Committee on 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 26. Your inquiry concerns rights of access to records of a social worker with whom you were involved more than twenty years ago relative to an adoption.

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

First, the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. It is emphasized that the Freedom of Information Law is applicable 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 propriety 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 pertains to records of state and local government; it does not apply to a "private" agency, for example, or the courts.

Lastly, I have spoken before a local organization that can send you useful information. It is suggested that you seek information from:

Ms. Mary Smith
Birthparent Support Network of
the Capital District
505 Hamilton Street
Schenectady, New York 12305

I hope that I 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 3995

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

February 5, 1986

Mr. Leon Jonassaint
Auburn Correctional Facility
135 State Street
Auburn, NY 13024-9000

Dear Mr. Jonassaint:

Your letter dated January 7 addressed to Secretary of State Shaffer has been forwarded to this office for response. Please be advised that the letter did not reach the Department until January 31.

In the first portion of your letter, you raised questions regarding the filing of regulations by officials of certain correctional facilities. Although the Committee has no responsibility with respect to the filing of regulations, I have contacted the Office of Information Services at the Department of State on your behalf. From the information you have provided, we are unable to identify the rules and regulations about which you have inquired. However, all of the rules and regulations filed with the Department by the Department of Correctional Services are published in Title 7 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR). That publication should be available to you from the Auburn Correctional Facility's law library. Alternatively, the publication can be purchased for $48 from:

Lenz & Riecker, Inc.
One Columbia Place
Albany, New York 12207

The NYCRR will not only provide you with the text of Department of Correctional Services' rules but will also tell you when each of the rules was filed with the Department. If you should have a question about a rule published in the NYCRR, you must provide the appropriate NYCRR citation. In most cases, a description of the rule's subject matter will not be sufficient.

The second portion of your letter involves a request for "a copy of a listing of one hundred not-for-profit organizations in New York, with emphasis on the five boroughs of New York City". You added that "Said organizations should be ones that provide social assistance of any nature to persons of poor socio-economic backgrounds".

In this regard, it is noted that the Department of State is the repository of certificates of incorporation. As such, the Department maintains records concerning thousands of not-for-profit corporations.

Further, I point out that, as a general rule, an agency is not required to create or prepare a record in response to a request. With respect to your request, the Department maintains no "list" of one hundred of the types of organizations that you are seeking. I believe that records regarding corporations are kept alphabetically. Further, records regarding profit as opposed to not-for-profit corporations are not, to the best of my knowledge, kept separately. In short, since no such list is maintained, there is no record that can be provided.

Lastly, for future reference, it is noted that the Freedom of Information Law requires that an applicant request records "reasonably described". Consequently, when making a request, sufficient detail should be included to enable agency officials to locate the records sought.

I hope that I 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-3996

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

February 7, 1986

Mr. Alan Siegel
[redacted]

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

Dear Mr. Siegel:

I have received your letter of January 30 in which you requested an advisory opinion.

According to your letter, you have been refused entrance to a Civil Service examination for failing to meet a five year professional experience requirement. You believe that a particular individual, who may not have the requisite experience, has been approved to take the examination in question and has been appointed, on a provisional basis, to the job title you seek.

Subsequently, you requested materials from the Department's records access officer that would indicate the qualifications of a specific individual for employment as "Social Services Consultant". Your request was denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy. You asked whether disclosure would "violate this individual's right to privacy". In this regard, I offer the following comments.

First, the Freedom of Information Law provides rights of access to records maintained by governmental agencies. All records are presumed available unless the records, or portions thereof, can be withheld under one or more of the grounds listed in section 87(2)(a)-(i) of the Law. Section 87(2)(b) permits an agency to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy. Moreover, sections 89(2-a) of the Freedom of Information law and 96(1)(c) of the Personal Privacy Protection Law prohibit state agencies from disclosing personal information which would result in an unwarranted invasion of personal privacy.

Second, it is sometimes difficult to advise whether disclosure of personal information would result in an unwarranted invasion of personal privacy. The courts, however, 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 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 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; and Capital Newspapers v. Burns, Sup. Ct., Albany Cty., May 5, 1984, Supplemental decision, June 9, 1984]. On the other hand, if records or portions of records are irrelevant to the performance on 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, Nov. 22, 1977 and 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, that indicate that an 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, personal information that is not relevant to a public employee's qualifications may constitute an unwarranted invasion if disclosed.

For example, if a position requires a bachelor's degree, the portion of a record indicating that the degree was awarded should, in my opinion, be available. Other information included in the same record, such as grade point average, class rank or the date that the degree was conferred, could be withheld.

To the extent, however, that the records you seek pertain to applicants for employment, rather than to individuals whom already hold a position with government, I believe that the records should be withheld. Section 89(2)(b)(i) specifically defines an unwarranted invasion of personal privacy to include disclosure of employment, medical or credit histories or personal references of applicants for employment.

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

Sincerely,

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3997

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

February 7, 1986

Mr. Harold Mondshein
[redacted]

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

Dear Mr. Mondshein:

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

You seek several records which you believe are maintained by the New York City Off-Track Betting Corporation. The records pertain to your grievance which was filed under a collective bargaining agreement between OTB and Local 2021, District 37. You indicated that "the court matter" has been concluded on other grounds. You want to know whether you are entitled to various records submitted to OTB by the Union, records submitted to the Union by OTB, records reflecting the attendance at a meeting between a Union representative and an OTB employee and records reflecting the content of such meeting. In this regard, I offer the following comments.

First, as you may know, the Freedom of Information Law provides that all records of an agency are available unless the records, or portions thereof, can be withheld under one or more grounds for denial listed in section 87(2)(a)-(i). In my view, the New York City OTB Corporation is an agency subject to the provisions of the Freedom of Information Law. Thus, the records that you seek should be made available unless they can be denied pursuant to one or more of the statutory grounds.

Second, the Freedom of Information Law does not require an agency to create a record which does not already exist. Section 89(3) states that an entity need not "prepare any record not possessed or maintained by such entity". Thus, if the records

that you described are not maintained by OTB, it need not provide you with the information that you seek. Further, if the information sought does not exist as a record or records, OTB would not be obliged to create a record on your behalf.

Third, it appears that most of the records that you seek include factual information concerning your grievance and the grievance procedure itself. Since such records likely contain only factual information, and any personal details included in the records likely pertain to you, I believe those portions would be available to you.

Finally, you may wish to request the records from the records access officer for OTB. If the records are denied, a written explanation of the denial, citing one or more of the grounds listed in section 87(2)(a)-(i), should be provided to you.

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

Sincerely,

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-4198

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

February 10, 1986

Ms. Sharon Pruitt
[redacted]

Dear Ms. Pruitt:

I have received your letter of February 4 and the materials attached to it.

Your correspondence pertains to a dispute between you and your employer, Reichert Scientific Instruments, which is a division of Warner-Lambert Technologies, Inc. Further, you are seeking from this office various records, such as time cards and the like, concerning your employment.

In this regard, first, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. Consequently, this office does not maintain the records in which you are interested and, therefore, cannot make them available. Moreover, the Committee has no authority to require that records be disclosed or withheld.

Second, the Freedom of Information Law does not apply to the records in question. The Freedom of Information Law is applicable 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, the Freedom of Information Law, as a general matter, is applicable to records of state and local government in New York; it does not apply to records of a private corporation.

It is suggested that you discuss the matter with your union representative.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3999

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

February 10, 1986

Mr. Leo P. Davis
Attorney at Law
442 Main Street
P.O. Box 425
East Moriches, NY 11940

The staff of the Committee on Open 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 January 28 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry pertains to rights of access to an appraisal apparently prepared more than two years ago for the East Moriches Union Free School District concerning real property owned by the District known as the "Old Schoolhouse". Having formerly been a member of the Board of Education, you are aware of the appraised value, for you notarized the appraisal when it was made available to the School District. Since the appraisal, the Old Schoolhouse, by means of a federal grant, received repairs and improvements worth approximately $60,000. You also added that "in the last 2 1/2 years, property values in East Moriches have soared."

Recently, the School Board has agreed to sell the Old Schoolhouse for a specific sum, pending voter approval. Due to your previous role on the Board, you have knowledge that the proposed sale price and the appraised value are significantly different.

You stressed in your letter that you do not want to "breach the confidence between the appraiser and the School Board by publicly acknowledging [your] knowledge of the amount of the appraisal..."

You conceded that the appraisal at the time of its submission to the Board or during the process of solicitation of purchasers and the ensuing negotiations, could likely have been withheld. However, it is also your view that, once the Board passed a resolution accepting a purchase offer, "there is no rationale for such confidentiality". In short, it is your contention "that the appraisal was confidential until an offer was accepted by official Board resolution, and at that point in time, the appraisal loses its confidentiality".

In this regard, I agree with your contentions for the following reasons.

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, it appears that only one of the grounds for denial is relevant to rights of access. Specifically, section 87(2)(c) permits an agency to withhold records or portions thereof that:

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

From my perspective, the cited provision generally deals with the capacity to withhold information in two types of situations.

One might deal with a situation in which an agency is seeking to buy or sell goods or services and is involved an attempt to attract buyers or sellers, as the case may be. For instance, when an agency wants to buy a particular type of equipment, it might solicit bids. If two bids have been submitted to date, but the deadline for submission of bids is a date certain next week, disclosure of the bids now to a third potential bidder would give that person an unfair advantage in relation to the other bidders. Such a disclosure would in my view "impair present or imminent contract awards", and the bids could, at that time, be withheld. In the context of the facts that you described, the School Board is not involved in that kind of situation; presumably, any deadline for the submission of offers has passed.

The other comes closer to the facts described in your letter. If an agency has obtained an appraisal of real property that it seeks to sell, premature disclosure would enable potential buyers to make purchase offers based upon the appraisal, thereby possibly precluding the agency from obtaining a higher

offer. Under the circumstances that you have described, in which the Board has passed a resolution to accept a specific sale offer, disclosure of the appraisal at this juncture would no longer "impair" the ability of the District to reach an agreement, for an agreement has been made.

Somewhat analogous was a situation in which the Court of Appeals upheld a denial of access to appraisals regarding properties that an agency owned and "planned to offer for sale to the public" [Murray v. Troy Urban Renewal Agency, 56 NY2d 888, 890 (1982)]. Although appraisals concerning properties not yet sold were withheld on the basis of section 87(2)(c), the Court also stated 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.).

The distinction between the situation that you described and that in Murray is that there is an additional step, for the voters make a final determination concerning the sale of the property. As such, although an offer has been accepted, no final sale has yet occurred. Nevertheless, the appraisal in my view accessible.

Viewing the Freedom of Information Law from an historical perspective, as noted earlier, the Law is based on a presumption of access. To a great extent, the grounds for denial describe some harm that would arise as a result of disclosure. While it has been held that the common law "governmental" or "official information" privilege no longer exists [see e.g., Doolan v. BOCES, 48 NY 2d 341 (1979)], I view the Freedom of Information Law as a codification of a variety decisions that represented the "governmental privilege". That privilege could be asserted when government could prove that disclosure would, on balance, be detrimental to the public interest [see Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1974)].

If, for example, the appraisal indicates a figure lower than the purchase price, disclosure at this juncture would not in my view result in any detriment or "impairment", for the purchaser has agreed to pay a specific amount, should District voters approve the sale. If, on the other hand, the appraisal is higher than the purchase price, disclosure would appear to result in benefit, rather than detriment to the District, for taxpayers might have the capacity to insist upon a better or perhaps more realistic return on the sale. Further, it is questionable in my view, whether an appraisal performed more than two years ago could be considered as significant if indeed the property has undergone improvements and market conditions have substantially changed. Stated differently, if the appraisal is no longer relevant or an effective guide to the value of the property, I do not believe that section 87(2)(c) could be asserted as a basis for withholding.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4000

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

February 12, 1986

Mr. Edward J. Roche
[redacted]

Dear Mr. Roche:

I have received several letters from you recently concerning various requests for records concerning your son.

Although I do not believe that I can provide specific direction, I would like to offer general comments.

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) 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 foregoing, the Freedom of Information Law does not apply to the courts or court records.

Second, you referred to the "Privacy Act". In this regard, there is a statute known as the "Personal Privacy Protection Law". However, that statute pertains only to personal information and records maintained by state agencies; it does not apply to municipal agencies, such as a county social services or police department, or a village police department, for example.

Third, the Freedom of Information Law is one among numerous laws that deal with access to records. Further, the first ground for denial in the Freedom of Information Law, section 87(2)(a), concerns records that are "specifically exempted from disclosure by state or federal statute". You suggested in one of the items of correspondence that the Freedom of Information Law "supercedes the authority of Section 390.50 subdivision I of the Criminal Procedure Law..." In short, I disagree, for I believe that the cited provision specifically exempts from disclosure pre-sentence reports, except with respect to the situations indicated in that provision in which disclosure is appropriate.

Another statute that appears to be relevant and which prohibits disclosure, except in specified circumstances, is section 784 of the Family Court Act. That provision, entitled "Use of police records", states that:

> "All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted."

In short, while the Freedom of Information Law often may be useful in obtaining government records, other statutes often provide specific direction concerning particular records.

It is 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4001

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

February 13, 1986

Mr. Eddie McLain
85-A-5466
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. McLain:

I have received your letter of February 10 concerning a request made under the Freedom of Information law.

Specifically, you wrote that you sent a request to Best Realty Company in Yonkers, but that you received no response. You raised questions concerning an appeal based upon the failure to respond.

In this regard, I offer the following comments.

It is emphasized that the Freedom of Information Law is applicable 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, the Freedom of Information Law generally pertains to records of state and local government in New York; it does not apply to records maintained by a private firm, such as that identified in your letter.

In short, since the Freedom of Information Law does not apply, there is no right to appeal. Further, since you referred to filing an Article 78, I point out that an Article 78 proceeding may, in appropriate circumstances, be initiated against a public officer or body. I do not believe that an Article 78 proceeding may be initiated against a private company.

As you requested, enclosed is "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:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4002

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

February 19, 1986

Mr. Benjamin Wilson
#85-A-2378
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051-0975

Dear Mr. Wilson:

I have received your letter of February 5, which reached this office today.

You have requested from the Committee pre-sentence reports and "statements" concerning yourself, as well as recommendations from "all" district attorneys' offices.

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

First, 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. In short, since this office does not maintain the records sought, we cannot make them available to you.

Second, a request made under the Freedom of Information Law should be directed to the "records access officer" at the agency or agencies that you believe maintain the records that you want. For instance, if you believe that a particular district attorney possesses records in which you are interested, a request should be sent directly to that office.

Third, the Freedom of Information [section 89(3)] requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you include sufficient detail to enable agency officials to locate the records, such as identification, index and docket numbers, dates, descriptions of events and similar information.

Lastly, I point out that access to pre-sentence reports is dealt with specifically by section 390.50 of the Criminal Procedure Law. In brief, I believe that only a court can determine that pre-sentence reports should be released. Therefore, it is suggested that you discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4003

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

February 19, 1986

Mr. Manuel Rivera
Drawer B
Stormville, NY 12582

Dear Mr. Rivera:

I have received your recent letter concerning the use of the Freedom of Information Law.

You requested information concerning whom you may contact for the purpose of requesting records from the offices of District Attorneys in both Bronx and Queens Counties. While I do not have specific names of individuals to contact, the head of an agency is required to designate a "records access officer" who is responsible for dealing with requests made under the Freedom of Information Law (21 NYCRR 1401.2). As such, a request may be directed to the records access officer. The address for the Office of District Attorney in the Bronx is 215 East 161st Street; in Queens, the address is 125-01 Queens Boulevard, Kew Gardens.

When making a request, it is noted that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate the records sought, such as names, dates, descriptions of events, identification, index and docket numbers, and similar information.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A0-3004

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

February 20, 1986

Mr. Anthony Ricco
79-A-0627
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. Ricco:

I have received your letter of January 10, which reached this office of January 28, as well as your ensuing letter indicating that you transferred from Auburn to the Clinton Correctional Facility.

As you requested, I have conferred with a representative of the Department of Correctional Services on your behalf and received a copy of a determination on appeal rendered by Judith LaPook, Counsel to the Department, dated February 13. Having reviewed the determination, there is little that I can add, for I am unfamiliar with the specific contents of the records in question. However, for purposes of clarification, I offer the following comments.

First, some of the information sought apparently does not exist in the form of a record or records. In this regard, I point out that, as a general matter, an agency is not required to create or prepare a record in response to a request [see Freedom of Information Law, section 89(3)].

Second, with respect to your request for a list of "enemies", although it was stated that no such list exists, and that, therefore, no list must be prepared, if such list had been prepared, I would concur that it could be withheld. One of the grounds for denial to which the determination referred is section 87(2)(b), which permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". The other provision to which reference was made, section 87(2)(f), permits a denial if disclosure would "endanger the life or safety of any person".

Third, while some aspects of the records sought were found to be available, portions of those records considered to be "evaluative" would be denied or deleted prior to granting access. Those evaluative materials could likely be withheld under 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..."

As such, to the extent that inter-agency or intra-agency materials contain "evaluative" information, I believe that those portions of the records could be withheld by means of deletions.

Lastly, to make records available after having made appropriate deletions, copies would have to be prepared. As indicated in the determination, the Freedom of Information Law permits an agency to charge a fee of up to twenty-five cents per photocopy when copies of records are requested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4004

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

February 20, 1986

Mr. Anthony Ricco
79-A-0627
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. Ricco:

I have received your letter of January 10, which reached this office of January 28, as well as your ensuing letter indicating that you transferred from Auburn to the Clinton Correctional Facility.

As you requested, I have conferred with a representative of the Department of Correctional Services on your behalf and received a copy of a determination on appeal rendered by Judith LaPook, Counsel to the Department, dated February 13. Having reviewed the determination, there is little that I can add, for I am unfamiliar with the specific contents of the records in question. However, for purposes of clarification, I offer the following comments.

First, some of the information sought apparently does not exist in the form of a record or records. In this regard, I point out that, as a general matter, an agency is not required to create or prepare a record in response to a request [see Freedom of Information Law, section 89(3)].

Second, with respect to your request for a list of "enemies", although it was stated that no such list exists, and that, therefore, no list must be prepared, if such list had been prepared, I would concur that it could be withheld. One of the grounds for denial to which the determination referred is section 87(2)(b), which permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy". The other provision to which reference was made, section 87(2)(f), permits a denial if disclosure would "endanger the life or safety of any person".

Third, while some aspects of the records sought were found to be available, portions of those records considered to be "evaluative" would be denied or deleted prior to granting access. Those evaluative materials could likely be withheld under 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..."

As such, to the extent that inter-agency or intra-agency materials contain "evaluative" information, I believe that those portions of the records could be withheld by means of deletions.

Lastly, to make records available after having made appropriate deletions, copies would have to be prepared. As indicated in the determination, the Freedom of Information Law permits an agency to charge a fee of up to twenty-five cents per photocopy when copies of records are requested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4005

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

February 21, 1986

Mr. Carl McNeal
79-A-1258
B-8-4
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

Dear Mr. McNeal:

I have received your recent letter in which you requested various records from this office.

First, 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. In short, since this office does not maintain the records sought, we cannot make them available to you.

Second, a request made under the Freedom of Information Law should be directed to the "records access officer" at the agency or agencies that you believe maintain the records that you want. For instance, if you believe that a particular district attorney possesses records in which you are interested, a request should be sent directly to that office.

Third, the Freedom of Information [section 89(3)] requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you include sufficient detail to enable agency officials to locate the records, such as identification, index and docket numbers, dates, descriptions of events and similar information.

Lastly, I point out that, for records kept at a correctional facility, the regulations of the Department of Correctional Services indicate that a request may be directed to the facility superintendent. For records kept at the Department's central offices in Albany, a request may be sent to the Deputy Superintendent for Administration.

Enclosed for your consideration is a copy of the regulations of the Department of Correctional Services promulgated pursuant to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-A - 4006

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

February 28, 1986

Mr. John Patterson
2A-9
Box F
Fishkill, NY 12524

Dear Mr. Patterson:

I have received your recent letter in which you requested medical records from this office.

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

First, 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. In short, since this office does not maintain the records sought, we cannot make them available to you.

Second, a request made under the Freedom of Information Law should be directed to the "records access officer" at the agency or agencies that you believe maintain the records that you want.

Third, the Freedom of Information [section 89(3)] requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you include sufficient detail to enable agency officials to locate the records, such as identification numbers, dates, descriptions of events and similar information.

Lastly, I point out that, for records kept at a correctional facility, the regulations of the Department of Correctional Services indicate that a request may be directed to the facility superintendent. For records kept at the Department's central offices in Albany, a request may be sent to the Deputy Superintendent for Administration.

Enclosed for your consideration is a copy of the regulations of the Department of Correctional Services promulgated pursuant to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 4007

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

February 28, 1986

Mr. Ronald DeFeo, Jr.
#75-A-4053
Box 149
Attica Correctional Facility
Attica, NY 14011

Dear Mr. DeFeo:

I have received your letter of February 20.

You wrote that you are having difficulty obtaining information from the Department of Correctional Services concerning your transfer. Consequently, you requested information "on how to appeal this matter" to the Committee on Open Government.

In this regard, it is noted that the Committee does not render determinations on appeal following a denial of a request for records. I direct your attention to section 89(4)(a) of the Freedom of Information Law, which provides in relevant part that:

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

For your information, the person designated to render determinations on appeal under the Freedom of Information Law for the Department is Counsel to the Department. As such, an appeal may be directed to Counsel at the Department's Albany 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-4008

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

February 28, 1986

Mr. Richard Flowers
#76-A-2565
Attica Correctional Facility
Box 149
Attica, NY 14011

Dear Mr. Flowers:

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

You have requested from the Department records concerning a "license certification" regarding broadcasting held by the Department of Correctional Services.

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

First, neither the Committee on Open Government nor the Department of State maintains the records in which you are interested. In short, since this office does not maintain the records sought, we cannot make them available to you.

Second, a request made under the Freedom of Information Law should be directed to the "records access officer" at the agency or agencies that you believe maintain the records that you want.

Third, the Freedom of Information [section 89(3)] requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you include sufficient detail to enable agency officials to locate the records, such as identification numbers, dates, descriptions of events and similar information.

Lastly, I point out that, for records kept at a correctional facility, the regulations of the Department of Correctional Services indicate that a request may be directed to the facility superintendent. For records kept at the Department's central offices in Albany, a request may be sent to the Deputy Superintendent for Administration.

Enclosed for your consideration is a copy of the regulations of the Department of Correctional Services promulgated pursuant to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4009

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

March 3, 1986

Mr. Russell Meerdink
President
The Russell Meerdink Company, Ltd.
222 Butte Des Morts Drive
Menasha, Wisconsin 54952

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

Dear Mr. Meerdink:

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

According to correspondence attached to your letter, you firm publishes the "Directory of Yearling Buyers" and the "Directory of Broodmare Buyers". Among the sources of information used to prepare the directories are various state racing commissions. In a letter addressed to Mr. Mark Thomas of the NYS Racing and Wagering Board, you sought "permission to obtain the addresses and telephone numbers of certain buyers "that are likely on file with the Board". You offered to visit the Board to compile the data yourself or to pay a fee to have the Board compile the information for you. In response to your request, Mr. Stephen J. Cipot, Assistant Director of Investments and Audits, wrote that "As a matter of policy, the NYS Racing and Wagering Board does not release information which it considers to be of a private matter to commercial enterprises", and added that the Board "does not publically make the type of information you seek available".

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

First, as you may be aware, the Committee on Open Government is required to promulgate regulations concerning the procedural implementation of the Freedom of Information Law pursuant to section 89(1)(b)(iii) of the Law. In turn, section 87(1) requires each agency to adopt rules consistent with the Law and the Committee's regulations. The regulations must include the designation of a records access officer, to whom requests should be directed, and an appeals person or body. I believe that the records access officer for the Racing and Wagering Board is Thomas C. Davide. It is suggested that you might want to submit a request to Mr. Davide. Further, I believe that Mr. David B. Vaughan has been designated the "Access Appeals Officer".

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that, as a general rule, an agency need not create or prepare a record in response to a request. Your letter to Mr. Thomas indicated that you requested a list pertaining to particular licensees. If no such list exists, the agency is not in my view be obligated to prepare such a list on your behalf. Similarly, if the agency maintains the information sought in a variety of records, it would not be required to cull from its records the information sought in order to compile the information in which you are interested.

Third, 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 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.

Fourth, it appears that Mr. Cipot's denial was based in part upon 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 that are relevant to the agency's duties would if disclosed often result in a permissible rather than an unwarranted invasion of personal privacy. Further, it is not clear whether the information sought pertains to individuals, corporations, or partnerships, for example. From my perspective, to the extent that it identifies license holders that are not natural persons, the provisions concerning the protection of personal privacy would not be applicable.

Lastly, the reference to "commercial purposes" likely pertains to section 89(2)(b)(iii) of the Freedom of Information Law, which provides that an unwarranted invasion of personal privacy includes the:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

In my view, if you would not use the information sought as a mailing list or for purposes of commercial solicitation, it is questionable whether the provision quoted above would justify a 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: Mark Thomas
Thomas C. Davide
Stephen J. Cipot

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4010

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

March 4, 1986

Mr. Demitrious M. Jackson
President
National Association for
the Advancement of Colored
People Westbury Branch
P.O. Box 203
Westbury, NY 11590

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

Dear Mr. Jackson:

I have received your letter of February 10 in which you seek a "ruling" pertaining to rights of access to records.

According to your letter, "a number of serious charges have been made concerning the alleged lack of certification and the nature of qualifications and credentials of several recent administrative and/or supervisory appointments in the Westbury Union Free School District No. 1". You added that it has also been alleged that "applicants with the required certification and with demonstrably superior qualifications have been by-passed in favor of individuals either without certification or with less credentials and experience, or both".

To obtain information on the subject, you requested, with respect to persons holding positions recently filled, the academic degrees and the institutions and years during which the degrees were awarded, and their administrative and teaching certifications. In response, Beth Lunenfeld, Records Access Officer for the District, denied the records on the ground that disclosure would constitute an "unwarranted invasion of personal privacy"

In this regard, I offer the following comments.

First, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee has no power to compel an agency, such as a school district, to grant or deny access to records. As such, my comments should be viewed as advisory rather than as a "ruling".

Second, The Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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, I point out that 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 that follow. The quoted language in my view indicates that the Legislature recognized that a single record might be both accessible and deniable in part. I believe that the language also imposes an obligation on the part of agency officials to review records sought in their entirety to determine the extent, if any, to which the records may justifiably be withheld.

Fourth, it appears that the only relevant ground for denial under the circumstances 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". Further section 89(2)(b) lists examples of unwarranted invasions of personal privacy, including the provision to which Ms. Lunenfeld referred [section 89(2)(b)(i)].

However, it is noted that there have been several judicial interpretations of the privacy provisions concerning public employees. In a variety of contexts, the courts have found that public employees enjoy a lesser right to privacy than any other identifiable group, for public employees have a responsibility to be more accountable to the public than any group. In addition, the courts have found in essence that records that are relevant to the performance of the official duties of a public employee are available on the ground that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. As such, the fact that records may be contained within personnel files or that they identify particular individuals does not necessarily mean that they can be withheld. Further, although disclosure might result

in an invasion of privacy, disclosure might not necessarily result in an "unwarranted" invasion of privacy. Conversely, it has been held that records concerning public employees that are not relevant to the performance of their official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

In conjunction with the standards described in the preceding paragraph, it would appear that the most important document regarding the qualifications of a teacher, administrator or supervisor, is a certification. As I understand it, the issuance of a certification, which I believe is the equivalent of a license, is based upon findings by the State Education Department that a particular individual has met the qualifications to engage in a particular area or areas of teaching or education. As such, the certification is likely the best and most accurate source of determining a school employee's qualifications. Further, I believe that it is clearly relevant to the performance of the employee's official duties.

Therefore, it is my view that the certifications pertaining to the duties of the employees in question are available under the Freedom of Information Law, for disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

While I believe that a certification is clearly accessible under the Freedom of Information Law, rights of access to the remainder of the information sought are questionable and may be dependent in part upon the specific contents of records. For example, the granting of a certification might be conditioned upon the award of a degree from an accredited institution. Nevertheless, the identification of the institution and the year in which it was awarded are reflective of information somewhat more "personal" than the certification. Similarly, academic vitae or resumes might contain a variety of personal information, some of which might be available, and some of which might be deniable. Those aspects of a resume indicating an individual's home address, social security number, marital status, grades and the like might, if disclosed, constitute an unwarranted invasion of personal privacy, for they are largely irrelevant to the performance of his or her official duties. Contrarily, since the Freedom of Information Law has long granted access to the name, public office address, title and salary of all employees of an agency [see Freedom of Information Law, section 87(3)(b)], those portions of a resume indicating previous public employment in New York would in my view be available.

In short, depending on their contents, the records that you are seeking, other than certifications, may be accessible or 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

cc: Beth Lunenfeld, Records Access Officer
John M. Franco, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4011

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

March 4, 1985

Mr. Jeff Sinclair
#81-A-745
Drawer B
Stormville, NY 12582

Dear Mr. Sinclair:

I have received your letter of March 3, in which you appealed a constructive denial of access to records by the Westchester County Office of the District Attorney.

It is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not have the power to render a determination on appeal or compel an agency to grant or deny access to records. In short, this office cannot rule on your appeal and it does not have custody or control over the records that you are seeking.

I point out that 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 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)].

Under the circumstances, it is suggested that you appeal to the District Attorney or the person designed by the District Attorney to render determinations on appeal under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4012
FOIL-AO-24

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

March 4, 1986

Mr. Dan Getman
Staff Attorney
Prisoners' Legal Services
of New York
2 Catharine Street
Poughkeepsie, NY 12601

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

Dear Mr. Getman:

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

According to your letter and the attachments, you requested from the Superintendent of the Fishkill Correctional Facility "copies of all grievances concerning Captain Reynolds as well as copies of any other documents concerning disciplinary action against Captain Reynolds". The Superintendent denied your request on the grounds that disclosure would result in an unwarranted invasion of personal privacy and/or are intra-agency materials. You have appealed the denial to Counsel for the Department of Correctional Services, narrowing your request to documents dated after December 31, 1982 and to initial grievance complaints and final decisions. You explained that grievances are "the internal complaint procedure by which prisoners challenge the decisions or behavior of state officials" within the Department. You want to know whether the grounds cited for denying you request are appropriate. 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 unless the records, or portions thereof, may be withheld under one or more of the grounds for withholding listed at section 87(2)(a) through (i) of the Law.

For example, section 87(2)(b) permits an agency to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy. Moreover, sections 89(2-a) of the Freedom of Information Law and 96(1)(c) of the Personal Privacy Protection Law require state agencies to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Thus, to the extent that the records sought would constitute an unwarranted invasion of Captain Reynold's privacy or the privacy of other individuals, I believe that the Department would be required to withhold the records.

Second, whether disclosure would result in an unwarranted invasion of personal privacy is often difficult to determine. Certainly, if identifying details can be deleted, disclosure would not constitute an invasion of personal privacy. Thus, when the names of the grievants are withheld while the substance of the complaint is made available, the personal privacy of the grievants is protected.

On the other hand, it appears that you are more interested in the substance of the complaints and final agency determinations concerning Captain Reynolds. Deleting his name from the records would not provide you with the information that you seek. Therefore, it must be determined whether disclosure of such records would result in a permissible rather than an unwarranted invasion of personal privacy.

In various opinions, the courts have indicated that public employees enjoy a lesser degree of privacy than others, reasoning that public employees are to be held more accountable. Generally, 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 invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905, (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Capital Newspapers v. Burns, 109 AD 2d 92 (1985)]. Conversely, 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 unwarranted invasions 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].

Third, in my view, the complaints and grievances concerning Captain Reynolds are indeed relevant to the performance of his duties. Likewise, the final determinations made by the Captain's superiors regarding the merit of the grievances and the propriety of the Captain's conduct are relevant to his job performance.

Nonetheless, I believe that it is necessary to strike a balance between the public's right to know whether a public employee is performing his job and that employee's right to privacy. For example, if a public employee has been charged with misconduct by his superiors and a hearing and a determination are to follow, I believe that the charges can be withheld until they are proven or accepted. If the charges are later upheld, the statement of charges and the determination thereon should be made available. Withholding the statement of charges spares the employee undue embarrassment or injury to his reputation if the charges are later found to be meritless.

On the other hand, disclosure of complaints made or grievances brought by the public against a public employee may not result in the same harm to a public employee as would a formal charge brought by a superior. In Walker v. City of New York, 64 AD 2d 980, the Court held that records of complaints regarding a police officer and investigations of complaints made by a civilian complaint review board were available under the Freedom of Information Law to the extent that disclosure did not impair an ongoing investigation or identify confidential sources. Similarly, records of complaints made against a parole officer were determined to be available in Montes v. State of New York, 406 NYS 2d 664 (Court of Claims, 1978).

In addition, I note that section 50-a of the Civil Rights Law provides for the confidentiality of "All personnel records, used to evaluate performance toward continued employment or promotion, ...under the control of...a department of correction of individuals employed as correction officers..." In Capital Newspapers, Division of Hearst Corp. v. Burns, 490 NYS 2d 651, however, the Appellate Division stated that "the Legislature did not intend to create a blanket exemption from disclosure for personnel records", but rather meant to "prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action". In my view, disclosure of the personnel records is prohibited only when the purpose for which they are sought includes their use in an underlying criminal or civil action.

Furthermore, section 50-a of the Civil Rights Law pertains only to the personnel records of police and correction officers. Since section 50-a was not cited as a basis for denial and it is unclear whether Captain Reynolds is a correction officer, that provision may not apply to the records sought.

Finally, I believe that section 87(2)(g) of the Freedom of Information Law cannot be cited as a basis for denying the grievances and final determinations rendered thereon. Grievances

or complaints prepared by members of the public or, for example, inmates, cannot in my view, be characterized as inter-agency or intra-agency materials. Moreover, as you noted, the grievances would likely consist of "factual data". Neither factual data nor final agency determinations may be withheld as inter-agency or intra-agency materials [see Public Officers Law, section 87(2)(g)(i) and (iii)].

In sum, I believe that the records sought should be made available to the extent that they do not include formal, unproven or unaccepted charges against Captain Reynolds and are not to be used in an underlying civil or criminal action. To the extent that disclosure would result in an unwarranted invasion of personal privacy of other individuals who may be identified in the records, I believe that such portions of the records 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

BY Cheryl A. Mugno
Assistant to the Executive Director

RJF:CAM:ew

cc: Judith LaPook

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-4013

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

March 4, 1986

Mr. Dennis Green
#84-A-2713
135 State Street
P.O. Box 618
Auburn, NY 13024-9000

Dear Mr. Green:

I have received your letter of February 12 in which you seek assistance concerning your unsuccessful efforts in obtaining court records.

In this regard, it is noted that the Freedom of Information Law pertains 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) 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 foregoing, the records that you seek, which are apparently maintained by a court, are not subject to the Freedom of Information Law.

It is suggested that you discuss the matter with your attorney or perhaps a representative of Prisoners' Legal Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4014

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

March 6, 1986

Mr. Robert J. Koslow
South New Berlin Bus Drivers
Association
P.O. Box 47
South New Berlin, NY 13843

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

Dear Mr. Koslow:

I have received your letter of February 20 concerning a request for records of the South New Berlin School District under the Freedom of Information Law.

According to your letter, on January 21, you submitted a request to the District Clerk, who stamped it "RECEIVED". However, the Superintendent later returned the request to you by mail and stated that the request was submitted to the wrong person, whose office "is just down the hall". Consequently, you resubmitted the request on the following day. The record was apparently made available for inspection on February 14, and you then requested a copy and offered to pay the appropriate fee. You were refused copies by the records access officer, who told you that the Superintendent would have to give prior approval. He added that the Superintendent would be unavailable until February 18 and that you would have to submit another request form in order to receive copies.

It is your view that the actions previously described represent violations of the Freedom of Information Law. As such, you requested that I:

> "1. Conduct a full investigation of these illegal acts.
>
> 2. Prosecute to the extent of the law, those persons responsible.

3. Direct the School District to cease and desist improper practice and adhere to the laws that apply.

4. Award for the Association, punitive damages."

In this regard, I offer the following comments.

First, although I am in general agreement with your contention, the Committee on Open Government has only the authority to advise. Neither the Committee nor its staff has the power to compel an agency to grant or deny access to records or to award punitive damages, for example.

Second, the procedure that you have been forced to follow is, in my opinion, inconsistent with the letter and the spirit of both the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401), which govern the procedural aspects of the Law.

While an agency may develop a request form for purposes of its own administrative convenience, the Law itself contains no reference to a particular form. Section 89(3) of the Law states in part that a written request must "reasonably describe" the records sought. Therefore, it has been consistently advised that any written request that reasonably describes the records sought should suffice. It has also been advised that a failure to complete a form prescribed by an agency cannot result in either a denial of a request or a delay in responding to the request.

As you wrote and as a copy of a your request indicates, the application was pre-addressed to the records access officer and was stamped "RECEIVED". Therefore, I believe that you had good reason to assume that the application would be forwarded to the records access officer, particularly since his office is in the same building. I point out, too, that the records access officer has the duty of coordinating agency response to public requests for access to records [21 NYCRR 1401.2(a)]. Therefore, if the request is to the records access officer but submitted to a different person, the records access officer in my view nonetheless has the "duty to coordinate" the District's response.

Further, the regulations also state that the records access officer is responsible for assuring that agency personnel:

"(3) Upon locating the records, take one of the following actions:

(i) Make records available for inspection; or

(ii) Deny access to the records in whole or in part and explain in writing the reasons therefor;

(4) Upon request for copies of records:

(i) Make a copy available upon payment or offer to pay established fees, if any; or

(ii) Permit the requester to copy those records..." [21 NYCRR 1401.2(b)].

It is emphasized that section 87(2) of the Freedom of Information Law refers to the right to inspect and copy records, and that section 89(3) requires that an agency provide copies of records upon payment of or offer the pay the appropriate fees. From my perspective, if a record is accessible and a copy is requested, the records access officer has the duty of ensuring that a copy is provided. Further, if the Board of Education has designated a particular individual as records access officer and that person has granted the right to inspect, no additional approval is needed prior to making copies. Therefore, I do not believe that the delay or the approval of the Superintendent were proper actions.

Lastly, 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 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 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)].

Enclosed are copies of the Freedom of Information Law, the Committee's regulations and an explanatory pamphlet that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Joseph Busch
Frederick A. Hall

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-1259
FOIL-AO-4015

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

March 6, 1986

Ms. Constance Roberts
[redacted]

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

Dear Ms. Roberts:

As you are aware, I have received your letter of February 13, as well as the materials attached to it.

Your inquiry concerns a series of events involving the City of Poughkeepsie Zoning Board of Appeals. Having discussed the matter with you by phone, it does not appear that legal action can be taken, for the statute of limitations has expired. I point out that section 107 of the Open Meetings Law enables an "aggrieved person" to initiate suit pursuant to Article 78 of the Civil Practice Law and Rules. The time within which a suit may be initiated is four months from the date of an agency's action. As I understand the situation, more than four months have passed since the Board's determination.

Nevertheless, in an effort to enhance compliance with the Open Meetings Law in the future, I offer the following comments.

First, by way of background, for several years a city zoning board of appeals had the authority to deliberate in private, outside the requirements of the Open Meetings Law, on the ground that the deliberations were "quasi-judicial". The Open Meetings Law exempted from its coverage quasi-judicial proceedings, and the public had no right to attend such proceedings. However, an amendment to the Law enacted in 1983 prohibits zoning boards of appeals from deliberating in private in conjunction with the exemption concerning quasi-judicial proceedings. Since the amendment, zoning boards of appeals have been required to give effect to the Open Meetings Law in the same manner as other public bodies [see attached, Open Meetings Law, section 108(1)].

Second, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public except to the extent that a ground for entry into an "executive session" may appropriately be cited [see section 105(1)(a) through (h)]. Moreover, the courts have construed the term "meeting" expansively. In brief, it has been held by the state's highest court that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which the gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Third, since you indicated that the Board gave no notice prior to certain meetings, it is noted that section 104 of the Law requires that notice of the time and place be given prior to every meeting. Specifically, section 104(1) pertains to meetings scheduled at least a week in advance and requires that notice be given to the public by means of posting in one or more designated, conspicuous public locations, and to the news media (at least two), not less than seventy-two hours prior to such meetings. Section 104(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the public and the news media as described in the preceding sentence "to the extent practicable" at a reasonable time prior to such meetings.

Fourth, as suggested earlier, the Law permits a public body to hold closed or "executive" sessions to discuss certain topics. It is emphasized, however, that the Law specifies and limits the grounds for entry into an executive session. Moreover, the Law prescribes a procedure that must be accomplished, during an open meeting, before an executive session may be held. 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..."

As such, it is clear that a public body cannot convene an executive session to discuss the subject of its choice. In addition, a motion to enter into an executive session must indicate, in general terms, the subject to be discussed.

And fifth, you indicated that minutes of meetings were not made available promptly. Section 106(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks of such meetings. If action is taken during an executive session, minutes reflective of the action taken must be prepared and made available within one week.

Your remaining question pertains to a request made under the Freedom of Information Law for tape recordings of meetings.

Here I point out that the Freedom of Information Law pertains to existing records and that section 86(4) of that statute 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, a tape recording constitutes a "record" subject to rights of access.

Like the Open Meetings, the Freedom of Information Law is based upon a presumption of access. All records of an agency are accessible, except those records or portions thereof that fall within one or more grounds for denial listed in paragraphs (a) through (i) of section 87(2) of the Law (see attached).

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]. Therefore, I believe that you have the right to listen to the tape at no charge or obtain a copy of the tape upon payment of a fee for the actual cost of reproduction [see section 87(1)(b)(iii)].

Lastly, since the response to your request has been delayed, I point out that the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401), which govern the procedural aspects of the 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 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)].

Enclosed is "Your Right to Know", which describes both the Freedom of Information and Open Meetings Laws. A copy of this opinion will be sent to the City's Zoning Board of Appeals and its Zoning Administrator.

I hope that I 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: Zoning Board of Appeals
Michael Haydock, Zoning Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4016

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

March 6, 1986

Mr. Charles Maynard
83-A-2406
Box 307
Beacon, NY 12508

Dear Mr. Maynard:

I have received your letter of March 3 in which you requested a copy of your pre-sentence report.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As a general matter, the Committee does not maintain possession of records. In short, since the office does not maintain your pre-sentence report, I am unable to provide it to you.

It is noted that rights of access to pre-sentence reports are not governed by the Freedom of Information Law, but rather by section 390.50 of the Criminal Procedure Law. I believe that the cited provision indicates that only a court can disclose a pre-sentence report. As such, a request should be directed to the court that maintains the record. Further, it is suggested that you discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4017

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

March 7, 1986

Mr. Walter Goldstein
[redacted]

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

Dear Mr. Goldstein:

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

You suggested that various kinds of information are being released to reporters by the New York City Police Department, but that you are being denied the same information.

Although you included correspondence indicating an initial denial of your request, it appears that the information sought, as described in the correspondence, was made available on appeal. While I have some recollection of our conversation of several weeks ago, I do not recall enough, in terms of the specific information that you are seeking, to provide guidance. If you could provide more specific information or other correspondence indicating denials of records, perhaps I could provide direction.

It is noted that, as a general matter, the grounds for denial appearing in the Freedom of Information Law are based upon potential harm as a result of disclosure. For example, the ground for denial that is likely cited most often by police agencies is section 87(2)(e). That provision states that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Based upon the language quoted above, the effects of disclosure often determine the extent to which records are accessible or deniable. Depending upon the facts, a record, such as the complaint form that you attached, might be accessible or deniable, in whole or in part. If a crime has been solved and a conviction has occurred, there might not be any basis for withholding; contrarily if a crime is under investigation, and if a suspect's identity is included on the report, premature disclosure could have the effect of interfering with the investigation. Therefore, there may be no specific rule or guide that can be applied with respect to rights of access to Department records.

Again, if you could provide more information, perhaps I could provide better guidance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-401

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

March 7, 1986

Mr. Walter Goldstein
[redacted]

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

Dear Mr. Goldstein:

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

You suggested that various kinds of information are being released to reporters by the New York City Police Department, but that you are being denied the same information.

Although you included correspondence indicating an initial denial of your request, it appears that the information sought, as described in the correspondence, was made available on appeal. While I have some recollection of our conversation of several weeks ago, I do not recall enough, in terms of the specific information that you are seeking, to provide guidance. If you could provide more specific information or other correspondence indicating denials of records, perhaps I could provide direction.

It is noted that, as a general matter, the grounds for denial appearing in the Freedom of Information Law are based upon potential harm as a result of disclosure. For example, the ground for denial that is likely cited most often by police agencies is section 87(2)(e). That provision states that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Based upon the language quoted above, the effects of disclosure often determine the extent to which records are accessible or deniable. Depending upon the facts, a record, such as the complaint form that you attached, might be accessible or deniable, in whole or in part. If a crime has been solved and a conviction has occurred, there might not be any basis for withholding; contrarily if a crime is under investigation, and if a suspect's identity is included on the report, premature disclosure could have the effect of interfering with the investigation. Therefore, there may be no specific rule or guide that can be applied with respect to rights of access to Department records.

Again, if you could provide more information, perhaps I could provide better guidance.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4018

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

March 7, 1986

Mr. Eddie McLain
85-A-5466 C-19-30
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. McLain:

I have received your letter of February 19.

Your question is whether you can learn whether a landlord "reported an arson structural fire" concerning a building. You asked whether that information could be obtained form the office of public housing or the owner's insurance company.

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

First, as you may be aware, 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."

As such, although records of a New York City agency, for example, would fall within the scope of the Freedom of Information Law, the records of an insurance company would not be covered by the Freedom of Information Law.

Second, a record indicating that the fire was reported on a particular date at a specific location would in my opinion likely be available, if such a record continues to exist. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, a review of the grounds for denial, as well as relevant case law, indicates that such a record would be available [see e.g., Dwyer, Matter of (Fire Department, City of New York, 378 NYS 2d 984; and Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

Third, it is emphasized 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, including names, dates, locations, descriptions of events and similar information that would enable agency officials to locate the records sought. Further, a request should be directed to the agency's "records access officer".

The address of the New York City Housing Authority is 250 Broadway, New York, NY. You might also want to write to the New York City Fire Department, Headquarters, 250 Livingston Street, Brooklyn, NY.

I hope that I 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- 1260
FOIL-AO- 4019

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

March 10, 1986

Ms. Debbie Meisel
Committee on Southern Africa
SUNY-Binghamton
P.O. Box 2000
Binghamton, NY 13901

The staff of the Committee on 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. Meisel:

I have received your letter of February 20 in which you questioned the status of the SUNY-Binghamton Foundation under the Freedom of Information and Open Meetings Laws.

You wrote that:

> "The problem arises from a mis-belief that the foundation believes it is not a public corporation and therefore not subject to the Freedom of Information Law and the Open Meetings Laws. Under these laws, the foundation would be responsible to show their investment portfolio to the Committee on Southern Africa, as we requested on February 19, 1986. Also the Board of directors would be required to hold open meetings instead of 'secret' ones."

As such, you have asked whether the Foundation is a "public corporation", whether its portfolio is a "record" subject to the Freedom of Information Law, and whether the meetings of its Board of Directors fall within the requirements of the Open Meetings Law.

In order to learn more about the Foundation, I have reviewed corporate records filed with the Department of State. Originally created in 1957 as the Harpur College Foundation of the State University of New York, Inc., records were amended in 1967, and the name of the corporation was altered to its current name.

The Foundation is not a "public corporation", but rather a not-for-profit corporation created pursuant to section 201 of the Not-for-Profit Corporation Law.

The incorporation papers describe the purposes of the Foundation as follows, in relevant part:

> "a. To assist in advancing the welfare and development of the State University of New York at Binghamton, a unit of the State University of New York, by accepting and encouraging gifts to this Corporation and by using such gifts to advance such purposes in a manner consistent with the educational purposes of the State University of New York.
>
> b. To make such grants of financial assistance to the State University at Binghamton, its faculty and students, as shall be acceptable to, and deemed desirable by, the proper officials of the State University of New York and of the State University of New York at Binghamton, including, without limiting the foregoing, scholarship grants to students, the endowing of professorships and the like."

In addition, paragraph c pertains to the authority of the Foundation's Board to invest and reinvest its funds.

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 determined that such an entity is an "agency" subject to the Freedom of Information Law. In so holding, the Court found that:

> "We 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.

It is emphasized that the incorporation papers indicate that there is a strong nexus between the Foundation and the State University College at Binghamton. In short, it appears that the Foundation carries out its duties for the benefit and on behalf of the University. Its statement of purposes is, in my view, parallel to those of the University. Further, it appears that the Foundation would not exist, but for its relationship with the State University of New York.

Additionally, in similar circumstances arising at other branches of State University of New York, the records pertaining to a Foundation and its work are in possession of officials at the University. If that is so, I believe that the records pertaining to the Foundation in possession of the University officials fall within the scope of the Freedom of Information Law, whether or not the Foundation is considered an "agency".

Here I direct your attention to section 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 University at Binghamton 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:

> "The statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental 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 Foundation appears to be somewhat analogous to that described by the Court. Consequently, it is reiterated that if the records are maintained by State University of New York officials concerning the Foundation, they are in my opinion subject to the Freedom of Information Law, for they would be in physical possession of the officials of the University.

Further, assuming that the portfolio of investments is subject to the Freedom of Information Law, I believe that it would be available, for no ground for denial could appropriately be cited.

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 section 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 consist 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 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 Foundation incorporation papers include the promotion of education at the State University at Binghamton, as well as providing scholarships and professorships, and various other purposes that inure to the benefit of the University. 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, section 608. It is also possible that quorum requirements imposed by section 41 of the General Construction Law would be applicable.

Fourth, the statement of purposes of the Foundation indicates that the Foundation performs a governmental function for an agency of the State, and in this instance, the State University at Binghamton.

If my assumptions and contentions are accurate, the Board of Trustees is a public body required to comply with the Open Meetings Law.

Lastly, I point out that public bodies have the authority to convene closed or executive sessions under circumstances described in section 105(1) of the Open Meetings Law. Of possible significance are section 105(1)(f) and (h), which state, respectively, that executive sessions may be held to discuss:

> "f. 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...
>
> h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities held by such public body, but only when publicity would substantially affect the value thereof."

If for example, a discussion focuses on the "financial" or "credit" history of a particular corporation, such as a corporation in which the Foundation has investments, it is likely that the discussion could be conducted during an executive session under section 105(1)(f). Under section 105(1)(h), if the Foundation is considering selling its stock in a particular corporation, an executive session would be justified if open discussions would "substantially affect the value" of the stock.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Clifford Clark
Rollin Twinings
Anthony Miceli, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 1261
FOIL-AO 4020

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

March 12, 1986

Mr. Joel P. Gagnon
[redacted]

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

Dear Mr. Gagnon:

I have received your letter of March 8. Please accept my apologies for failing to include with my earlier correspondence copies of the Freedom of Information and Open Meetings Laws, and "Your Right to Know". Those materials are attached.

You raised questions concerning any requirements that might exist relative to records, such as the preparation of minutes, of a planning board.

In this regard, I point out that section 106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, subdivision (1) of section 106 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."

In view of the foregoing, minutes of a meeting of a planning board must, at a minimum, contain the types of information described above. It is emphasized that there is nothing in the Law that precludes a board from preparing minutes that are more expansive and detailed than required by the Open Meetings Law.

Subdivision (2) of section 106 concerns minutes of an executive session. It is noted that, as a general rule, a public body may vote during a properly convened executive session, unless the vote is to appropriate public monies. If action is taken during an executive session, the provision cited above requires that:

> "Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; 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."

If, for example, an issue is discussed during an executive session, but no action is taken, minutes of the executive session need not be prepared.

Subdivision (3) of section 106 states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As such, minutes of open meetings must be prepared and made available within two weeks of such meetings. If action is taken during an executive session, minutes indicating the nature of the action taken, the date and the vote must be prepared and made available within one week.

In the event that minutes are not approved within the time periods prescribed in section 106(3), it has been suggested that the minutes nonetheless be made available after having been marked "unapproved", "draft", or "non-final", for example.

The minutes are considered "public records" due in part to the requirements of the Open meetings Law and also due in part to the provisions of the Freedom of Information Law. The Freedom of Information Law is applicable to records of an "agency", a term 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since a planning board is a "municipal...board", it is an "agency" required to comply with the Freedom of Information Law.

Lastly, with respect to voting, section 87(3)(a) 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 members votes..."

In view of the foregoing, any final action taken by the planning board must be recorded by means of minutes and, in addition, a record of votes must be prepared that identifies the manner in which each member cast his or her vote.

Once again, I apologize for neglecting to send to you the enclosed materials.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4020

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

March 12, 1986

Mr. John E. Tibbens
[redacted]

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

Dear Mr. Tibbens:

I have received your letters of February 20 and March 7, as well as the correspondence related to your letters.

Having reviewed the materials, I offer the following observations.

First, it is noted that the Freedom of Information Law is a vehicle under which any person may request records. Your letter of January 30 addressed to Mr. George Firth of the Department of Environmental Conservation indicated that you requested information, by phone, by raising a series of questions. In this regard, I point out that an agency may require that an applicant request records in writing [see attached, Freedom of Information Law, section 89(3)]. Further, the cited provision states, as a general matter, that an agency need not create a record in response to a request. If, for example, the Department does not have records containing the answers to your questions, Department officials would not be required by the Freedom of Information Law to prepare a record or records on your behalf in order to respond to your inquiries.

Second, in terms of rights of access to existing 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.

Since I am unfamiliar with the contents of the records that you are seeking, I cannot advise as to the propriety of Mr. Firth's response of February 20. Nevertheless, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". It is possible that disclosure of witnesses' identities or statements would result in such an invasion of privacy. Further, section 87(2)(e) provides that an agency may withhold records that:

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

Again, without knowing more about the investigation or the nature of records in question, I could not conjecture as to rights of access. However, it is possible that section 87(2)(e) might be applicable.

Third, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) and section 87(1) of the Freedom of Information Law, each agency must have designated a "records access officer", a person responsible for coordinating an agency's response to requests made under the Freedom of Information Law. Under the circumstances, it is unclear whether your inquiry was viewed by the Department as a request made pursuant to the Freedom of Information Law. Therefore, it is suggested that you might want to submit a written request to the Department's records access officer, Mr. Graham Greeley. Enclosed is a copy of an explanatory brochure that contains a sample letter of request.

Lastly, for future reference, 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 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

Enc.

cc: George Firth
Graham Greeley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4022

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

March 13, 1986

Ms. Mindy Donnelly
The Citizen
25 Dill 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 Ms. Donnelly:

I have received your letter of February 21, and the news article attached to it.

Your inquiry concerns rights of access to burial permits and, in this regard, I offer the following comments.

First, statutes concerning burials and burial permits are found with Articles 41 and 42 of the Public Health Law. Having reviewed those provisions, there is nothing that specifically directs that burial permits be available to the public or that they be considered confidential. It is noted that the Public Health Law does contain provisions that deal with access to and the conditions under which birth and death certificates are available (see e.g., Public Health Law, sections 4173 and 4174). Therefore, due to the absence of direction concerning access to burial permits, I believe that rights would be determined by the Freedom of Information Law.

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

From my perspective, none of the grounds for denial would apply. I point out that 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". Although a burial permit might identity the deceased, it is questionable in my view whether the privacy of a deceased may be invaded. Further, as I understand the contents of burial permits, no intimate personal details are included. As such, the only ground for denial of potential relevance could not in my opinion justifiably be asserted to withhold a burial permit.

In addition, it has been consistently advised that licenses or permits (i.e., to drive, teach, own a pistol, sell real estate, etc.) are accessible, for they are generally intended to enable the public to know that certain conditions have been met.

Lastly, attached are copies of statutes that may be of interest, for they may be relevant to your article.

I hope that 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-4023

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

March 17, 1986

Mr. John J. Kelly 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. Kelly:

I have received your letter of February 24. Please accept my apologies for the delay in response.

Your inquiry concerns a request for records of the City School District of Peekskill made on February 4. As of the date of your letter to this office, you had received no response to the request.

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

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 (see attached regulations, 21 NYCRR Part 1401). In turn, section 87(1) requires the head or governing body of a public corporation (i.e., the board of education in a school district) to adopt regulations consistent with the Freedom of Information Law and the Committee's regulations. One aspect of the regulations involves the designation of a "records access officer", who has the duty of coordinating an agency's response to requests for records.

It is unclear, on the basis of the request attached to your letter, whether the Superintendent is the records access officer. If he is not the records access officer, I believe that the request should have been forwarded to the appropriate person.

Second, the Freedom of Information and the regulations promulgated by the Committee prescribe 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 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 ap- pealed 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 fol- low 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

Enc.

cc: Mr. Donald S. Rickett, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4024

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

March 17, 1986

Mr. John Bal
[redacted]

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

Dear Mr. Bal:

I have received your letter of February 18 concerning the scope of the Freedom of Information Law.

Specifically, attached to your letter is correspondence sent to your attorney by Assemblyman Sheldon Silver. In response to what appears to have been a request for records of Assemblyman Silver, he wrote that, pursuant to the Freedom of Information Law:

> "records are available only from the 'judiciary', the 'state legislature' or a governmental 'agency'. Since I am none of the above, the Freedom of Information Law does not require me to furnish any information personally."

You asked whether Mr. Silver is "immune from the Freedom of Information Law".

Since the materials do not describe the nature of the records sought, I cannot offer specific guidance. However, I would like to offer the following general comments.

First, as you may be aware, section 86 of the Freedom of Information Law (see attached) contains several definitions which are important in terms of determining the scope of the Law. In view of the definitions, records of an "agency" may be treated differently from records of the State Legislature. Further, the definitions indicate that the Freedom of Information Law has no application with respect to records of the "judiciary", the courts.

Second, rights of access to records of an "agency" are governed by the provisions of section 87(2). In brief, the cited provision states that all agency records are available, except those records or portions thereof that fall within one or more of the grounds for denial listed in paragraphs (a) through (i) of section 87(2). Rights of access to records of the State Legislature are governed by section 88(2), which lists certain categories of records that must be made available by the State Legislature. As such, the scope of rights of access often differs between records of an "agency" as opposed to those of the State Legislature.

Third, of possible significance is section 86(4), which defines "record" to include:

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

The language quoted above refers to "information kept, held, filed, produced or reproduced by with or for an agency or the state legislature..." Again, without knowledge of the information sought, I could not advise as to whether it would constitute a "record" of the State Legislature.

As such, while I do not believe that a state legislator is "immune" from the Freedom of Information Law, without greater knowledge of the nature of the information that you requested, the application of the Freedom of Information Law is, under the circumstances, conjectural.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Sheldon Silver, Member of the Assembly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4025

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

March 17, 1986

Mr. Edward Roche
[redacted]

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

Dear Mr. Roche:

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

Having reviewed the materials, it appears, in brief, that the issue involves rights of access to court records involving your son. Although I wish I could provide you with specific guidance, I do not believe that the Freedom of Information Law is applicable.

As a general matter, the Freedom of Information Law pertains 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."

As such, the Freedom of Information Law does not apply to the courts or court records.

Under the circumstances, it is suggested that you confer with an attorney. Further, there may be one or more state agencies that could provide direction or help. For instance, you might want to contact the following offices:

Office of Alcoholism and Substance Abuse
Nassau-Suffolk Regional Coordinator
P.O. Box 600
Brentwood, New York 11717
(516) 273-0888

and/or

Commission on the Quality of Care
for the Mentally Disabled
One Commerce Plaza
99 Washington Avenue
Albany, New York 12210

I regret that I cannot not 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 - 4026

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

March 18, 1986

Dr. R. Warren Flint
[redacted]

The staff of the Committee on 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. Flint:

As you are aware, I have received your letter of February 24 concerning requests for records of the Oswego City School District.

Your initial requests were dated February 5. Since you received no response within five business days as required by the Freedom of Information Law, section 89(3), you appealed on the ground that the failure to respond constituted constructive denials of access. Your requests were forwarded and answered by Mr. John Sullivan, School District Attorney.

You wrote, however, that the "main problem with the response letter...is that the information [you] requested was not directly addressed in all cases".

Having reviewed the materials attached to your letter, I offer the following comments.

First, I agree that there appears to have been no response to certain aspects of your requests. Part of the problem might involve the manner in which your requests were phrased. I point out 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 need not create or prepare a record in response to a request. For example, in one of your letters, you asked the Superintendent "what role he played" [redacted] in the processing of applications for the position of superintendent. That, in my view, is more a question than a request for a record. Further, the District would not by obliged to create a record in an effort to respond to your inquiry.

Second, some aspects of Mr. Sullivan's answer to your request provide information rather than records. For instance, Mr. Sullivan referred to a certificate issued by the State Education Department. From my perspective, rather than a reference to the certificate, a copy of the certificate itself should have been made available. Further, no reference is made in the response to your request concerning minutes of a particular meeting. If such minutes exist, I believe that they should be made available. You also asked for the dates of receipt of applications. Again, if such records exist, I believe that they would be available, perhaps after the deletion of identifying details pertaining to unsuccessful candidates for the position.

Third, you requested a summary of the superintendent's education, "including degrees, major discipline, and dates degrees were granted". That portion of the request was denied on the ground that disclosure would constitute "an unwarranted invasion of personal privacy". While the quoted language is subject to a variety of interpretations, for issues regarding privacy often require the making of subjective judgments, it is clear, based upon a series of judicial decisions, that public employees enjoy less privacy than others, for it has been determined that public employees are required to be more accountable than others. In brief, it has been held in a variety of contexts that records relevant to the performance of a public employee's duties would, if disclosed, result in a permissible rather than an unwarranted invasion of personal privacy [Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; and Capital Newspapers v. Burns, Sup. Ct., Albany Cty., May 5, 1984, Supplemental decision, June 9, 1984]. While I would agree that a portion of a record indicating the name of an institution that awarded a degree, as well as other items of highly personal information, could generally be withheld as an unwarranted invasion of personal privacy, the nature of a degree or major field of study would in my view likely be available, for they are relevant to the performance of one's official duties and may represent criteria that must have been met as conditions of employment.

Lastly, you raised a point concerning the timeliness of the District's response to your request. The Freedom of Information Law and the regulations promulgated by the Committee [21 NYCRR Part 1401] contain prescribed time limits for responses to requests. Specifically, for future reference, 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: Edward Garno
Stanley Jackson
John Sullivan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1263
FOIL-AO- 4027

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

March 18, 1986

Ms. Christine Egeland
[redacted]

[redacted] 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. Egeland:

I have received your letter of March 13, as well as the materials attached to it.

Your first question is whether the Board of Education of the St. Regis Falls Central School District should "make available to the public present at an open meeting, copies of a document they are going to discuss at that time". Technically, although an agency may make records available at meetings, and many agencies routinely do so, there is no general requirement of which I am aware that requires that records be made available at meetings. However, records may be requested prior to meetings in accordance with the Freedom of Information Law and an agency's regulations which must, according to section 87(1) of the Freedom of Information Law, be consistent with the Law and the general regulations promulgated by the Committee (see attached regulations of the Committee, 21 NYCRR Part 1401).

It is noted that the issue has arisen frequently. Specifically, often records used by members of public bodies are reviewed and discussed at open meetings but are not distributed to members of the public who attend. The result may be a discussion of facts and figures that are unknown to the public. Due to the expressions of frustration, the Committee has recommended to the Governor and the Legislature that the Open Meetings Law specify that, with certain restrictions, records discussed at an open meeting must be available to the public prior to or at the beginning of a meeting. Further, many have contended that a discussion of a record in public results in what might be viewed as a waiver of any basis for withholding that might otherwise be asserted.

One of the focal points of your correspondence is an "Intent to Participate Form" transmitted by your local BOCES for completion by District officials. As I understand it, the Form describes certain options available to the District and BOCES' estimate of the cost to the District. If "yes" is circled on the Form, the District essentially agrees to pay at least the estimated expense. As stated at the beginning of the Form used in 1985, a copy of which you enclosed:

> "The Bureau of School District Organization has approved or is in the process of approving the following 1985-86 BOCES Services for your school district. Please indicate your intention to participate in specific services BY CIRCLING YES OR NO. Your action on this notice represents a commitment by your district to participate in the services selected and is an authorization for the District Superintendent to secure personnel for any new service and retain present staff members for continuing services."

As indicated above, when "yes" is circled, that notation "represents a commitment" by the District to participate in certain services and to expend public monies.

In terms of access to the Form, 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 of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

From my perspective, although one of the grounds for denial is applicable, due to its structure, I believe that the completed form must be made available. 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.

Under the circumstances, since circling a "yes" represents a "commitment", I believe that it also represents a final agency determination accessible under section 87(2)(g)(iii).

You wrote that the Superintendent based his denial in part on the contention that the Form is a "working paper". While it may be a "working paper", that alone is not determinative of rights of access. It is reiterated that all records are available, except to the extent thal one or more grounds for denial may appropriately be asserted. Section 86(4) of the Law defines "record" to mean:

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

As such, "working papers" are "records" subject to rights of access.

It is also noted that it has been held that budget estimates and other kinds of statistical or factual data are accessible under section 87(2)(g)(i), even though they might not be reflective of "objective reality" [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 NY 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977); also Polansky v. Regan, 440 NYS 2d 356, 81 AD 2d 102 (1981)]. Therefore, even though figures prepared in the budget process may be considered as estimates or subject to change, it has been held that they constitute "statistical or factual tabulations" accessible under the Freedom of Information Law, whether or not action has been taken with respect to those figures.

With regard to the "preliminary budget", again, I believe that budget worksheets and similar records reflective of statistical or factual data are subject to rights of access as soon as they exist.

In addition, section 1716 of the Education Law, entitled "Estimated expenses for ensuing year" states that:

> "It shall be the duty of the board of education of each district to present at the annual meeting a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each. The amount for each purpose estimated necessary for payments to boards of cooperative educational services shall be shown in full, with no deduction of estimated state aid. This section shall not be construed to prevent the board from presenting such statement at a special meeting called for the purpose, nor from presenting a supplementary and amended statement or estimate at any time. Such statement shall be completed at least seven days before the annual or special meeting at which it is to be presented and copies thereof shall be prepared and made available, upon request, to taxpayers within the district during the period of seven days immediately preceding such meeting and at such meeting. The board shall also as a part of the notice required by section two thousand four of this chapter give notice that a copy of such statement may be obtained by any taxpayer in the district at each schoolhouse in the district in which school is maintained during certain designated hours on each day other than a Saturday, Sunday or holiday during the seven days immediately preceding such meeting."

Your remaining questions pertain to the Open Meetings Law.

It is emphasized at the outset that the term "meeting" has been expansively construed by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Your specific questions are whether two boards can meet privately "with or without the Consultant to discuss an Efficiency Study" and whether there are "any circumstances under which a Board of Education may discuss in executive session ANY aspects of an Efficiency Study" (emphasis yours).

Like the Freedom of Information Law, the Open Meetings Law is based upon a presumption of openness. A meeting of a public body must be conducted open to the public unless and until a topic arises that may appropriately be discussed during an executive session. I point out in passing that it has been held that meetings jointly held by two public bodies are subject to the Open Meetings Law, assuming that a quorum of at least one public body is present [Oneonta Star, Division of Ottaway Newspapers, Inc. v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)].

Since the nature of the efficiency study to which you referred is not described, I cannot provide specific guidance. However, it appears that only one of the grounds for entry into executive session is likely relevant, the so-called "personnel" exception for executive session.

It is noted that the provision in question differs in current Open Meetings Law from the provision that appeared in the Law as originally enacted.

The former section 105(1)(f) permitted a public body to enter into executive session to discuss:

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

Under the language quoted above, public bodies entered into executive sessions to consider issues that related tangentially or indirectly to personnel as a group. It was the Committee's contention, however, that section 105(1)(f) was largely intended to protect privacy, not to shield matters of policy under the guise of privacy.

In an effort to remedy the deficiency and clarify the Law, the Committee recommended amendments to section 105(1)(f) that were approved by the State Legislature and which became effective on October 1, 1979.

Section 105(1)(f) now permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

Consequently, the "personnel" exception may in my view be cited to enter into an executive session only when the matter pertains to a "particular" person in conjunction with one or more of the topics included in section 105(1)(f). I do not believe that the cited provision can serve to exclude the public when an issue concerns personnel generally.

Therefore, if the efficiency study involves issues relating to programs, policy, the functions of an office, or the duties accorded to positions, I do not believe that an executive session could properly be held. Contrarily, to the extent that a discussion focuses on the performance of a "particular person", an executive session would likely be validly held.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Clerk of the Board
Robert Whitman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4028

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

March 18, 1986

Mr. Lee H. Turner
Attorney & Counselor at Law
22 S. Main Street
Norwood, New York 13668

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

Dear Mr. Turner:

I have received your letter of February 24 in which you requested an advisory opinion.

According to your letter and the attachments, you requested several records related to telephone calls made through the community development office of the Town of Norfolk. At a Town Board meeting, the Supervisor indicated that several "unauthorized long distance calls" had been made from that number and that the Town had been reimbursed for the calls. You subsequently requested all records related to the unauthorized calls, the caller and the reimbursement made. Initially, your request was denied in part, access being granted only to copies of the telephone bills and to specific pages of the Town's General Fund books. Upon appeal, however, it appears that the Town Board has decided to make the remainder of the requested records available to you. Nonetheless, you want to know whether information concerning the caller and the amount reimbursed to the Town is available under the Freedom of Information Law. 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 of records can be withheld under one or more of the grounds listed in section 87(2)(a) through (i) of the Law. Relevant to the telephone records are subdivisions (b) and (g) of section 87(2).

First, section 87(2)(b) permits an agency to withhold records which, if disclosed, would constitute an unwarranted invasion of personal privacy. Court opinions have indicated that public employees enjoy a lesser degree of privacy with respect to their employment than do others. It is reasoned that public employees are to be held more accountable. Thus, records relevant to the performance of their official duties are generally available. Disclosure of such records results in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; and Capital Newspapers v. Burns, 490 NYS 2d 651 (1985)]. Conversely, records that are irrelevant to the performance of one's official duties may be withheld as disclosure may result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Ct., NYLJ, Nov. 22, 1977 and Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Records related to non-business long-distance calls made on a town telephone would be available for inspection to the extent that disclosure would not result in an unwarranted invasion of personal privacy. For example, if a record identifies the party called, that portion of the record may result in an unwarranted invasion of personal privacy. On the other hand, records indicating the town employee who placed the call would not, in my view, constitute an unwarranted invasion of his or her privacy. Moreover, I believe that records relating to the Town's request for reimbursement and the amount of the reimbursement should be made available. In my opinion, the public's right to know which employees make non-business calls and whether the Town is adequately reimbursed outweighs the employee's personal privacy in the matter. I point out, however, that I know of no court opinions that have considered this issue and that my opinion is based only on my interpretation of the Freedom of Information Law.

Second, section 87(2)(g) permits an agency to withhold records which are inter or intra-agency materials that do not include factual or statistical data, instructions to staff that affect the public or final agency policy or determinations. Since the records that you requested were prepared by and for town employees, the records may be characterized as intra-agency materials. The letters, memoranda and bills concerning the phone calls, however, likely consist of factual matter, i.e., the numbers dialed and the amount to be reimbursed. Such factual matter cannot be withheld as intra-agency material under section 87(2)(g).

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

Sincerely,

Cheryl A. Mugno
Assistant to the Executive Director

CAM:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 4029

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

March 19, 1986

Ms. Eileen Mosher
Opportunities for Broome, Inc.
Box 1492
Binghamton, New York 13902

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

Dear Ms. Mosher:

I have received your letter of February 25 in which you requested assistance concerning the use of the Freedom of Information Law.

According to your letter, on February 19, you submitted four requests to the Binghamton Code Enforcement Bureau. As of the date of your letter to this office, you had received no responses to the requests. You also inferred that officials of the Code Enforcement Bureau may have changed their policy on disclosure "with regard to [you]." Further, your telephone calls made to follow up on your requests have not been answered.

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401), which govern the procedural aspects of the Law contain prescribed time limits for responding 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 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)].

Second, as a general matter, who you are, or what your purpose in requesting records might be, should be irrelevant to your rights or treatment relative to the Freedom of Information Law. In short, it has been held that records available under the Law should be made equally available to any person, without regard to status or interest [Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; see also M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

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 section 87(2)(a) through (i) of the Law.

The first item that you requested is a memorandum issued by the City Attorney to the Code Enforcement Bureau concerning the Freedom of Information Law. Of likely 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. Conversely, those aspects of inter-agency or intra-agency materials reflective of opinion, advice or recommendation, for example, could be withheld.

Under the circumstances, the memo in question could be characterized as intra-agency material. If it is advisory, it could be withheld. If it indicates City policy or instructions to staff that affect the public, I believe that it would be available.

Similar considerations would be present with respect to other aspects of your requests, such as those involving inter-departmental correspondence and memoranda. Inspection reports might also be considered intra-agency materials; however, they would likely consist of statistical or factual information available under section 87(2)(g)(i).

Violation notices, orders, hearing determinations and similar documentation would in my view likely be available, for no ground for denial would be applicable.

In the case of tenant complaints, it is possible that identifying details regarding tenants could be deleted on the ground that disclosure of those portions of the complaints would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, sections 87(2)(b) and 89(2)(b)].

Lastly, I point out that section 89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

As such, if records are available under a different provision of law, nothing in the Freedom of Information Law could be asserted to withhold those records. Of possible relevance is section 307 of the Multiple Residence Law states that:

> "All records of the department shall be public. Upon request the department shall be required to make a search and issue a certificate of any of its records, including violations, and shall have the power to charge and collect reasonable fees for searches and certificates."

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: Keith Heron, Code Enforcement Bureau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4030

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

March 19, 1986

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 February 26, as well as the documentation attached to it.

According to your letter, the rules of the Fairview Fire District indicate that the District maintains regular business hours. Nevertheless, you wrote that you have been required to make an appointment to inspect its records.

In this regard, I offer the following comments.

First, as you may be aware, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law. The Committee has done so by means of 21 NYCRR Part 1401. In turn, section 87(1) requires the governing body of a public corporation (such as the board of a fire district) to promulgate its own rules and regulations consistent with the Law and the Committee's regulations.

Second, with respect to the issue, section 1401.4 of the Committee's regulations provide that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.

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

As such, if an agency maintains regular business hours, there should be no need to make an appointment. It is noted, however, that an agency is not required to respond instantly to a request. In brief, the Law [section 89(3)] and the regulations [section 1401.5(b)] require that an agency respond to a request within five business days of its receipt.

Second, having reviewed the District's rules, I believe that they are incomplete. Rather than detailing the areas of deficiency, copies of this opinion, the Committee's regulations, and model regulations designed to assist agencies in adopting appropriate rules will be sent to the District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert D. Mauro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4036

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

March 20, 1986

Mr. John L. Williams
#79-A-2348
Mt. McGregor Correctional Facility
P.O. Box 2071
Wilton, NY 12866

The staff of the Committee on Open 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 February 27 in which you seek assistance relative to the Freedom of Information Law.

According to your letter, on February 7, you "filed a 'Freedom of Information Law Request' by Affidavit of Service to the New York State Department of Law...". As of the date of your letter to this office, you had not received any response to the request.

In this regard, I offer the following comments.

First, I point out that a request should generally be directed to an agency "records access officer", a person designated to coordinate an agency's response to requests made under the Freedom of Information Law (see 21 NYCRR 1401.2). For your information, the records access officer at the Department of Law is Mr. Albert Singer.

Second, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401 et seq.) prescribe 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 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- 1264
FOIL-AO- 4033

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

March 20, 1986

Mr. Isidore Gerber
[redacted]

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

Dear Mr. Gerber:

I have recently received a variety of letters from you concerning the Freedom of Information and Open Meetings Laws. Please note that two letters dated February 5 reached this office on March 10.

One of your letters of February 5 concerns a motion for entry into an executive session by the Board of Trustees of the Village of Liberty on which the basis cited was apparently "litigation", without more. As you are aware, section 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". However, in the case of an executive session held to discuss litigation that has been commenced, it has been held that a motion to go into executive session must identify the title of the litigation [Daily Gazette v. Town Board, Town of Cobleskill, 444 NYS 2d (1981)]. It has also been held that the purpose of section 105(1)(d) is to enable a public body to discuss its "litigation strategy" in private, so as not to bare its strategy to its adversary [see Weatherwax v. Town of Stony Point, 97 AD 2d 840 (1983)]. Therefore, even though an issue might result in a lawsuit, that alone would not necessarily qualify for discussion in an executive session.

Another letter dealt with closed meetings held to review an audit performed by the Department of Audit and Control. It appears that representatives of the Department and the Village met. However, it also appears that a quorum of the Board of Trustees was not present. In short, the Open Meetings Law applies to meetings of "public bodies". From my perspective, a

board does not become or function as a public body unless and until a quorum, a majority of its total membership, is present. As such, if no quorum was present, the Open Meetings Law would not in my view have applied. Conversely, if a majority of the Board met to review the audit, the Open Meetings Law would have applied and notice of such a meeting should have been given.

Another of your letters pertains to difficulties that you faced relative to a board of elections and the placement of your name on the ballot. The issues that you raised fall outside the jurisdiction of this office, for they do not involve either the Freedom of Information Law or the Open Meetings Law.

The remaining letter pertains to your requests for information relating to HUD grants. Without additional knowledge regarding the nature of the grants and the conditions under which grants are awarded, I cannot provide specific direction. However, I offer the following general remarks.

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, the Freedom of Information Law enables an agency to withhold records or portions of records the disclosure of which would result in an unwarranted invasion of personal privacy. While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal details of individuals' lives. As such, with respect to grant programs, often the question involves the extent to which disclosure would constitute an unwarranted as opposed to a permissible invasion of personal privacy.

Third, from my perspective, a disclosure that permits the public determine the general income level of a participant in a grant program would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrased by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., section 697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy.

Therefore, if, for example, if grants are made to "low income" persons, it is likely that disclosure of portions of records indicating their identities might justifiably be withheld. On the other hand, if a grant is not conditioned on an income qualification, but rather perhaps upon the location of property, disclosure of the identities of those recipients of grants would likely be proper.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states, as a general rule, that an agency need not create or prepare a record in response to a request. Consequently, if a request involves "information" or totals, for instance, that do not exist in the form requested, the Freedom of Information Law does not require an agency to create a new record on behalf of an applicant.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey A. Carmen, Village Manager
Bernice Nicholson, Clerk Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1264
FOIL-AO- 4033

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

March 20, 1986

Mr. Isidore Gerber
[redacted]

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Dear Mr. Gerber:

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board does not become or function as a public body unless and until a quorum, a majority of its total membership, is present. As such, if no quorum was present, the Open Meetings Law would not in my view have applied. Conversely, if a majority of the Board met to review the audit, the Open Meetings Law would have applied and notice of such a meeting should have been given.

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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, the Freedom of Information Law enables an agency to withhold records or portions of records the disclosure of which would result in an unwarranted invasion of personal privacy. While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal details of individuals' lives. As such, with respect to grant programs, often the question involves the extent to which disclosure would constitute an unwarranted as opposed to a permissible invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey A. Carmen, Village Manager
Bernice Nicholson, Clerk Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4034

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

March 24, 1986

Mr. Robert Moates
75-A-1544
Attica Correctional Facility
Box 149
Attica, New York 14011

Dear Mr. Moates:

I have received your recent letter, which reached this office on March 21. You have requested from this office various records.

It is emphasized at the outset that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. Consequently, this office does not maintain records generally, such as those in which you are interested, nor does the Committee have the authority to compel an agency to grant or deny access to records. In short, the Committee cannot provide the records that you requested, for this office does not possess them.

As you are aware, the Freedom of Information Law is applicable 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 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 include:

> "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.

Lastly, insofar as the records in which you are interested are maintained by an agency or agencies, requests should be directed to those agencies individually. Further, a request made under the Freedom of Information Law may be addressed to the "records access officer" in which the applicant "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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4035

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

March 25, 1986

Mr. Donald Strickland
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. Strickland:

I have received your letter of February 28 in which you raised questions relative to the Freedom of Information Law.

You wrote that, during your trial, you requested from the District Attorney records indicating pending charges against prosecution witnesses. The District Attorney apparently indicated that, to his knowledge, there were no such records. You added that you "know the contrary" and that your private investigator unsuccessfully requested those records from a local police department and a sheriff's office. You have asked how you might obtain such records.

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

First, it is noted that the records of an office of a district attorney are subject to the Freedom of Information Law [see e.g., 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., June 24, 1982].

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

Without additional information relative to the facts and circumstances, I cannot advise as to whether a denial was appropriate. However, when an agency denies records sought under the Freedom of Information Law, an applicant may appeal the 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 apply fully explain in writing to the person requesting the record the reasons for further denial or provide access to the record sought."

Third, the records in question might also be maintained by a court. Although the Freedom of Information Law does not apply to the courts or court records, often such records are available from the clerk of a court. As such, it is possible that you might be able to obtain the records in question by seeking them from the court clerk in which a proceeding is or has been conducted.

Lastly, you asked whether you may obtain "files" regarding police officers. Here I point out that section 50-a of the Civil Rights Law states in subdivision (1) that:

> "All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law and such personnel records under the control of a sheriff's department or a department of correction of individuals employed as correction officers shall be

> considered confidential and not subject to inspection or review without the express written consent of such police officer or correction officer except as may be mandated by lawful court order."

Although it was recently held that certain personnel records pertaining to police officers are not confidential, despite the language quoted above, it was also found that:

> "The statute does not make all personnel records of police officers exempt from disclosure. The statute was intended to apply to situations where a party to an underlying criminal or civil action is seeking documents in a police officer's personnel file, and was apparently designed to prevent 'fishing expeditions' to find material used in cross-examinations (see Matter of Gannett Co. v. James, 108 Misc. 2d 862, 438 N.Y.S.2d 901, affd. 86 A.D.2d 744, 447 N.Y.S.2d 781). If, upon in camera inspection, the Trial Judge finds that a document sought is 'relevant and material in the action before him', he must make the relevant portions of the document available (Civil Rights Law section 50-a[3])" [Capital Newspapers v. Burns, 490 NYS 2d 651, 654, AD 3 Dept. 1985].

As such, rights of access to police officers' personnel records appear, under the circumstances, to be 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4036

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

March 25, 1986

Ms. Nancy McCann
Westchester Rockland Newspapers
1825 Commerce Street
Yorktown Heights, NY 10598

The staff of the Committee on 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. McCann:

As you are aware, I have received your letter of March 3, in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry concerns a request for a record indicating disciplinary action taken with respect to a particular teacher in the Yorktown School District. According to your letter, the Superintendent denied your request on the ground that:

> "Any document in the district's files is an intra-agency document which was not either a determination of the Board of Education or of me as chief executive officer of the Board of Education."

You added that:

> "During a telephone interview March 4 Greene said that after consulting with him and the deputy superintendent, middle school Principal Manuel Kurie wrote a letter outlining the 'appropriate action' which Kurie took in response to the reported assault. The school district has taken no further action in the matter and has no plans to do anything in the future, said Greene."

It is your view that Mr. Kurie's letter is available. Based upon the facts that you provided, I agree with your contention in conjunction with the ensuing analysis.

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

Second, with respect to records involving disciplinary action taken against a public employee, I believe that two paragraphs of section 87(2) are relevant. Section 87(2)(b) permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In addition, section 87(2)(g) allows an agency to withhold certain inter-agency or intra-agency materials under certain circumstances.

With regard to privacy, the courts have held 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 respect to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980]. Conversely, it has been held that records concerning public employees that are not relevant to the performance of their official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau NYLJ, Nov. 22, 1977; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984].

Based upon the judicial determinations cited above, I believe that if the record sought is reflective of final disciplinary action taken against a public employee, it is available, for, as stated in Geneva Printing and Donald C. Hadley v. Village of Lyons (Sup. Ct., Wayne Cty., March 25, 1981), such a record would "deal with a matter of public concern, that being a public employee's accountability for misconduct". On the other hand, if allegations of misconduct did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld for disclosure would result in an unwarranted invasion of personal privacy.

With regard to the Superintendent's stated basis for denial, section 87(2)(g) provides that an agency may withhold inter-agency or intra-agency materials which are not:

> "are inter-agency or intra-agency materials which are not:
>
> 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.

It appears that the record in which you are interested could be characterized as "intra-agency" material; however, it also appears to consist of a "final determination" which would be available under the Law.

Lastly, if the record sought identifies a particular student or students, I believe that such identifying details are likely confidential pursuant to the Family Educational Rights and Privacy Act (20 USC 1232g) and should, therefore, be deleted. In brief, that federal Act prohibits a school district from disclosing "education records" to the extent that disclosure would identify a particular student, unless the parents of the student consent to disclosure. In sum, if a student is identified in the record sought, I believe that the identifying details concerning the student should be deleted, while the remainder of the record indicating the nature of disciplinary action taken against the teacher should be available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Richard Greene, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4037

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

March 26, 1986

Ms. Suzanne Eastman
[redacted]

The staff of the Committee on 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. Eastman:

I have received your letter of February 15 in which you requested an advisory opinion.

According to your letter and the attached correspondence, you are the president of a parents group in the Dryden Central School District. You requested a list of parents and addresses or, in the alternative, a list of addresses of school children residing in the District. Your request was initially denied as an "unwarranted invasion of personal privacy" and the denial was subsequently upheld upon the advice of the school attorney. You would like to know whether your parents group is entitled to a copy of the list. 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 to the public unless they can be withheld under one or more of the grounds listed in section 87(2)(a)-(i) of the Law. Subdivisions (a) and (b) of section 87(2) are relevant to your inquiry.

Section 87(2)(a) permits an agency to withhold records which are specifically exempted from disclosure by a state or federal statute. Rights of access to education records or records which tend to identify students are governed by the federal Family Educational Rights and Privacy Act, 20 U.S.C. 1232(g), commonly referred to as the "Buckley Amendment". The Buckley Amendment requires that student records be kept confidential unless a parent or "eligible student", age 18 or older, waives his or her right to confidentiality.

Access to "directory information" is an exception to the general requirement of confidentiality. The regulations promulgated under the Buckley Amendment by the U.S. Department of Education permit school districts to disclose directory information, which may include a student's name, address, telephone number, birth date and school activities. Prior to disclosing directory information, however, notice must be given to parents or to eligible students of the school district's policy of releasing directory information so that they may request that directory information not be disclosed. Directory information may then be released by a school district unless it receives notice from a parent or eligible student requesting confidentiality.

Attached to your letter was page two of a "District Bulletin" published by the Dryden Central School District. The Bulletin included a notice regarding access to student information. The notice provided that:

> "'Directory Information' will not be treated as confidential information and such information will be made available for publication through school district news releases. Parents or guardians of Dryden students and students 18 years of age and older who desire such 'Directory Information' not be released for publication shall notify the appropriate principal in writing by the third Monday in September."

In my view, the District's policy with respect to access to directory information is as broad as the U.S. Department of Education regulations permit. Thus, I do not believe that the Buckley Amendment can be cited as a federal statute which specifically prohibits disclosure of student's names and addresses.

Second, the Freedom of Information Law permits, although it does not require, an agency to withhold records which would constitute an unwarranted invasion of personal privacy if disclosed. Section 89(2)(b)(iii) provides that an unwarranted invasion includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund raising purposes." In my view, this provision was intended to limit the use of agency records solely for the purpose of commercial solicitation or gain. Significantly, it provides an agency the only opportunity under the Freedom of Information Law to inquire about the purposes for which a request is made. With that additional information, an agency can determine whether disclosure of a list of names and addresses would constitute an unwarranted invasion of personal privacy.

According to your correspondence, you explained to the District the purposes for which your group requested the list of addresses. You intend to "disseminate information to parents about [y]our group for membership purposes" and "are committed to increasing parental involvement in this district". In my opinion, your intentions are not akin to the commercial or fund raising purposes cited at section 89(2)(b)(iii). To the contrary, the use of a list of names and addresses to inform individuals of a group concerned with their children's education and to encourage parental participation is, in my view, more important and acceptable than the use of the same list for purely commercial purposes or purposes unrelated to the role of the school district.

I point out, however, that the examples provided in section 89(2)(b) are not exclusive and that other types of disclosures may result in unwarranted invasions of personal privacy. With respect to personal privacy, reasonable people have varying opinions as to what constitutes an "unwarranted invasion". In this case, for example, some of the parents may believe that disclosure of their addresses to a parents group which will solicit their support is an unwarranted invasion of personal privacy. Others, however, may welcome disclosure under these circumstances. Moreover, the District has put parents and eligible students on notice that it will be disclosing directory information regarding students unless those parents or eligible students object. In my view, a failure to notify the District that directory information should be withheld may be an indication that a parent or student believes that disclosure would not constitute an unwarranted invasion of personal privacy.

In short, I believe that the District should make a list of students and/or parents names and addresses available to your parents group in accordance with their directory information policy. In my view, disclosure would be permissible under both the Freedom of Information Law and 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,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:jm

cc: John M. Wheeler, Ed.D., Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4038

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

March 26, 1986

Ms. Patricia Foley
[redacted]

The staff of the Committee on 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. Foley:

I have received your letter of March 3 in which you raised a question concerning the application of the Freedom of Information Law.

Specifically, you wrote that you are interested in obtaining "insurance claims a company would file in the event of theft, money or property".

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 Law to mean:

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

In view of the foregoing, as a general matter, the Freedom of Information Law pertains to records of units of state and local government; it would not be applicable to records of a private corporation, such as an insurance company.

Second, I have contacted the State Insurance Department on your behalf, and I learned that the Department generally does not maintain the type of record that you are seeking.

Third, if a theft is followed by a claim, it is likely that a report regarding the event would be prepared and kept by a police department. Therefore, it is suggested that a request be directed to the police department that would have prepared such a report.

Under the Freedom of Information Law, an agency can require that a request be made in writing. Further, the Law states that an applicant must "reasonably describe" the record sought. Therefore, when making a request, you should include sufficient detail to enable agency officials to locate the record, such as names, dates, descriptions of events, addresses, and the like.

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.

In addition, if a request is denied, the reasons for the denial must be stated in writing, and you must be informed of the right to appeal.

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4038

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

March 27, 1986

Mr. Robert J. Koslow
South New Berlin Central School
Bus Drivers' Association
P.O. Box 47
South New Berlin, NY 13843

The staff of the Committee 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. Koslow:

I have received your letter of March 3 concerning a request directed to the South New Berlin Central School District.

According to your letter and the correspondence attached to it, an incident occurred on December 16 involving a school bus owned by the South New Berlin Central School District. In response to your request for an accident report pertaining to the incident, you were informed by the Superintendent that there is no such record.

You have asked that this office conduct an investigation, prosecute, direct the School District to "cease and desist" its improper practices and to "award punitive damages". As I informed you in previous correspondence, the Committee does not have the authority to engage in the functions that you described.

Nevertheless, in an effort to learn more of the situation, I have contacted the School District on your behalf. Having spoken with Mr. Joseph Busch, Assistant Superintendent, I was informed that he is familiar with your request as well as the incident, and that no motor vehicle accident report or other record relative to the incident was prepared or submitted. In this regard, I point out that the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law states that, as a general matter, an agency is not required to create or prepare a new record in response to a request. In short, if no record is maintained, none can be made available. Under such a circumstance, the Freedom of Information Law would not apparently be applicable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Busch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4040

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

March 28, 1986

Mr. Ed Sperling
The Times Herald Record
40 Mulberry Street
Middletown, NY 10940

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

Dear Mr. Sperling:

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

According to your letter and the correspondence attached to it, the Times Herald Record requested from Orange County "a list of hotels and motels and the amount of money spent on each" during particular periods of time in relation to housing the County's needy. It is your contention "that this information does not contain the permanent addresses of people. By its very nature, emergency housing is not a permanent residence and there is no indication that someone residing at one of these hotels or motels is a client of the Orange County department of social services." Nevertheless, the County Attorney denied your request on the basis of section 136 of the Social Services Law. You pointed out that other counties readily provided the same information, and you included copies of several responses from other counties containing the information sought.

In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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.

Of possible significance is the first ground for denial, section 87(2)(a), which pertains to the capacity to withhold records that are "specifically exempted from disclosure by state or federal statute". One such statute is section 136 of the Social Services Law. The cited provision states in relevant part that:

> "1. The names or addresses of persons applying for or receiving public assistance and care shall not be included in any published report or printed in any newspaper or reported at any public meeting except meetings of the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town; nor shall such names and addresses and the amount received by or expended for such persons be disclosed except to the commissioner of social services or his authorized representative, such county, city or town board or body or its authorized representative, any other body or official required to have such information properly to discharge its or his duties, or, by authority of such county, city or town appropriating board or body or of the social services official of the county, city or town, to a person or agency considered entitled to such information."

The question, therefore, is whether the information sought would include what might be characterized as an "address".

From my perspective, if Orange County maintains records in a manner analogous to the other counties that supplied you with information, section 136 of the Social Services Law would not be applicable and the information sought would be available. In my opinion, the purpose of section 136 is to require the confidentiality of records that would identify an applicant for or a recipient of public assistance in order that the privacy of such individuals is ensured. It is noted that regulations promulgated by the State Department of Social Services involving the safeguarding of information maintained by the Department, local social services districts and other authorized agencies refer to "Records containing individually identifiable information" [21

NYCRR 357.5(a)]. The information supplied by other counties refers to hotel or motel names and locations and a variety of figures, such as a total amount paid to hotels or motels during a given fiscal year, a daily room rate, or an average daily cost, for example. On the basis of that information, I believe that it would be all but impossible to assume that a person staying in a hotel or motel is a recipient of public assistance. For instance, in the case of the list provided by Sullivan County, the highest total payment for a full year, either 1984 or 1985, to a hotel or motel was slightly over $9,000; for most of the other hotels or motels, the figure for either calendar year was significantly lower. Under those circumstances, I would conjecture that the amounts paid represent a small fraction of the total yearly receipts of a hotel or motel. If that is so, the information would not in my opinion be "identifiable" in any way to a recipient of public assistance. Further, for the same reason, the name of a hotel or motel could not be characterized as an "address" that would identify a recipient of public assistance.

In sum, if Orange County maintains records analogous to those involving the same subject matter that have been made available by other counties, I believe that the records are accessible under the Freedom of Information Law, for neither the confidentiality restriction imposed by section 136 of the Social Services Law, nor section 87(2)(a) of the Freedom of Information Law, would be applicable bases for a 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: James G. Sweeney, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4041

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

March 31, 1986

Mr. Junious Gray
#80-A-1640
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. Gray:

I have received your letters of February 20 and February 21, which reached this office respectively on March 12 and March 10. Please note that the offices of the Committee are located at the Department of State as indicated above; the Committee is not a part of the Division of Criminal Justice Services.

Having reviewed your correspondence, you alluded to a request for criminal history records regarding named individuals. The request was sent to the New York City Police Department. Ms. Susan Wagner responded, stating that the records "are not records of the New York City Police Department", but rather of the New York State Division of Criminal Justice Services. As such, she provided the address of that agency by means of a letter dated February 13, a copy of which was sent to me as required by section 89(4)(a) of the Freedom of Information Law. You have asked for assistance in obtaining the records in question.

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. Therefore, this office neither maintains the records you seek, nor does it have the authority to compel an agency to grant or deny access to records.

Second, as Ms. Wagner suggested, since the Division of Criminal Justice Services is the repository of criminal history records, a request should be sent to that agency. Specifically, such a request may be made to:

Division of Criminal Justice Services
Identification and Data Systems
Stuyvesant Plaza
Executive Park Tower
Albany, NY 12203

It is noted that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, you should attempt to include sufficient detail to enable agency officials to locate the records.

Lastly, under the circumstances, it is suggested that you confer with an attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4042

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

March 31, 1986

Mr. Thaddeus A. Jarzabek
[redacted]

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

Dear Mr. Jarzabek:

I have received your letter of March 7 in which you requested assistance concerning the use of the Freedom of Information Law.

According to your letter and the materials attached to it, you underwent certain medical tests at the Erie County Medical Center in April of 1985. You have unsuccessfully requested the names and residence addresses of two employees who were involved in performing the tests.

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

First, as you may be aware, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations pertaining to the procedural implementation of the Freedom of Information Law (see attached, Committee regulations, 21 NYCRR Part 1401). In turn, section 87(1) of the Law requires the head or governing body of a public corporation (such as Erie County) to adopt regulations in conformity with the Law and consistent with the regulations promulgated by the Committee.

One aspect of the 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 for records made under the Freedom of Information Law (see regulations, section 1401.2).

In this regard, I have no knowledge as to whether Erie County's regulations adopted under the Freedom of Information Law include the designation of a records access officer concerning the records maintained at the Erie County Medical Center. It is suggested, therefore, that you contact the office of the County Executive or the County Attorney to determine precisely the identity and address of the records access officer having the duty to respond.

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

From my perspective, a record indicating medical test results, and the names of the employees who performed the tests, should be available to you, the subject of the records. While such a record might be characterized as "intra-agency" material [see attached, Freedom of Information Law, section 87(2)(g)], statistical or factual information contained within intra-agency materials are available [see section 87(2)(g)(i)], unless a different ground for denial is applicable.

Third, a different statute that is often employed to obtain medical records is section 17 of the Public Health Law (see attached). That statute does not grant a patient direct rights of access to medical records pertaining to him or her; however, a competent patient may designate a physician who may request and obtain medical records on behalf of the patient from another physician or hospital. Therefore, a treating physician might request and obtain medical records on your behalf from the Erie County Medical Center.

Fourth, an agency is not required to disclose the home addresses of its employees. I recognize that you cited a decision in which a court granted access to a list of retired public employees and their home addresses [NYS Teachers Pension Associates, Inc. v. Teachers' Retirement System of the City of New York, 71 AD 2d 250 (1979)]. Nevertheless, following that decision, section 89(7) was added to the Freedom of Information Law. That provision states that nothing in the Freedom of Information Law requires the disclosure of the home address of a present or former public employee.

Lastly, the Freedom of Information Law and the Committee's regulations 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

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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4043

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

March 31, 1986

Mr. Robert B. Hacker
#82-C-153
135 State Street
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. Hacker:

I have received your letter of March 3 in which you asked how you might obtain information relating to a criminal proceeding in which you are involved.

In brief, it is your view that the testimony of a witness given during pretrial proceedings differed from that given during the trial. You also indicated that you believe that the testimony was changed because a witness had "been to counselors and through therapy" and that"she under went hypnosis". You would like to obtain the names of such counselors.

In this regard, without additional knowledge of the facts, I cannot provide guidance as to whether the information sought exists, or whether it is accessible or deniable. Nevertheless, I offer the following general comments.

First it is possible that the records sought are maintained by a district attorney or other law enforcement agencies. If that is so, a request may be made under the Freedom of Information Law. It is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, section 89(3) of the Freedom of Information Law

requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, you should include sufficient detail to enable agency officials to locate the records in which you are interested.

Third, under the circumstances, it is suggested that you confer with an attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4044

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

March 31, 1986

Mr. John P. Garrick
83-A-7375
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. Garrick:

I have received your letter of March 7 in which you requested assistance concerning a request made under the Freedom of Information Law.

In brief, according to your letter, you were charged with assaulting another inmate, but you were "cleared...by the victim himself". Nevertheless, you were charged again and found "guilty" based upon information provided by "confidential sources". You unsuccessfully requested a copy of the statement "excluding the alleged informer's name".

Since receipt of your letter, I received a copy of a determination rendered on appeal in which the initial denial was upheld. It was determined that:

> "Release of the requested record would constitute an unwarranted invasion of privacy, might reveal a confidential informant, and would endanger the life or safety of persons. Accordingly, the decision of Mr. Sarli is affirmed."

Without greater knowledge of the facts and circumstances relating to the incident, I cannot provide specific guidance.

As you may be aware, 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.

Further, the introductory language of section 87(2) in my view indicated that the Legislature envisioned situations in which a single record might be both accessible or deniable in part. Often deletion of a name or other identifying details is sufficient to ensure that disclosure of the remainder of the record would not result in an unwarranted invasion of personal privacy or endanger one's life or safety. If deletion of identifying details would result in the elimination of the potentially harmful effects of disclosure cited in the determination, it would appear that the remainder of the record should be made available. However, in many situations, the deletion of a name or other identifying details would not alone serve to preclude the recipient of a record from knowing the identity of the individual whose name has been deleted, particularly when facts about an incident are known to an applicant for a record.

In sum, as stated earlier, with greater knowledge of the facts, I could not conjecture as to the propriety of the denial.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4045

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

March 31, 1986

Mr. John Giordano
[redacted]

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

Dear Mr. Giordano:

I have received your letter of March 11 in which you asked that I confirm the substance of our conversation of March 7.

Your inquiry concerns a denial of your request for an audit of the Village of Lynbrook performed by the State Department of Audit and Control. You wrote that the "Report of Examination" was filed with the Village on February 18. Specifically, you have requested an advisory opinion:

> "regarding the Villages refusal to make available a copy to [you] on March 6, 1986 (section 35.1 General Municipal Law N.Y. State), the lack of public notice (section 35.2a-c GML), and deficient presentation of the Report at a Board of Trustees meeting (section 35.3 GML)."

In this regard, subdivision (1) of section 35 of the General Municipal Law states that:

> "1. A report of such examination shall be made and shall be filed in the office of the state comptroller and in the office of the clerk of the municipal corporation, district, agency or activity, or with the secretary if there is no

> clerk. An additional copy thereof shall be filed with the chief fiscal officer, except that in the case of a school district, such additional copy shall be filed in the office of the chairman of the board of trustees, the president of the board of education or the sole trustee, as the case may be. When so filed, each such report and copy thereof shall be a public record open to inspection by any interested person."

As such, when the report is filed with the Village, it becomes a public record.

With respect to the Freedom of Information Law, section 89(6) of the Law provides that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

Therefore, if some provision of law other than the Freedom of Information Law grants rights of access, nothing in the Freedom of Information Law can be cited to deny access to records otherwise available. In short, it appears that the refusal to enable you to inspect or copy the report when it was filed was contrary to law.

The other provisions of section 35 of the General Municipal Law pertain to issues that fall outside the advisory jurisdiction of this office.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Lynbrook
Marie Salem, Office of the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4046

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

March 31, 1986

Mr. Maximiliano Amparo
84-A-7615
135 State Street
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 Mr. Amparo:

I have received your letter of February 28.

You asked how you may obtain copies of your grand jury minutes and statements of co-defendants under the Freedom of Information Law.

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 or proprietary function for the state of any one or more municipalities thereof, except the judiciary of 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, assuming that the records in question are maintained by a court, the Freedom of Information Law would not be applicable.

Second, I believe that rights of access to such records are generally governed not by the Freedom of Information Law, but rather by the Criminal Procedure Law.

It is suggested that you discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4047

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

March 31, 1986

Mr. Robert L. Shapiro
83-A-6609
Pouch #1
Woodbourne, NY 12788

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

Dear Mr. Shapiro:

I have received your letter of March 3 in which you raised questions regarding rights of access to records under the Freedom of Information Law.

Specifically, you asked whether the following records are accessible:

> "1. Evaluations and reports prepared by prison service unit counselors.
>
> 2. Unusual incident reports concerning myself.
>
> 3. Pre-parole evaluation reports and histories of previous parole supervision.
>
> 4. Good behavior allowance reports."

In this regard, it is emphasized that I am generally unfamiliar with the specific contents or the nature of the information contained within the reports that are the subject of your inquiry. Further, due to the language of the Freedom of Information Law, depending upon the contents of a report, such a record might be accessible or deniable, in whole or in part. Since I am unable to provide specific guidance, I offer the following general comments.

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

Second, among the grounds for denial, section 87(2)(g) may be of particular significance. The cited provision states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Conversely, to the extent that such materials are reflective of opinions, recommendations, advice and the like, I believe that they could be denied.

The reports that you identified could likely be characterized as "intra-agency" materials. Further, to the extent that they contain evaluative material in the nature of an opinion, they could likely be withheld.

Other grounds for denial might also be relevant, depending upon the specific content of a report. For instance, section 87(2)(b) permits an agency to deny records or portions of records which if disclosed would constitute "an unwarranted invasion of personal privacy". If, for instance, an unusual incident report identifies others, it is possible that disclosure of their identity would result in an unwarranted invasion of personal privacy.

In short, no general rule can be offered that would indicate that a particular report would, in every instance, be accessible or deniable.

Lastly, for your information, the regulations of the Department of Correctional Services indicate that a request for records maintained at a facility may be directed to the facility superintendent. Further, section 89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Therefore, when making a request, the request should 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4048

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

April 1, 1986

Mr. Harold Mondshein
[redacted]

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

Dear Mr. Mondshein:

I have received your letter of March 2 addressed to the attention of Ms. Cheryl Mugno.

In brief, in response to a request directed to the Office of Collective Bargaining, you were given some of the information requested, but you were also informed that other records sought do not exist.

As Ms. Mugno advised by means of a letter to you on January 9, the Freedom of Information Law generally pertains to existing records and section 89(3) of the Law states that, unless otherwise indicated, an agency is not required to create or prepare a record in response to a request. The only suggestion that I can offer is that you seek a certification to the effect that records are not maintained by the agency or that they could not be found following a diligent search. Specifically, section 89(3) states that, on request, the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

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: Malcolm D. MacDonald, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4049

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

April 1, 1986

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 March 10 and the correspondence attached to it.

Specifically, you received a letter dated March 7 from James C. Gelormini, First Assistant Corporation Counsel of the City of Syracuse, in which he wrote that "The City is in the process of ascertaining the existence of various invoices" that you apparently requested. Mr. Gelormini wrote that "we [the City] would require a $15.00 deposit before formally furnishing the documents" and added: "If you don't forward the fee, we will assume that you do not want your request filled". You also wrote that "last week he wanted an advance deposit of $150.00 on another request".

In this regard, I offer the following comments.

First, it is unclear on the basis of your correspondence whether you requested to inspect the records, or whether you requested copies. If the request involves the inspection of records, I do not believe that any fee can be imposed [see Freedom of Information Law, section 87(1)(b)(iii), also regulations of Committee on Open Government, 21 NYCRR 1401.8].

Second, in the event that requested records are accessible, section 89(3) of the Freedom of Information Law states in relevant part that:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

Further, section 87(1)(b)(iii) permits an agency to assess a fee of up to twenty-five cents per photocopy, unless a different statute permits the assessment of a higher fee.

In view of the foregoing, while I believe that an agency may require payment before it provides photocopies of records, I believe that such a fee can be imposed after the requested records have been located and a specific or perhaps approximate fee for photocopying can be determined. Further, I am unaware of any aspect of the Freedom of Information law or the regulations promulgated by the Committee that would authorize an agency to require that a "deposit" be made as a condition precedent to searching for requested records or ascertaining the existence of the records sought.

The only instance in which I can envision that a deposit or advance payment might be justifiable would involve a case in which an applicant had in the past failed to pay the requisite fees for photocopies made by an agency. In such a case, perhaps an agency could require the payment of unpaid fees for photocopies of records prior to the preparation of documents sought by means of a new request.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: James L. Gelormini

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4050

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

April 2, 1986

Mr. Andrew Santi
Alto Auto Body Repair
546 Third Avenue
Brooklyn, NY 11215

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

Dear Mr. Santi:

I have received your letters of March 10 and March 22 concerning requests directed to the New York City Department of Environmental Protection and the Environmental Control Board.

It is your view that those agencies have engaged in "systematic, deliberate, ongoing and continuous violation of the provisions of the New York State Freedom of Information Law..." As you requested, I have reviewed the materials attached to your letter and have contacted the Environmental Control Board on your behalf.

Having discussed your contentions with Board's records access officer, Ms. Anne Freedman, I do not believe that your allegations are accurate. Further, I believe that Ms. Freedman has attempted to comply with the Freedom of Information law and will continue to do so.

According to Ms. Freedman, much of the information sought that is maintained by the Board has been made available. I was informed that what may be the most voluminous document that you requested, a contract between the Board and Sennet and Krumholz, has been offered to you upon payment of the requisite fee for photocopying. As you may be aware, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy. Ms. Freedman also assured me that a list of administrative law judges and their per diem rates of pay would also be made available.

It is noted, too, that in your requests, in several instances, you sought information. In this regard, as a general matter, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that, unless otherwise indicated, an agency is not required to create or prepare a record in response to a request. Some aspects of your request might involve information that does not exist in the form of a record or records. Similarly, other aspects appear to involve questions rather than requests for existing records.

In sum, it is my view that there is no deliberate effort to violate the Freedom of Information Law on the part of the agencies to which you referred. Moreover, it appears that actions have been taken indicating an intent to comply.

I hope that I have 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. Anne Freedman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4051

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

April 2, 1986

Ms. Edythe Wolfson
[redacted]

The staff of the Committee on 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. Wolfson:

I have received your letters of March 10 and March 27 in which you allege that the New York City Board of Education and the State Education Department have failed to comply with the Freedom of Information Law.

Having reviewed your letters and the Commissioner's determination on appeal, it is unclear, from my perspective, exactly what you have requested or which records have been denied. The records sought generally pertain to proceedings conducted pursuant to section 3020-a of the Education Law. With respect to rights of access on the part of the subject of such a proceeding, such rights are generally determined based upon the terms of section 3020-a rather than the Freedom of Information Law. With respect to rights of access by third parties, it has been held that the name and charges initiated against a teacher are deniable while the charges are pending or, stated differently, prior to any final determination relative to the charges [see Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

Further, as I understand the situation, it was determined that many records requested from the State Education Department are available. However, it appears that you asked that the records be delivered to a location convenient to you. In my view, an agency is not required by the Freedom of Information Law to take such a step. Ins short, copies of records can be produced upon payment of the appropriate fees for photocopying; alternatively, accessible records can be made available for inspection in the office in which the records are kept.

Lastly, if you are dissatisfied with an agency's determination following an appeal, section 89(4)(b) of the Freedom of Information Law provides that:

> "a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two."

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4052

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

April 2, 1986

Mr. Dan Getman
Staff Attorney
Prisoners' Legal Services
of New York
2 Catherine Street
Poughkeepsie, NY 12601

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

Dear Mr. Getman:

I have received your letter of March 7 addressed to Cheryl Mugno of this office. You have requested an opinion regarding a fee of fifty cents per photocopy for records maintained by the Central New York Psychiatric Center.

In this regard, I have conferred with Ms. Jamie Benfield, Assistant Counsel at the Office of Mental Health, who has agreed to supply photocopies at a rate of twenty-five center per photocopy.

With respect to fees, as a general matter, it is my view that section 87(1)(b)(iii) of the Freedom of Information Law precludes an agency from charging more than twenty-five cents per photocopy, unless there is specific statutory authority to assess a higher fee.

As you are aware, in a technical sense, the records that you are seeking are being made available not under the Freedom of Information Law, but rather under the limited disclosure provisions of the Mental Hygiene Law, Section 33.13. Nevertheless, the documents you seek constitute "records" as defined in section 86(4) of the Freedom of Information Law, and due to the absence of any specific authority to charge a photocopying fee in the Mental Hygiene Law, I believe that the fee provisions of the Freedom of Information Law are applicable. Stated differently, since the Mental Hygiene Law does not specifically authorize a fee for photocopies, the provisions of the Freedom of Information Law regarding fees would in my opinion apply.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Jamie Benfield, Assistant Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4053

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

April 3, 1986

Ms. Patricia M. Kennedy
Staff Attorney
Prisoners' Legal Services
of New York
102 West State Street
Ithaca, NY 14850

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

Dear Ms. Kennedy:

I have received your letter of January 7 in which you requested an advisory opinion. In addition, I have received a copy of the March 7 order dismissing the proceeding brought by Mr. Antonio Humphries which challenged some of the policies questioned in your letter.

According to your January 7 letter and the attachments, the Department of Correctional Services has adopted certain policies regarding access to tape recordings of hearings on disciplinary charges. For instance, the Department routinely makes these tapes available to PLS attorneys but only for a charge of $5.00 per tape. You want to know whether that is a reasonable amount in light of the Freedom of Information Law and Committee's regulations concerning fees for copies. In addition, you asked when a waiver of fees is appropriate. The Department's regulations, 7 NYCRR 5.36, permits the custodian of records, in his or her discretion, to waive fees.

Based upon the correspondence attached to your letter, you also summarized a second concern as follows:

> "The Department of Corrections says that if an inmate pays a $5.00 fee for the tape, he will receive a copy of the tape. If an inmate is unable to pay the $5.00 fee, he will not be provided with a copy of the tape and no arrange-

> ment will be made for his access to the tape. If an inmate is able to pay the $5.00 fee, but does not have a tape recorder and is, for example, in a disciplinary housing unit, no arrangements will be made for him to be able to play the tape in order to hear it. If an attorney obtains a copy of the tape for her client, and wishes to send the tape to the inmate, the correctional facility will not allow the tape which they sent to the attorney to be delivered to the inmate."

You want to know whether the positions taken by the Department are in accordance with the Freedom of Information Law. In this regard, I offer the following comments.

First, as you know, the Freedom of Information Law provides that all records of an agency are available unless they can be withheld under one or more of the grounds for withholding listed at section 87(2)(a) through (i). An agency may charge a fee for providing copies of records to an individual. Section 87(1)(b)(iii) permits an agency to charge up to 25 cents per page up to nine by fourteen inches or the actual cost of reproducing any other record unless a different fee is prescribed by statute.

In addition, the Committee has promulgated regulations regarding fees. The regulations permit an agency to provide copies of records without charging a fee. Relevant to copies of tape recordings, the regulations provide that:

> "The fee for copies of records not covered by paragraphs (1) and (2) of this subdivision 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 1401.8(3)].

In my view, the Committee's regulations prohibit an agency from charging more than the actual cost of reproducing a tape recording. For example, if the agency can reproduce a cassette tape in-house, I believe that the actual cost would be the cost of the blank cassette, i.e., the average unit cost excluding fixed costs [see Zaleski v. Hicksville Union Free School District,

Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978]. If the agency cannot reproduce the tape in-house, however, the actual cost of having the tape reproduced, i.e., the cost to the agency, may be charged to the requester.

Second, although the Committee's regulations permit an agency to waive the fee for copies, whether the fee is waived is within the discretion of the agency. As the Department's regulations at 7 NYCRR 5.36 state, the custodian of records may, "in his discretion, waive all or any portion of the fees". Since both the Committee's and the Department's regulations permit a waiver of fees at the discretion of the agency, the Committee is not authorized to determine when a waiver of fees is appropriate. It is recommended, however, that the fee waiver policy be equally administered.

Third, you indicated that, upon payment of the fee, the Department will provide an inmate with a copy of a tape. If the inmate is unable to pay the fee, however, no tape will be made available to the inmate for review. In my opinion, the Freedom of Information Law requires that a record be made available for "inspection" or review without charge. Thus, if the Department or its facility has a tape player, accomodations should be made for the inmate to listen to a tape on the recorder at no charge. If the Department and its facilities do not maintain or own tape recorders, they need not provide a recorder to the inmate for review of the tape.

In addition, you wrote that if an attorney obtains a copy of a tape on behalf of a client, the correctional facility will not permit the tape to be delivered to the inmate. Apparently, this policy applies to inmates in disciplinary housing units. In my view, an inmate can be denied access to a tape only when the information would fall within one of the categories for withholding listed at section 87(2)(a) through (i). If the Department cannot cite a basis for withholding the tape, I believe that it must be made available to the inmate.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4054

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

April 3, 1986

Mr. Joseph Gervin
Assistant Superintendent
Mahopac Central School
District
Mahopac, NY 10541

Dear Mr. Gervin:

I am writing to you on behalf of Mrs. Irene Hufnagel.

When we spoke last Tuesday, April 1, you told me that the records requested by Mrs. Hufnagel on March 18 would be made available to her the following day, April 2. I explained that she wanted copies of the names of the employees of the Mahopac Central School District and their respective gross salaries. You indicated that such information was included in a computer print-out along with information concerning payroll deductions which had to be deleted.

I also explained to you that section 87(3)(b) of the Freedom of Information Law requires that all agencies maintain:

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

The provision quoted above has been in existence since the Freedom of Information Law took effect in 1974. I forwarded a copy of the Law to you earlier this week and advised that your District maintain a separate record containing the information described in section 87(3)(b) which would be available in its entirety to the public.

Based upon our conversation on April 1, I was surprised to hear from Mrs. Hufnagel yesterday that she had only received a list of numbers, presumably salaries, without any corresponding names of employees or job titles. She has resubmitted her request, with my assistance, to clarify that she wants a record which identifies each District employee and his or her respective salary. In other words, she would like a record that states:

"Joseph Gervin, Assistant Superintendent, Mahopac Central School District Office, $50,000."

I believe that any individual who requests a record identifying a District employee and his or her salary would be entitled to the record under the Freedom of Information Law. Moreover, the record should be made available within five business days of the receipt of a request.

I hope that this letter clarifies any misunderstanding and that Mrs. Hufnagel will receive the requested records soon.

If you have any questions please do not hesitate to call.

Sincerely,

Cheryl A. Mugno

Cheryl A. Mugno
Assistant to the Executive Director

CAM:ew

cc: Mrs. Irene Hufnagel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4055

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

April 3, 1986

Ms. Gloria A. Thompson
Senior Public Records Analyst
State Education Department
State Archives
Albany, New York 12230

<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. Thompson:

As you know, I have received your correspondence concerning the capacity to transfer student attendance registers from a school district to an historical repository.

By way of background, attached to your letter is an inquiry from the Newfane Central School District in which it was explained that the District maintains student attendance registers that "date back to 1903". Although the records could be destroyed in accordance with the Education Department's retention and disposition schedule, it was suggested that the records might be transferred to the local historical society where they might be available to the public for the purpose of engaging in historical research.

In my opinion, the statute governing rights of access to and disclosure of the records in question is the federal Family Educational Rights and Privacy Act (20 USC 1232g), which is commonly known as the "Buckley Amendment". The Buckley Amendment provides, in brief, that "education records" maintained by an educational agency or institution that identify a particular student or students are confidential to all but the parents of students under the age of eighteen, or the students themselves when they reach the age of eighteen. Education records subject to the confidentiality restrictions imposed by the Buckley Amendment may be disclosed only with the consent of the parents of students, or the students themselves, as the case may be. While the Act and the regulations promulgated by the United States Department of Education permit disclosure of education records without prior consent in certain circumstances, none of those circumstances would apparently be applicable in this situation.

In an effort to gain an expert opinion regarding the issue, I have contacted Ms. Pat Ballinger of the U.S. Department of Education on your behalf. Ms. Ballinger is responsible for overseeing the administration of the Buckley Amendment. Although she understood and appreciated that the records are, at this juncture, of primarily historical value, she confirmed that the Act and the regulations preclude the transfer or public disclosure of the records without prior consent of the persons to whom the records pertain.

I hope that I 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-4056

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

April 4, 1986

Mr. Douglas R. Young
[redacted]

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

Dear Mr. Young:

I have received your letter of March 17, as well as the correspondence related to it.

According to the materials attached to your letter, on November 13, you submitted a request to the Mayor of the Village of Ticonderoga for "information pertaining to all compensation paid to the Ticonderoga Village attorney...", Mr. James Murdock, for particular years. Also attached is a second letter dated March 6 in which you wrote to the Mayor to confirm your understanding that the request would be granted. Nevertheless, you received a denial on March 14 by the Mayor, who indicated that you could appeal the denial, also to the Mayor. Another item of correspondence consists of a letter sent to the Mayor by the Village Attorney. He suggested to the Mayor that:

> "As records access officer, it is your responsibility to so advise me of this request. Generally, such records, if they exist, would be public information and can be released. However, such records cannot, and should not, be released at this time."

He added that the request for records "is too broad in form and too general for a complete and proper response". Mr. Murdock pointed out that, due to a variety of factors, records of payment or vouchers "cannot be considered accurate or complete".

You have requested an advisory opinion concerning rights of access under the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that, as a general matter, an agency is not required to create or prepare a record in response to a request. Therefore, by means of example, if no records exist that provide a total of payments for a given period, the agency would not in my opinion be required to review individual records for the purpose of preparing a new record containing a total. However, individual records, or portions thereof, might be made available in order that you could independently prepare your own total.

Second, with respect to the breadth of your request, section 89(3) requires that an applicant "reasonably describe" the records sought. Here I point out that the Court of Appeals, the state's highest court, has held that the standard of reasonably describing records is met when the "agency may locate the records in question" [Farbman & Sons v. NYC Health and Hospitals Corp., 62 NY 2d 75, 83 (1984)]. As such, if Village officials are able to locate the records that you are seeking, I believe that your request would meet the requirement that the records sought be reasonably described.

Third, section 86(4) of the Freedom of Information Law defines "record" expansively to include:

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

Due to the breadth of the definition, I believe that bills, vouchers, audits and similar or related documentation constitute "records" subject to rights of access.

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

While a Village board of trustees or a mayor 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 section 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, section 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., Aug. 2, 1981].

If existing records are incomplete or misleading, for instance, a notation could be added to the records, or a cover letter might describe why the figures may not be completely accurate.

Fourth, the response to your request indicates the Mayor responded initially, and she also is the person to whom an appeal may be directed. Here I point out that the regulations promulgated by the Committee [21 NYCRR 1401], which have the force of law, state that the records access officer and the appeals person cannot be the same individual [21 NYCRR 1401.7(b)]. Further, 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 records the reasons for further denial, or provide access to the record sought."

Lastly, the Freedom of Information Law and the regulations prescribe 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 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: Virginia R. Smith, Mayor
James R. Murdock, Jr., Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4057

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

April 7, 1986

Mr. Hans Pecher
[redacted]

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

Dear Mr. Pecher:

I have received your letters of March 11 and March 20.

The issue involves rights of access to a complaint relating to a settlement of a controversy that arose between the Southern Cayuga Central School District and its former superintendent. Of particular relevance is a settlement agreement, a copy of which you forwarded. The agreement was reached following the initiation of a lawsuit in the United States District Court for the Northern District of New York and was apparently approved by Court. The settlement agreement states in part that:

> "The charges filed with the Clerk of the Board on or about June 11, 1984 will be withdrawn, all copies of the same will be expunged from school district records, and no copy of said charges will be released to the media by any party, or to their agents. The complaint in this action will not be released to the media by the plaintiff or her agents."

You wrote that the District's Attorney, Mr. Louis Contiguglia, has a copy of the complaint, and that he agrees that the complaint constitutes a "record" as defined by the Freedom of Information Law, section 86(4). Nevertheless, Mr. Contiguglia has contended that disclosure would violate the terms of the settlement.

In this regard, I offer the following comments.

First, it is emphasized that the facts, as I understand them, are, from my perspective, unique. In short, I am unaware of any situation or judicial determination involving facts analogous to those described.

Second, ordinarily a complaint would in my opinion be accessible to the public from the clerk of the court having jurisdiction in the matter, or from the agency that maintains possession of the complaint, such as the School District. I point out that, although neither the New York Freedom of Information Law nor the federal Freedom of Information Act (5 U.S.C. 552) is applicable to the courts or court records, records maintained by or filed with a court are generally available (see e.g., Judiciary Law, Sections 4 and 255). Once a record is filed with a court and is available from the court or its clerk, the same record generally would also be available from an agency that maintains it. However, in this instance, the Court appears to have prohibited the parties from disclosing the record you seek. Consequently, while the School District or Mr. Contiguglia would likely disclose similar records in other circumstances, disclosure might, in view of the terms of the settlement agreement, result in a finding of contempt. Stated differently, release of the complaint might violate an agreement approved by a federal court.

At this juncture, since District officials, including its attorney, are bound by the settlement agreement, I believe that your efforts in seeking disclosure should be directed to the court that approved the agreement. I am not familiar with federal court proceedings or the legal authority to seal what would otherwise be considered as public records. It is suggested, therefore, that you confer with the appropriate court officials.

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: A. Edward DeMiceli, Superintendent
Louis Contiguglia

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4058

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

April 8, 1986

Mr. Brian T. Edwards
Assistant County Attorney
Sullivan County
Department of Social Services
P.O. Box 231
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. Edwards:

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

The correspondence consists of a letter dated December 31 addressed to me by Steven H. Kurlander, Assistant County Attorney. As I explained to you by phone, for reasons unknown, Mr. Kurlander's letter never reached this office.

In brief, Mr. Kurlander explained that a request was made by Ms. Helen Prusinski, who is represented by a law firm, regarding a matter in which the County is involved. The request apparently concerned a copy of a particular regulation. Mr. Kurlander expressed the contention that "providing such information ex parte would violate the attorney-client relation which was and still is established in this case". He also contended that the Freedom of Information Law does not require that an agency "research and recite a section of law which should be obtained through the services of her attorney".

As presented in that manner, I agree that the Freedom of Information Law is not a vehicle under which an agency is required to answer questions; on the contrary, it represents a means by which any person may seek existing records.

Having reviewed earlier correspondence on the matter, it appears that perhaps both Ms. Prusinski and I misinterpreted an earlier statement made by Mr. Kurlander. Specifically, Mr. Kurlander on November 27 wrote to Ms. Prusinski and stated that "any information concerning the matter should be obtained through your attorney". As indicated in my letter to Ms. Prusinski of December 26, I interpreted Mr. Kurlander's statement to mean that she could not request records from the County, and that her attorney should make such requests. It was advised at the time that any person may seek records under the Freedom of Information Law and that attorneys enjoy no special rights under that statute. It appears, however, that Mr. Kurlander was suggesting that Ms. Prusinski's attorneys should be responsible for answering her legal questions and performing legal research on her behalf. If indeed Mr. Kurlander was not suggesting that Ms. Prusinski could not invoke the Freedom of Information Law, but rather that her attorneys should perform the appropriate legal research on her behalf, I would agree with Mr. Kurlander's contentions.

In sum, it is my view that any person, including Ms. Prusinski, may request records under the Freedom of Information Law. Concurrently, it is also my opinion that an agency is not required by the Freedom of Information Law to create a record in response to a request or to prepare legal citations, 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
cc: Ms. Helen Prusinski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4059

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

April 9, 1986

Mr. Theodore Dvoroznak
84-A-5493
P.O. Box 2071
Wilton, NY 12866

Dear Mr. Dvoroznak:

I have received your letter of April 8 addressed to Mr. Fred Gonsowski. Please be advised that, although Mr. Gonowski is an employee of the Department of State, he is not associated with the Committee.

According to your letter, you were denied the capacity to review medical records. Consequently, you have appealed to this office.

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

First, as a general matter, the Committee on Open Government has the authority to advise with respect to the Freedom of Information Law. This office is not empowered to render determinations on appeal following denials of requests for records, nor does it have the authority to compel an agency to grant or deny access to records.

Second, you did not identify the person to whom you made your request. Here I point out that the regulations of the Department of Correctional Services indicate that requests for records kept at correctional facilities may be directed to the facility superintendent. Further, in the event of a denial, section 89(4)(a) of the Freedom of Information Law states in part that:

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

> executive, or governing body, who shall within 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 the person designated at the Department of Correctional Services to make determinations on appeal is Counsel to the Department.

Third, with respect to medical records, it has generally been suggested that statistical or factual information contained within such records are available [see Freedom of Information Law, section 87(2)(g)(i)], but that portions of medical records consisting of advice, recommendation, opinion, and the like may justifiably be withheld.

There may also be restrictions regarding access to records kept at a facility by a satellite unit of the Office of Mental Health in conjunction with section 33.13 of the Mental Hygiene Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1271
FOIL-AO-4060

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

April 9, 1986

Mr. John Semeniak
Superintendent of Schools
New York Mills Union Free
School District
1 Marauder Boulevard
New York Mills, NY 13417

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

Dear Mr. Semeniak:

I have received your letter of March 2 in which you requested an advisory opinion.

Your inquiry concerns "information that should be shared with the public during a Board budget review session". Specifically, you asked:

> "-Is the first draft budget document, which includes staffing; tax impact; current and estimated costs information, given to the Board of Education during a budget review session, required to be shared with the public?
>
> -Does this information need to be shared with the public curing a regular Board review session?"

In this regard, I offer the following comments.

First, it is assumed that the budget review sessions conducted by the Board of Education are open to the public. As a general matter, when a quorum of a public body convenes for the purpose of conducting public business, such a gathering constitutes a "meeting" subject to the Open Meetings Law. Further, none of the grounds for entry into a closed or "executive session" could likely be asserted to discuss the preparation of a budget.

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 of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

I point out 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 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.

While one of the grounds for denial is relevant to the records in question, due to the structure of that provision, it is likely in my view that much of the information contained in the records should be available. Specifically, the provision in question, section 87(2)(g), states that an agency may withhold records that:

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

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

Under the circumstances, I believe that the documentation 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 in the nature of estimates or projections found within so-called budget worksheets in possession of the State Division of the Budget, that 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 74 (1977).

Lastly, although the Board may share the records with the public at a meeting, an agency may in my opinion require that the records be made available in accordance with applicable rules and regulations adopted pursuant to section 87(1) of the Freedom of Information Law. Such rules generally indicate that an applicant may submit a request to the agency's designated records access officer during regular business hours, and that the agency has up to five days from the receipt of a request to respond.

It is noted that the public has on occasion complained that it is difficult to follow a public body's discussion when the discussion focuses on a document in possession but which has not been made available to the public attending the meeting. The issue was addressed in the Committee's most recent annual report to the Governor and the Legislature in which it was written that:

> "Many members of the public have brought to the attention of the Committee a frustrating situation that relates to discussions at meetings and access to records. Often a public body will review and discuss a particular record at an open meeting, but the record may not be available or distributed to the people attending the meeting. For instance, a board in reviewing its expenditures might refer to an item appearing on 'page 3, line 6'. While that information is referenced at a meeting, the public may be unaware of the contents of the record that is the subject of the discussion. Therefore, although the meeting is open, the public is unable to know of what the discussion specifically concerns."

In an effort to remedy the situation, it was recommended that "with certain exceptions, a record that is the subject of a discussion at an open meeting should be available to the public at the time of the meeting".

Although the proposal has not been enacted, it may be relevant to your concerns.

I hope that I 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-1272
FOIL-AO-4061

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

April 10, 1986

Mr. Kevin 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 recent letter and the correspondence attached to it.

According to your letter, during a meeting of the Town Board of the Town of Catherine:

> "The Town Supervisor showed the Town Board members a letter and asked them if they had all had a chance to see the letter, they agreed they had, and the supervisor then asked if the Town Board were all in agreement, and they said yes. This was done without refering to any name or subject for this letter and very quickly and quietly - moving right on to another matter."

On the day after the meeting, you requested all letters shown to the Town Board during the meeting. You later received the requested records, with exception of the "secret" letter. It was explained to you that:

> "The letter you requested was actually an inner-office memo prepared by Supervisor Delvan Decker, to be distributed to the Town Board members only, regard-

> ing a rough draft of a proposed letter which was not formally acted upon by the Supervisory of the Town Board."

You have requested an advisory opinion concerning the denial and, in this regard, I offer the following comments and suggestions.

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 records or portions thereof that fall within the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, relevant to your inquiry is section 87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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 or recommendation, for example, they could in my view be withheld.

Under the circumstances, it appears that the record in question could be characterized as "intra-agency" material that would be accessible or deniable under section 87(2)(g), in whole or in part, depending upon its contents.

Third, with respect to the meeting, you said that the Board agreed with the contents of the record, If their agreement represented the taking of some action, I believe that the minutes of the meeting should indicate the nature of such action. Here I direct your attention to the Open Meetings Law, which states in section 106(1) 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."

Lastly, in terms of recourse, you have the right to appeal the denial of your request. Section 89(4)(a) of the Freedom of Information Law provides that:

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

Enclosed is a copy of "Your Right to Know", which describes the provisions of both the Freedom of Information and the Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Susan N. Reynolds
Town Board, Town of Catherine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4062

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

April 10, 1986

Mr. Angel Perez
83-A-2562
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. Perez:

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

You have asked how you may obtain court records under the Freedom of Information Law. You also wrote that you want to obtain a copy of an autopsy report.

In this regard, 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 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 Freedom of Information Law does not apply to the courts or court records.

There are, however, other provisions of law that often grant substantial rights of access to court records. It is suggested that you seek records from the clerk of the court in which the proceeding was conducted. In your request, you should provide as much detail as possible, such as names, dates, index and docket numbers, in order to enable appropriate officials to locate the records sought.

With respect to an autopsy report, if the autopsy was performed in New York City, it is recommended that you seek the report from the Office of the Medical Examiner, which is located at 52 First Avenue, New York, NY. If the autopsy was performed in a county outside of New York City, I believe that section 677 of the County Law could enable you to obtain a copy of an autopsy report only by means of a court order.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4063

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

April 11, 1986

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 March 18, which reached this office on March 26.

Your inquiry concerns rights of access to "judgment docket books, which are filed by the NYC Environmental Control Board (as judgment creditor) with the 5 county clerks that comprise the City of New York". You added that:

> "The agency supplies to its field offices and to certain other employees within its agency micro-fiche exact copies of the same judgment docket books which are on regular 8 1/2 x 11" sheets of paper in book form, that the total amount of paper comprises at least a standard 8 foot counter with the books turned on end.
>
> "The docket books, as indicated in the denial letter from the records access officer are filled/recorded in the five (5) county clerk's offices, which have facilities for photocopying, but not in micro-fiche form."

The specific question raised is whether the microfiche copies of the contents of the docket books should be made available by the Board.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, and the term "record" is defined in section 86(4) of the Law to mean:

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

The language quoted above includes information maintained by an agency "in any physical form whatsoever" and refers specifically to "microfilms". As such, I believe that microfiche copies of the contents of docket books constitute "records" subject to rights of access.

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

Under the circumstances, since the docket books and microfiche are available for inspection, I believe that they are available for copying. When a record is available under the Law, "Upon payment of or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record..." Further, agency regulations must include reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

Lastly, even though the information sought might exist in two forms, docket books and microfiche, both forms in my view are "records" that would be equally available under the Law. In a similar situation in which assessment information existed in the form of traditional assessment rolls, as well as in the form of computer tapes, it was determined that:

> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner's purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy. It is therefore improper for respondent to deny petitioner's request for copies of the County assessment rolls in computer tape format" [Szikszay v. Buelow, 107 Misc. 2d 886, 436 NYS 2d 558, 563 (1981); see also Babigian v. Evans, 427 NYS 2d 668, aff'd 97 AD 2d 992 (1983); Real Estate Data, Inc. v. County of Nassau and Abe Selden, Chairman, Board of Assessors, Sup. Ct., September 18, 1981; Reese v. Mahoney, Supreme Court, Erie County, June 28, 1984].

In sum, it is my view that copies of microfiche versions of docket books should be made available 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:jm
cc: Anne Freedman
Marie Dooley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-4064

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

April 14, 1986

Mr. Dan Getman
Staff Attorney
Prisoners' Legal Services
of New York
2 Catherine Street
Poughkeepsie, NY 12601

Dear Mr. Getman:

I have received your letter in which you requested clarification of my March 4 advisory opinion.

The advisory opinion concluded with a summation of the discussion regarding whether complaints or grievances made by inmates concerning a correction officer were available under the Freedom of Information Law. I wrote that the records should "be made available to the extent that they do not include formal, unproven or unaccepted charges" and "are not to be used in an underlying civil or criminal action".

In my advisory opinion, I did not intend the words"formal, unproven or unaccepted charges" to include inmate grievances. As you recall, I distinguished charges brought by an employee's supervisor or superior from charges or complaints made by members of the public. Charges filed by a superior may result in a more formal review procedure and disposition than a complaint filed by an inmate or a member of the public.

In short, I believe that unproven or unaccepted charges or complaints made by an employees superiors may be withheld as an unwarranted invasion of personal privacy until a final determination is made. In my opinion, complaints and grievances brought by members of the public or, in this case, inmates, cannot 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,

/S/

Cheryl A. Mugno
Assistant to the Executive
Director

CAM:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1274
FOIL-AO-4065

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

April 15, 1986

Mr. John Goetschius
Greenburgh No. 11 Federation
of Teachers
P.O. Box 184
Dobbs Ferry, NY 10522

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

Dear Mr. Goetschius:

I have received your recent letter addressed to Ms. Mugno of this office, as well as a copy of a "personnel report" prepared by the Superintendent of the Greenburgh School District.

More specifically, you wrote that:

> "1) A personnel report is prepared by the Superintendent of Schools prior to a Board of Education meeting. This report contains all hirings, firings, salary adjustments, etc. (March 1986 personnel report attached).
>
> 2) The Board refuses to divulge the particulars of the report prior to its approval.
>
> 3) The motion is made to 'approve the personnel report' and all items are approved by a single vote.
>
> 4) No discussion of the items on the personnel report takes place in public session."

Your question is whether "this practice is permissible under the Open Meetings Law". In this regard, I offer the following comments.

First, it is emphasized that the report consists of recommendations concerning proposed personnel actions for review and eventual action by the Board of Education. Here I point out that section 87(2)(g) of the Freedom of Information Law states that an agency may withhold intra-agency materials that are reflective of opinion, advice or recommendation, for example. Further, section 89(7) states in part that nothing in the Freedom of Information Law requires the disclosure of "the name or home address of an applicant for appointment to public employment". As such, I do not believe that the Board is required to divulge the particulars of the report prior to its approval.

Second, with respect to public discussion of the report, there is nothing in the Open Meetings Law that pertains to the extent to which an issue must be discussed during an open meeting. Moreover, the Open Meetings Law permits a public body to engage in an executive session under section 105(1)(f) to consider:

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

Therefore, if, for example, the Board sought to discuss a personnel action with respect to a "particular person", it is likely that an executive session could properly be held.

Lastly, although the report is approved by means of a single vote, I would think that such a practice would be permissible, so long as the minutes, either specifically, or by means of incorporating the report by reference, indicate the nature of the action taken, by individual and the action taken with respect to them.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4066

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

April 15, 1986

Mrs. Shirley T. Holbrook
Wyoming County Treasurer
Court House Building
Warsaw, New York 14569

The staff of the Committee on 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. Holbrook:

I have received your letter of March 28 in which you requested an advisory opinion.

According to your letter, you are the Wyoming County Treasurer, and you have been involved in a dispute among County officials relative to a payroll problem. At issue is a letter sent by the State Civil Service Department to the County Personnel Officer. Specifically, you wrote that:

> "On Monday, March 24, 1986, [you were] allowed to read the letter in the office of the Personnel Officer. Its gist was determining who was right and who was wrong in the dispute between us three County Officers over the payroll problem. [You] asked the Personnel Officer for a copy of the letter which she refused to give [you]. After the refusal, [you] presented her with a Freedom of Information Request. She argued that she could not give [you] a copy of the letter because it was confidential information."

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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, under the circumstances, it appears that one of the grounds for denial may be relevant. However, due to its structure, it appears that the record in question may be available. Section 87(2)(g) states that an agency may withhold records that:

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

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

If indeed the Department of Civil Service rendered a determination concerning the dispute, the record would likely be available pursuant to section 87(2)(g)(iii).

Third, as a general matter, if a record is made available for inspection, an agency is required under section 89(3) to prepare a copy of such record upon payment of or offer to pay the requisite fees for photocopying. From my perspective, as suggested earlier, it appears that the record sought is accessible under the Freedom of Information Law, and that, since you were given the opportunity to inspect it, you also have the right to request and obtain a photocopy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: County Personnel Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4067

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

April 16, 1986

Ms. Dolores E. McCormick
[redacted]

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

Dear Ms. McCormick:

I have received your letters of March 26 and April 2.

As I understand the facts, you requested records from the City of Syracuse Department of Building and Property Rehabilitation, but you did not receive a response until several weeks had passed. Further, although your later letter indicates that you received much of what you requested, some of the documentation apparently involved 1984 rather than 1985.

In this regard, I offer the following comments.

First, for future reference, the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401), which have the force of 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 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)].

Second, if, for example, a record that should exist is, as you suggested, "unaccounted for", you may request a certification to the effect that an agency "does not have possession of such record or that such record cannot be found after diligent search" [see Freedom of Information Law, section 89(3)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4068

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

April 16, 1986

Mr. Phillip Velasquez
349-85-29614
14-14 Hazen Street
East Elmhurst, NY 11370

Dear Mr. Velasquez:

I have received your letter of April 13 in which you requested records pertaining to a case in which you were involved.

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 maintain records, such as those in which you are interested. Further, the Committee does not have the power to compel an agency to grant or deny access to records.

Nevertheless, enclosed are materials that may be useful to you in seeking records from agencies. They include copies of the Freedom of Information Law and "Your Right to Know", which describes the Law in some detail.

To seek records, a request should be sent to the "records access officer" at the agency or agencies that you believe maintain the records in which you are interested. It is emphasized that section 89(3) of the Law requires that an applicant request records "reasonably described". Therefore, you should include as much detail as possible, such as names, dates, descriptions of events, index and docket numbers and similar information that would enable agency officials to locate the records.

Lastly, it appears that some of the records in question may be maintained by a court. Here I point out that the Freedom of Information Law does not apply to the courts or court records. However, court records may be available by means of other provisions of Law. As such, it is suggested that any request for court records be directed to the clerk of the court in which the proceeding was conducted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4069

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

April 16, 1986

Mr. John Bal
[redacted]

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

Dear Mr. Bal:

I have received your letter of March 28. You have asked that I review a request made under the Freedom of Information Law to Assemblyman Sheldon Silver in order to advise whether the "request for information is within the Law".

More specifically, in a letter dated January 28, a request was made for the following information from Assemblyman Silver:

> "1. Any financial disclosure statements filed subsequent to July 15, 1985.
>
> 2. Page 3 of financial disclosure statement dated August 8, 1980 and January 15, 1984.
>
> 3. Personal income tax returns for the years 1977-1985.
>
> 4. Time sheets including salary for yourself and all members of your staff or any other payments for personal services since 1980.
>
> 5. An accounting of operational expenses for the last five (5) years other than personal services.

6. To your knowledge are any of the following persons employed by or lobbyists for Insurance Companies or real estate organizations, or represent any special interest group:

Jerry Keller
Brenda Keller
Kenny Karen
Norman Raber
Stephen Cleary
Michael Barrett
Joseph Giovanniello
Thomas Laverne
Solomon Bernstein

7. Did you accept in excess of $2,500.00 from Kenny Karen in any one calendar year?

8. Where is your primary residence?

9. Do you own or rent any other residences? List?"

In this regard, I offer the following comments.

It is noted at the outset that there appears to be some misunderstanding concerning the procedure under which records may be requested under the Freedom of Information Law. I point out that section 88(1) of the Freedom of Information Law states in relevant part that:

"The temporary president of the senate and the speaker of the assembly shall promulgate rules and regulations for their respective houses in conformity with the provisions of this article, pertaining to the availability, location and nature of records, including, but not limited to:

(a) the times and places such records are available;

(b) the persons from whom such records may be obtained..."

The Speaker, acting in accordance with the Law, has promulgated rules and regulations which include reference to a "records access officer", a person to whom requests should be directed for records of the Assembly. The records access officer has the duty of responding to requests. For future reference, a request for records of the Assembly or records relating to a particular member may be addressed to:

Ms. Sharon Galarneau
Assembly Records Access Officer
102 Concourse
Empire State Plaza
Albany, NY 12248

It is noted that, as a general matter, most agencies have designated a single records access officer responsible for coordinating the agency's response to requests for records. As such, requests should not necessarily be sent to the individual who physically maintains records, but rather to the records access officer.

With respect to the first five aspects of the request, it is suggested that the request be directed to Ms. Galarneau. The extent to which those records are maintained or made available by the Assembly, with the exception of code of ethics statements, is unknown to me.

The remainder of the request involves the raising of questions. From my perspective, the title of the Freedom of Information Law may be somewhat misleading, for it is not an access to information law, but rather an access to records law. Stated differently, the Freedom of Information Law is not a vehicle that requires a governmental entity or public officer to answer questions; it is a vehicle that enables the public to seek existing records. Further, section 89(3) of the Law provides that, as a general rule, an entity subject to the Law is not required to create or prepare a record in response to a request. Based upon the foregoing, Assemblyman Silver would not in my opinion be obliged by the Freedom of Information Law to answer the questions raised in the letter of January 28.

I hope that 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 Sheldon Silver

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4070

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

April 16, 1986

Mrs. Raye 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 Mrs. Elentuck:

I have received your letter of March 10, as well as the correspondence attached to it. Please accept my apologies for the delay in response.

According to your letter, officials of Community School District 24 and the New York City Board of Education have rejected your requests made under the Freedom of Information Law on the basis of the terms of a stipulation to which your son and certain officials agreed. In brief, it was apparently agreed that your son, a teacher, would have an opportunity for a new hearing relative to his dismissal, if he suspended his requests for records. You wrote that the stipulation states that:

> "Mr. Elentuck has submitted various Freedom of Information Law requests to the Community School District and Board of Education in furtherance of his interests in regard to the matters herein and in consideration of this agreement and the implementation of its terms he agrees to suspension by himself and all concerned of all further activity and proceedings relating to such requests."

Although you neither signed the agreement, nor are you mentioned in the agreement, your requests for records have been refused on the ground that your activities constitute "a subterfuge to

undermine the stipulation..." It is your view that you are not a party to the stipulation and that, therefore, your requests should either be granted or denied in accordance with the Freedom of Information Law.

You have asked for my views on the matter.

First, I am unaware of the nature of the discussion that may have led to the agreement. As such, I cannot advise with respect to its intent as it may apply to "all concerned". Further, this office is authorized to advise with respect to the Freedom of Information Law, rather than contractual agreements.

Second, as a general matter, the Freedom of Information Law has been construed broadly by the courts in terms of those who may request records. For instance, the Court of Appeals has held that "Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request [M. Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984)]. Similarly, 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" [Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165].

Third, under the circumstances, your remedies appear to involve appeals made in conjunction with section 89(4)(a) of the Freedom of Information Law. If your requests are denied on appeal, you have the right to initiate a proceeding under Article 78 of the civil Practice Law and Rules.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ew

cc: Ruth Bernstein
James T. Stein
John R. Nolan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4071

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

April 16, 1986

Mr. Larry DeBerry
78-A-0370
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. DeBerry:

I have received your letter of March 24 in which you requested assistance concerning a variety of requests for records. Attached to your letter are several items of correspondence prepared in response to your requests.

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

First, the Freedom of Information Law is applicable to records of an "agency", a term 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 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.

Nevertheless, since many of the records that you are seeking are apparently maintained by a court, I point out that court records are often available pursuant to provisions other than the Freedom of Information Law. When seeking court records, it is suggested that you direct a request to the clerk of the court in which the proceeding was conducted. Such a request should include sufficient detail to enable the appropriate officials to locate the records sought.

Second, one of the responses by an assistant district attorney suggested that a request for police records and forensic reports should be directed to your attorney. From my perspective, assuming that such records are maintained by an office of a district attorney, they would be subject to rights of access granted by the Freedom of Information Law. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Third, in the event of a denial of a request by an agency, you may appeal the 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 records the reasons for further denial, or provide access to the record sought."

Lastly, it is emphasized that the Freedom of Information Law requires that an applicant request records "reasonably described". Therefore, when making a request, it is suggested that you provide as much detail as possible, such as names, dates, descriptions of event, index and docket numbers and similar details that might 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4072

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

April 16, 1986

Mr. Michael McCloud
76-B-1023
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

Dear Mr. McCloud:

I have received your letter of April 13.

You indicated that you requested certain information from the Warden of the Suffolk County Jail, but that you received no response. You asked that I send a copy of your letter to the Warden on your behalf in order to "prove" that you seriously requested the information.

In this regard, I offer the following remarks.

First, although I will send a copy of your letter to the Warden, that alone would not, in my opinion, indicate that a request was in fact made.

Second, as a general matter, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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)].

For your information, I believe that an appeal may be directed to the Suffolk County Attorney.

Lastly, the information that you seek pertains to events that occurred in 1975. It is possible that records produced then may no longer exist. It is noted that the Freedom of Information Law pertains to existing records, and that section 89(3) of the Law states that, unless otherwise indicated, an agency is not required to create or prepare a record in response to a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Warden, Suffolk County Jail

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4073

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

April 17, 1986

Mr. Thomas DeVincenzo
Village Clerk
Village of Freeport
46 North Ocean Avenue
Long Island, NY 11520

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

Dear Mr. DeVincenzo:

I have received your letter of April 1 in which you asked that I confirm the advice rendered during a telephone conversation.

Specifically, you seek confirmation that:

> "1-Notices of violations, warning notices and any other information on apparent violations, in [your] Building Department files, are public record and available for copying, including those pertaining to one-family homes and other residential properties.
>
> 2-Plans and surveys in Building Department files, that are marked with the architect's or engineer's seal, are public record, and available for copying, unless they have been copywrited."

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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

With respect to records of the Building Department relating to code enforcement, three of the grounds for denial may be relevant. However, it is unlikely in my view that they could be asserted.

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.

For instance, inspection reports likely contain factual information accessible under section 87(2)(g)(i). Further, a notice of violation would in my opinion be reflective of a final agency determination accessible under section 87(2)(g)(iii).

Section 87(2)(e) permits an agency to withhold records that:

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

> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The language quoted above is based upon potentially harmful effects of disclosure and is generally cited in the context of criminal law enforcement. From my perspective, the effects of disclosure described in section 87(2)(e) would rarely arise in relation to building code enforcement. Moreover, in Young v. Town of Huntington, 388 NYS 2d 978 (1976), which was decided under the Freedom of Information Law as originally enacted, it was held that records compiled by a town building department fell outside the "law enforcement purposes" exception to rights of access. Even in a situation in which records might have fallen within section 87(2)(e), it was determined that complaints, such as those received by a building inspector's office, are available after having deleted identifying details regarding the complainants [see Church of Scientology v. State, 61 AD 2d 942 (1978); aff'd 46 NY 2d 906 (1978)].

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". Depending upon specific circumstances, it is possible that a warning notice might be withheld, if it pertains to an individual and if the notice is not indicative of a violation.

In sum, although several grounds for denial appearing in the Freedom of Information Law may be pertinent to the records in question, it appears that they could rarely be invoked.

It is noted, too, that the Freedom of Information Law preserves rights of access granted by other provisions of law. Section 89(6) states that:

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

One such provision of potential relevance is section 307 of the Multiple Residence Law which states that:

> "[A]ll records of the department shall be public. Upon request, the department shall be required to make a search and issue a certificate of any of its records, including

> violations, and shall have the power to charge and collect reasonable fees for searches and certificates."

Therefore, if the records in question are available under section 307 of the Multiple Residence Law, nothing in the Freedom of Information Law could be cited to limit or diminish rights granted by section 307.

Access to plans and surveys that are marked with the seal of an architect or engineer has been the subject of several questions and substantial research. Professional engineers and architects are licensed by the Board of Regents (see respectively, Education Law, Articles 145 and 147). While section 7307 of the Education Law requires that an architect have a seal, and that state and local officials charged with the enforcement of provisions relating to the construction or alteration of buildings cannot accept plans or specifications that do not bear such a seal, I am unaware of any statute that would prohibit the inspection of such records under the Freedom of Information Law. With respect to copying or reproduction of such records, the interpretation of the Copyright Act by the U.S. Justice Department serves to provide guidance. In brief, I believe that there are two methods of copyrighting materials. The first involves the so-called "common law" copyright, which enables an author or architect, for instance, to place a "C" on a work. The Justice Department has advised that the federal Freedom of Information Act (5 USC 552) permits the public to inspect and copy those kinds of copyrighted materials. The other method of copyrighting involves the registration of a work with the U.S. Copyright Office. According to the Justice Department, if materials have a registered copyright, it may be inspected, but it may not be reproduced without the written consent of the copyright holder. Assuming that the view of the Justice Department is appropriate, plans and surveys of the Building Department are clearly available for inspection. In addition, they would be available for copying, unless the copyright has been registered with the U.S. Copyright 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-AD-4074

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

April 17, 1986

Mr. Raymond Smith
#83-A-8102
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. Smith:

I have received your letter of April 4 in which you requested assistance.

According to your letter, you have attempted to obtain copies of "transcripts and arraignment minutes" from the Criminal Court of the City of New York pursuant to the Freedom of Information Law. You wrote that you can obtain copies for $10 per set. You have questioned whether the fee is appropriate in view of the provision in the Freedom of Information Law stating that an agency may charge up to twenty-five cents per photocopy.

In this regard, I offer the following comments.

First, as suggested to you in a letter written in December of 1985, the Freedom of Information Law is applicable to records of an "agency". The term "agency" is 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."

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. Moreover, the limitation on the assessment of fees for photocopies imposed by the Freedom of Information Law would not apply to the fees that may be charged for copies of records maintained by a court.

The specific language of the Freedom of Information concerning fees states that the fee "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." Stated differently, if a statute permits an entity to charge in excess of twenty-five cents per photocopy, the limitation of twenty-five cents per photocopy would not apply. In this instance, since the records sought are maintained by a court, rather than an agency, the provision of the Freedom of Information do not govern.

I hope that 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-4075

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

April 17, 1986

Ms. Lark J. Shlimbaum
Shlimbaum & Shlimbaum
265 Main Street
P.O. Box 8
Islip, New York 11751

<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. Shlimbaum:

I have received your letter of March 31, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you were denied access to records by the Town of Islip. In response to your appeal, the denial was upheld on the grounds that the records:

> "are exempt from disclosure under the Freedom of Information law for the reason that such records are intra-agency records and disclosure would constitute an unwarranted invasion of personal privacy."

Although you attempted to learn more of the nature of the records that were withheld, no additional information has been provided.

It is your view that, since section 89(4)(a) of the Freedom of Information Law states that a determination following an appeal "fully explain in writing...the reasons for further denial", you are "entitled to at least know the identity of the documents to which [you] have been denied access". Absent that type of information, it may be difficult to decide whether a request for relief is warranted.

You have requested my views on the matter.

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 authority to withhold "records or portions thereof" that fall within one or more of the ensuing bases for withholding. From my perspective, the quoted language indicates a recognition on the part of the Legislature that a single record or report, for example, might be both accessible or deniable in part. I believe that it also imposes an obligation on the part of the agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

The initial ground for denial offered by the Town is section 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. As such, the characterization of records as "intra-agency materials", without more, is not determinative of whether the records are available or deniable, in whole or in part.

The other ground cited by the Town would appear to refer to section 87(2)(b), which enables an agency to withhold "records or portions thereof", when disclosure would result in "an unwarranted invasion of personal privacy". Often the deletion of a name or other identifying details serves to protect against an unwarranted invasion of personal privacy, thereby possibly requiring disclosure of the remainder of a record [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985)].

From my perspective, the requirement imposed by section 89(4)(a), that a denial on appeal must "fully explain" the reasons for such a denial, involves more than the mere recitation of the language of one or more of the grounds for denial appearing in section 87(2).

It is noted that, in construing the federal Freedom of Information Act (5 USC 552), federal courts have in some instances required the preparation of a "Vaughn index" by an agency. Such an index provides an analysis of the documents denied as a means of justifying a denial and ensuring that the burden of proof remains on the agency [see Vaughn v. Rosen, 484 F. 2d 820, cert. den. 415 U.S. 977]. I am unaware of any decision involving the New York Freedom of Information Law that required the preparation of a similar index prior to the initiation of litigation. There is, however, a decision in which an agency was required to inform petitioner of the existence of records falling within the scope of a request. In Steele v. New York State Dept. of Health, 464 NYS 2d 925 (1983)], it was stated that:

> "To be certain that respondent has informed the petitioner of all records, which are in existence, respondent shall submit a list to petitioner of all documents in its possession related to petitioner's demand. This list shall include all documents that are in existence as of the present time. If respondent has not previously acknowledged the existence of certain of these documents and feels that some of them are exempt, it must submit to petitioner a full and complete description thereof. This decription shall be affidavit and such affidavit shall give a detailed analysis of the documents in such a way that the exemption will be demonstrated."

In sum, based on the foregoing, I do not believe that the bases for denial recited by the Town "fully" explained the reasons for denial. Further, in my opinion, a denial rendered following an appeal must include a more substantive indication of the nature of the records denied, and a more detailed description of the basis for further 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: Guy W. Germano, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4075

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

April 17, 1986

Ms. Lark J. Shlimbaum
Shlimbaum & Shlimbaum
265 Main Street
P.O. Box 8
Islip, New York 11751

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

Dear Ms. Shlimbaum:

I have received your letter of March 31, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you were denied access to records by the Town of Islip. In response to your appeal, the denial was upheld on the grounds that the records:

> "are exempt from disclosure under the Freedom of Information law for the reason that such records are intra-agency records and disclosure would constitute an unwarranted invasion of personal privacy."

Although you attempted to learn more of the nature of the records that were withheld, no additional information has been provided.

It is your view that, since section 89(4)(a) of the Freedom of Information Law states that a determination following an appeal "fully explain in writing...the reasons for further denial", you are "entitled to at least know the identity of the documents to which [you] have been denied access". Absent that type of information, it may be difficult to decide whether a request for relief is warranted.

You have requested my views on the matter.

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 authority to withhold "records or portions thereof" that fall within one or more of the ensuing bases for withholding. From my perspective, the quoted language indicates a recognition on the part of the Legislature that a single record or report, for example, might be both accessible or deniable in part. I believe that it also imposes an obligation on the part of the agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

The initial ground for denial offered by the Town is section 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. As such, the characterization of records as "intra-agency materials", without more, is not determinative of whether the records are available or deniable, in whole or in part.

The other ground cited by the Town would appear to refer to section 87(2)(b), which enables an agency to withhold "records or portions thereof", when disclosure would result in "an unwarranted invasion of personal privacy". Often the deletion of a name or other identifying details serves to protect against an unwarranted invasion of personal privacy, thereby possibly requiring disclosure of the remainder of a record [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985)].

From my perspective, the requirement imposed by section 89(4)(a), that a denial on appeal must "fully explain" the reasons for such a denial, involves more than the mere recitation of the language of one or more of the grounds for denial appearing in section 87(2).

It is noted that, in construing the federal Freedom of Information Act (5 USC 552), federal courts have in some instances required the preparation of a "Vaughn index" by an agency. Such an index provides an analysis of the documents denied as a means of justifying a denial and ensuring that the burden of proof remains on the agency [see Vaughn v. Rosen, 484 F. 2d 820, cert. den. 415 U.S. 977]. I am unaware of any decision involving the New York Freedom of Information Law that required the preparation of a similar index prior to the initiation of litigation. There is, however, a decision in which an agency was required to inform petitioner of the existence of records falling within the scope of a request. In Steele v. New York State Dept. of Health, 464 NYS 2d 925 (1983)], it was stated that:

> "To be certain that respondent has informed the petitioner of all records, which are in existence, respondent shall submit a list to petitioner of all documents in its possession related to petitioner's demand. This list shall include all documents that are in existence as of the present time. If respondent has not previously acknowledged the existence of certain of these documents and feels that some of them are exempt, it must submit to petitioner a full and complete description thereof. This decription shall be affidavit and such affidavit shall give a detailed analysis of the documents in such a way that the exemption will be demonstrated."

In sum, based on the foregoing, I do not believe that the bases for denial recited by the Town "fully" explained the reasons for denial. Further, in my opinion, a denial rendered following an appeal must include a more substantive indication of the nature of the records denied, and a more detailed description of the basis for further 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: Guy W. Germano, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4076

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

April 18, 1986

Mr. Robert J. Koslow
Representative
South New Berlin Bus
Drivers Association
P.O. Box 47
South New Berlin, NY 13843

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

Dear Mr. Koslow:

I have received your letter of April 4.

You have asked that I review your correspondence of March 3, for in your view, Mr. Hall, Superintendent of Schools, offered "conflicting statements" that I overlooked. Specifically, you wrote that Superintendent Hall wrote on January 20 that "an accident did occur on 12/16/85 and accident form MV-104f was completed and filed in the drivers personnel folder", but that on February 18, he wrote that "there is no record of any incident of an accident on 12/16/85".

I have reviewed Mr. Hall's memorandum of January 20, which is addressed to Mr. Carl Pike. Mr. Hall indicated that an accident report would be inserted into Mr. Pike's personnel file. His statement in relevant part is as follows:

> "An accident form MV-104F (6/81) which I asked you to fill in and submit to Supt. Office (to be placed in personnel folder for one year then discarded, as there was not any personal injuries)."

As I interpret Mr. Hall's statement, he asked Mr. Pike to complete an accident form; however, as I indicated to you on March 27, Mr. Joseph Busch, Assistant Superintendent, told me that no such accident report was completed, because it was deter-

mined that the accident was not serious and because there were no personal injuries. In short, if my understanding of the facts is accurate, there may originally have been an intent to complete an accident report, but, as the situation became clearer, it was determined that such a step would be unnecessary. As such, it is my belief, based upon conversations with Mr. Busch, that an accident report was never prepared.

Your remaining questions deal with fees. You asked whether an agency can require payment before the records are reproduced, and whether the District can charge a fee for records sought by a "recognized employee organization".

In this regard, when copies of accessible records are requested, an agency is required to prepare photocopies, at a rate of up to twenty-five cents per photocopy, "upon payment of, or offer to pay" the requisite fee [see Freedom of Information Law, sections 87(1)(b)(iii) and 89(3)]. Therefore, once an agency has determined the number of copies requested, it may in my view require that a fee be paid prior to reproduction of the records.

With respect to the status of a recognized employee organization, the Freedom of Information Law does not distinguish among applicants for records [see M. 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], and an employee organization does not, in my view, enjoy any special or greater rights than the public generally under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Mr. Frederick A. Hall, Superintendent
Mr. Joseph Busch, Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4077

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

April 21, 1986

Mr. Sergio Hector
85-A-2157 : X503
354 Hunter Street
Ossining, NY 10562

Dear Mr. Hector:

I have received your letter of April 14, which reached this office today.

You have requested from this Committee information concerning the manner in which a medical examiner must conduct autopsies, as well as information concerning the steps you must take to obtain information regarding hearings being held concerning the Queens County Medical Examiner.

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

First, the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As a general matter, this office does not maintain records, including those in which you are interested. Further, the Committee does not have the authority to compel an agency to grant or deny access to records.

With respect to the information sought, to the extent that policies and procedures, for example, appear in written form, I believe that they would be available from the agency or agencies that maintain such records. The basis for rights of access would in my view be section 87(2)(g) of the Freedom of Information Law. The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

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

In the context of your question, it would appear that policies or procedures would likely be available under section 87(2)(g)(iii), which grants rights of access to final agency policy or determinations.

When requesting records, section 89(3) of the Law requires that an applicant seek records "reasonably described". Stated differently, sufficient detail should be included in a request to enable agency officials to locate the records sought. It is also noted that agencies should have designated a so-called "records access officer", a person responsible for coordinating an agency's response to requests for records.

In the case of records that may be maintained by the Office of Medical Examiner, it is suggested that you send a request directly to that office. With respect to records concerning a proceeding conducted by the Board of Regents or a licensing board under the aegis of the Board of Regents, a request may be sent to the records access officer at the State Education Department, State Education Building, Albany, NY 12234.

Enclosed for your consideration is "Your Right to Know", which describes the Freedom of Information Law and includes a sample letter of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4078

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

April 22, 1986

Ms. Barbara B. Tromblee
Treasurer
Village of Westport
Westport, NY 12993

The staff of the Committee on 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. Tromblee:

I have received your letter of April 9.

Your inquiry pertains to fees for copies of a tentative budget prepared by the Village of Westport.

In this regard, I offer the following comments.

As you are aware, the Village Law, section 5-504, states in part that the Village budget officer "shall furnish a copy of the tentative budget and the budget message, if any, to each member of the board of trustees and he shall reproduce for public distribution as many copies as he may deem necessary". Therefore, it is clear that the tentative budget is intended to be available to the public.

The language quoted above does not indicate a specific number copies to be distributed for the public. Having discussed the matter with a variety of officials in the past, it is my belief that copies are intended to be distributed in various locations in a village, such as libraries or schools, for example, in order that the tentative budget can be readily reviewed by members of the public.

In terms of copies, as a general matter, the Freedom of Information Law requires that an agency prepare photocopies of accessible records based upon a fee of up to twenty-five cents per photocopy, unless a different fee is prescribed by statute. Assuming that no other statute permits a village to charge a different fee, I believe that it may charge up to twenty-five cents per photocopy in conjunction with section 87(1)(b)(iii) of the Freedom of Information Law.

You also asked that I explain how the Village tentative budget differs from an annual school district meeting. In all honesty, although I have some familiarity with the requirements imposed by the Education Law relative to school districts, I do not have sufficient expertise to provide you with the explanation that you seek. Further, since the Committee is charged with the responsibility of advising with respect to the Freedom of Information and Open Meetings Laws, your question falls outside the scope of the Committee's jurisdiction.

I hope that I 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-4079

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

April 23, 1986

Mr. John M. Striker
Publisher
Brownstone Publishers, Inc.
304 Park Avenue South
New York, New York 10010

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

Dear Mr. Striker:

I have received your letter of April 10 and the correspondence attached to it.

According to the materials, on April 1, you sent a request to the New York City Department of Consumer Affairs in which you sought the following information:

> "List of the 31 heating oil dealers used in the Department of Consumer Affairs' monthly heating oil price survey. Consumer Affairs surveys 31 heating oil dealers in New York City each month and publishes the average price. The price survey includes grade numbers 2, 4, and 6 home heating oil."

You also requested the "31 dealer price survey, including the names and addresses of the dealers surveyed and the prices they charge..."

Ms. Elaine Werbell denied the request of April 8 "pursuant to section 87.2(b) of the Freedom of Information Act in order to protect against an unwarranted invasion of privacy."

You requested an advisory opinion concerning the denial and, 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 of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, although Ms. Werbell alluded to an unwarranted invasion of privacy as the basis for withholding, the specific language of section 87(2)(b) refers to disclosures resulting in "an unwarranted invasion of personal privacy" (emphasis added). From my perspective, quoted language, as well as the examples of unwarranted invasions of personal privacy appearing in section 89(2)(b) of the Freedom of Information Law, are intended to pertain to records identifiable to natural persons, rather than the firms identified in the records sought. This contention is bolstered by the enactment of the Personal Privacy Protection Law, Article 6-A of the Public Officers Law. Although that statute applies only to state agencies and is not applicable to municipalities, such as New York City, the protection of privacy accorded by that statute, which relates to the standard regarding privacy in the Freedom of Information Law, clearly pertains to "personal information" about a "natural person" [see Public Officers Law, section 92(3)].

In short, I do not believe that the privacy provisions of the Freedom of Information Law could justifiably be asserted, because the information sought does not pertain to "natural persons", nor does it involve personal information. Concurrently, it is my view that the records sought must be made available under the Freedom of Information Law, for none of the grounds for denial 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

cc: Elaine Werbell
Christopher FitzPatrick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-408C

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

April 23, 1986

Mr. Richard M. Bradbury
Certified Public Accountant
34 South Broadway
White Plains, NY 10601

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

Dear Mr. Bradbury:

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

According to your letter, last month you requested from the Mahopac Central School District a copy of a lease involving the rental of space in an elementary school to an "outside party". The lease was approved by the Board of Education at an open meeting on February 12. Despite the action of the Board, the District's Freedom of Information Officer, Joseph Girven, denied the request on the ground that the lease had not yet been signed. You appealed the denial to Jerry J. Cicchelli, Chief School Administrator, who upheld the denial, stating that "Disclosure will impair an imminent contract award. There are ongoing negotiations over the terms of the document."

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. Moreover, the grounds for denial generally are intended to permit withholding in cases in which disclosure would be harmful to the work of an agency or a person, for example.

Second, the provision to which the Superintendent alluded is section 87(2)(c), which permits an agency to withhold records or portions thereof when disclosure would:

"impair present or imminent contract awards or collective bargaining negotiations."

From my perspective, the language quoted above may generally be invoked when disclosure would place the agency in an unfair or disadvantageous position in the negotiation process, or when premature disclosure of bids would give one or more bidders an advantage over other possible bidders prior to the deadline for submission of bids to an agency.

However, in this instance, which does not involve bids, but rather a prior approval by the School Board of a lease, disclosure in my opinion would not at this juncture "impair" the negotiation process or the position of the School District. If the record in question is known only to district officials, and disclosure would enable the other party to the negotiations to know the negotiation strategy or the parameters of the terms acceptable to the Board, premature disclosure might place the Board at a disadvantage in the negotiation process. During our phone conversation, you indicated that the lease approved by the Board, the subject of your request, has been disclosed to the potential holder of the lease. If that is so, if the record in question has been shared with the other party to the negotiations, disclosure could not in my view "impair present or imminent contract awards...".

In short, if the facts that you provided and my assumptions are accurate, I believe that the record sought is accessible under the Freedom of Information, for none of the grounds for denial 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

cc: Jospeh Girven, Freedom of Information Officer
Jerry J. Cicchelli, Superintendent of Schools
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4081

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

April 23, 1986

Ms. Cathy McDonald
Staff Writer
Westchester Rockland Newspapers
1825 Commerce Street
Yorktown Heights, NY 10598-8859

The staff of the Committee on 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. McDonald:

I have received your letter of April 10 and the correspondence attached to it. The materials pertain to a denial of your request for final environmental impact statements filed with the Town of North Salem "by both the proposed Holiday Inn Crowne Plaza and for the proposed Ramada Renaissance Hotel".

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. I point out, too, that final environmental impact statements filed by the firms in question could not in my view be characterized as "inter-agency or intra-agency materials" for the firms are not "agencies" [see definition of "agency", Freedom of Information Law, section 86(3)].

Second, and of particular relevance in this instance, section 89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

Therefore, if rights of access are granted by other provisions of law, those rights are preserved notwithstanding the provisions of the Freedom of Information Law.

Under the circumstances, I believe that other provisions of law direct that the records in question must be made available. Specifically, section 8-0109(6) of the Environmental Conservation Law states that:

> "To the extent as may be prescribed by the Commissioner pursuant to section 8-0113, the environmental impact statement prepared pursuant to subdivision two of this section together with the comments of public and federal agencies and members of the public, shall be filed with the commissioner and made available to the public prior to acting on the proposal which is the subject of the environmental impact statement."

The regulations prescribed by the Commissioner, which appear in 6 NYCRR 617.10, refer to "Draft EIS's" (environmental impact statements), and state in subdivision (e) that:

> "The draft EIS, together with the notice of its completion, shall be filed and made available for copying as follows:
>
> (1) one copy with the commissioner;
>
> (2) one copy with the appropriate regional office of the department;
>
> (3) one copy with the chief executive officer of the political subdivision in which the action will be principally located;
>
> (4) if other agencies are involved in the approval of the action, with each such agency;
>
> (5) one copy with persons requesting it. When sufficient copies of a statement are not available, the lead agency may charge a fee to persons requesting the statement to cover the costs in making the additional statement available..."

Subdivision (h), which pertains to "final EIS's, states that "The final EIS, together with notice of its completion, shall be filed in the same manner as a draft EIS". Further, subdivision (i) provides that "Each agency which prepares notices, statements and findings required in this part shall retain copies thereof in a file which is readily available for public inspection".

In view of the foregoing, I believe that the law and regulations seek to ensure that the record in which you are interested 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:ew

cc: Lois Q. Lippman, Appeals Officer
Town Board, Town of North Salem

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4082

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

April 23, 1986

Mr. Rufus Melvin
#85-A-5471
Attica Correctional Facility
P.O. Box 149
Attica, New York 14011

Dear Mr. Melvin:

I have received your letter of April 20 in which you requested from this office all records pertaining to you "that are in the possession of the Department of Correctional Services".

In this regard, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. The Committee does not maintain custody or control over records maintained by other agencies. As such, since this office does not possess the records you seek, we cannot make them available.

However, I offer the following comments and suggestions.

First, as a general matter, a request should be directed to the agency that maintains the records. According to the regulations promulgated by the Department of Correctional Services, a request for records kept at a correctional facility may be directed to the facility superintendent. For records kept at the Department's Albany offices, a request may be sent to the Deputy Commissioner for Administration.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. A request for "all records" pertaining to you might not meet that standard. Therefore, when making a request, it is suggested that you include sufficient detail to enable agency officials to locate the records in which you are interested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4083

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

April 29, 1986

Commissioner Rosemary Pooler
Public Service Commission
Agency Building 3
Empire State Plaza
Albany, New York 12223

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

Dear Commissioner Pooler:

I have received your recent letter in which you requested an advisory opinion.

According to your letter:

> "At the Public Service Commission our trial of cases typically involves the submission of evidence of parties, cross examination of that evidence, submission of briefs to a judge or judges, issuance of a recommended decision by the judge or judges and briefs submitted directly to the Commission after the issuance of the recommended decision. Before the Commission meets to decide a case, our office of Opinions and Review writes an Analysis of the entire record, the recommended decision, and all briefs. This Analysis document is denominated an interoffice memorandum."

You added that you "suspect that this interoffice memorandum would not be reachable" under the Freedom of Information Law. Nevertheless, you want to release it to all parties, for it is your view that its release will "promote greater discussion of the issues" and permit scheduled oral arguments "to be more clearly focused" on those issues.

Your question involves your right to disclose the "interoffice memorandum".

In this regard, I offer the following comments.

First, in terms of your "right" to disclose such a record, since I am unfamiliar with the rules and procedures of the Commission, I cannot speculate on your authority to act unilaterally as a member of the Commission.

Second, however, it is noted that, as a general matter, the Freedom of Information Law is permissive. Stated differently, while section 87(2) indicates that records or portions thereof may be withheld in accordance with the grounds for denial that follow, there is nothing in the Freedom of Information Law that prohibits the disclosure of a record. The only instances in which a record must be withheld would involve the application of other statutes that permit or require confidentiality. In those cases, such records would be "specifically exempted from disclosure by state or federal statute" [see Freedom of Information Law, section 87(2)(a)].

As an "interoffice memorandum", such a record would fall within the scope of section 87(2)(g) of the Freedom of Information Law. The cited provision states that an agency may withhold records that:

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

I point out that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency ~~policy or determinations must be made available.~~ ~~Concurrently~~, those aspects of inter-agency or intra-agency materials reflective of opinion, advice, recommendation and the like could in my opinion justifiably be withheld.

If the only basis for withholding the record in question is section 87(2)(g) pertaining to inter-agency or intra-agency materials, I believe that the Freedom of Information Law permits a denial of access to the record; however, again, assuming that the cited provision represents the sole basis for withholding, the Freedom of Information Law would not in my view require that the record 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-4084

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

April 29, 1986

Ms. Judy Braiman-Lipson
Empire State Consumer Association, Inc.
345 Clover Hills Drive
Rochester, New York 14618

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

Dear Ms. Braiman-Lipson:

I have received your letter of April 9, as well as the materials attached to it.

According to your letter, on March 20, you submitted a request for various records to the Records Access Officer of the Town of Henrietta. On March 28, the Town Attorney acknowledged the receipt of your request and indicated that he directed Carol Pennington, the Town Clerk and Records Access Officer, to notify you "as soon as the appropriate documents are marshalled in her office". On April 4, Ms. Pennington contacted you and told you that "she had all the records". An appointment was made to review the records on April 7. However, you were told by Ms. Pennington that some of the records sought were at the Library and that the Library Director "refused to allow anything to leave the Library". By way of background, the Library has been the subject of controversy and was closed for some time due to a chemical odor. Under the circumstances, you told Ms. Pennington that you did not want to go to the Library to review the records, for on the previous day, when you attended a meeting at the Library, you had a reaction to something in the atmosphere. Despite your reaction and your misgivings about inspect the records at the Library, the Library Director, Ms. Alonzo, told you that she would not allow the records to leave the Library. Following that event, you contacted the Supervisor to learn of the Town's authority with respect to the Library. You wrote that the Supervisor indicated that the Town Board appoints Library Board Members, it approves its budget and monitors its expenses, and that it takes responsibility for the maintenance of the building.

Since you have effectively been denied access to records on the basis of Ms. Alonzo's refusal to transfer them to the Records Access Officer, you have asked for my views concerning the controversy.

In this regard, I offer the following comments.

First, there appears to be no issue regarding rights of access, for it has apparently been determined that the records are accessible under the Freedom of Information Law.

Second, I believe that the provisions of the Town Law as well as the regulations promulgated by the Committee on Open Government, which have the force and effect of law, indicate that Ms. Pennington, as Town Clerk and Records Access Officer, may require that the records be transferred to her in order that you may inspect them.

As you may be aware, section 30 of the Town Law describes the powers and duties of the Town Clerk. Subdivision (1) of the cited provision states that the Town Clerk "Shall have the custody or all the records, books and papers of the Town". Therefore, from my perspective, although the Town Clerk might not have physical custody of records maintained in Town offices, she would nonetheless have legal custody.

Further, based upon review of the correspondence, the Town Clerk has also been designated as Records Access Officer. Here 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 Freedom of Information Law. The Committee has done so by means of 21 NYCRR Part 1401 et. seq. In turn, section 87(1) of the Law requires the governing body of a municipality to promulgate regulations for all agencies within the municipality consistent with the Law and the regulations of the Committee. Section 1401.2 of the regulations describes the duties of the records access officer. The records access officer is responsible for assuring that agency personnel, upon locating records, make the records available for inspection. Assuming that Ms. Pennington is the sole designated Records Access Officer, I believe that she would have the authority and the responsibility to obtain records, if necessary, from various officials of the Town that maintain records requested under the Freedom of Information Law. As such, I believe that the records in question, although in the physical custody of the Library Director, are in the legal custody of the Town Clerk, and that the Town Clerk as Records Access Officer has the authority to obtain records from the Library Director in order to carry out her responsibilities 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: Carol Pennington
Kate Alonzo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4085

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

April 30, 1986

Ms. Patricia C. Arthur
[redacted]

The staff of the Committee on 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. Arthur:

I have received your letter of April 10, 1986 in which you raised a question under the Freedom of Information Law.

Specifically, you asked whether "the provisions of Section 87 of said law...compel a town board to promulgate regulations concerning access to local records". Your question has arisen because it appears that your town board has not adopted regulations pursuant to the Freedom of Information Law. In this regard, I would like to offer the following comments.

First, it is noted that, while you referred to section 87(1)(b)(i)(ii) and (iii), of the Freedom of Information Law, section 87(1)(a) requires the governing body of each public corporation to promulgate uniform rules and regulations applicable to all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the Committee on Open Government and in conformity with the provisions of the Freedom of Information Law.

Second, section 60 of the Town Law states in part that the town board"...shall be vested with all the powers of such a town and shall possess and exercise all the powers...". It is my opinion that the cited provision indicates that a town board is the "governing body" of a public corporation, a town.

As the governing body of a public corporation, the town board is, in my opinion, required to promulgate the appropriate regulations applicable to all agencies in the town government consistent with the regulations of the Committee.

Third, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the implementation of the procedural aspects of the Law. Pursuant to this statutory authority, the Committee has promulgated regulations which are found in 21 NYCRR Part 1401. A copy of these regulations is enclosed for your information.

I am also enclosing a copy of Model Regulations drafted by this office as a guideline for public bodies and agencies in preparing their regulations. Certainly you may share the Model Regulations 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4086

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

May 1, 1986

Mr. Isidore Gerber
[redacted]

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

Dear Mr. Gerber:

I have received your letter of April 15 in which you complained about the amount of information made available by the Village of Liberty relative to its budget.

Attached to your letter is a request made under the Freedom of Information Law for "the federal revenue funds use as to debt service and the so-called 'worksheets' which are the appropriations in..." various areas of the Village budget. You wrote that the Mayor did not make available the records sought because he did not understand the meaning of the "detailed appropriations". As a consequence, you suggested that the public hearing on the budget was not held with enough information previously made available to the public to enable citizens to comment intelligently.

In this regard, I offer the following comments.

First, it is noted that section 89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". In construing the quoted language, it has been held by the state's highest court that a request reasonably describes the records sought if the agency can locate the records on the basis of the terms of the request [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Since I am not familiar with the specific documentation prepared in conjunction with the Village budget process, I cannot conjecture as to the sufficiency of your request. However,as you may be aware, one of the duties of a designated records access officer is to assist the requester in identifying the records sought, if necessary

[see 21 NYCRR Part 1401.2(b)]. Therefore, if there was an absence of understanding of the records in which you were interested, the records access officer, on request, might have attempted to discuss the matter with you for the purpose of determining the records in which you were interested.

Second, although I am not familiar with the nature of "worksheets" that may be used by the Village, case law indicates that figures on worksheets, such as estimates or projections of proposed expenditures, constitute "statistical or factual tabulations" that are accessible under the Law [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)]. Therefore, if the worksheets are similar to those described in the case cited above, I believe that they would be available.

Third, enclosed is a copy of section 5-506 of the Village Law, which provides the most complete description of which I am aware concerning the form and content of the tentative budget of a village.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Mayor
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4087

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

May 1, 1986

Mr. John Bal
[redacted]

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

Dear Mr. Bal:

I have received your letter of April 24, as well as the materials attached to it.

The first issue raised in your letter involves what appears to be an appeal to this office. The appeal relates to a response to a request sent to you by Ms. Sharon Galarneau, Assembly Records Access Officer, who denied certain aspects of a request. In this regard, although the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, the Committee does not render determinations on appeal. Provisions concerning the appeal of a denial of access to records are found in 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 ex-~~ plain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

For your information, the Appeals Officer for the Assembly is Mr. William Alexander, Room 347M, the Capitol, Albany, New York.

You also indicated that you sent a request pursuant to the Freedom of Information Law on March 28 to Assemblyman Sheldon Silver. You asked whether Assemblyman Silver is in violation of the Freedom of Information Law because he did not respond within five days.

As I explained to you in some detail in a letter dated April 16, requests for records of the Assembly should be directed to the Assembly's designated records access officer, rather than an individual member. In short, for the reasons described on April 16, I do not believe that members of the State Legislature are required by the Freedom of Information Law to respond individually to requests. Again, a request should have been sent not to Assemblyman Silver, but rather to the Records Access Officer.

Lastly, since you included a copy of your request to Assemblyman Silver, I would like to offer the following observations. You requested that Assemblyman Silver:

> "List amendments to the Governors proposed budget known as member-items, legislative initiatives or similar titles that you have requested since 1977 and indicate:
>
> a) Which items received public funding and amounts.
>
> b) The organizations that received funding and amounts.
>
> c) The governmental agency that administered funding.

In this regard, the Freedom of Information Law generally pertains to existing records, and section 89(3) states that, unless otherwise specified, an entity subject to the Law is not required to create or prepare a record in response to a request. Therefore, if the "list" that you requested does not exist, neither Assemblyman Silver nor the Assembly would in my view be required to create such a list on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: William Alexander
Sharon Galarneau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4088

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

May 1, 1986

Mr. Walter Fee
Mr. Michael Arena
Newsday
Long Island, NY 11747

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

Dear Messrs. Fee and Arena:

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

According to your letter, you were informed by the office of the Deputy Mayor of New York City for Policy and Physical Development that the City had received five or six proposals for construction, by the City, of a concrete plant. As such, on April 2, you requested "All proposals, and other documents, including financial statements, filed in connection with New York City's plan to operate its own concrete plant". In a letter dated April 9, Susan R. Rosenberg, Deputy Counsel to the Mayor, denied your request in conjunction with sections 87(2)(c) and 87(2)(g) of the Freedom of Information Law. Most recently, you informed me by phone that the City has preliminarily determined to negotiate with one of the firms that submitted proposals.

You have requested an advisory opinion concerning the denial and, 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 section 87(2)(a) through (i) of the Law.

Second, it is emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In view of the quoted language, I believe that the Legislature envisioned situations in which a record might be both accessible or deniable in part. Moreover, that language in my opinion imposes an obligation on the part of agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, in terms of the bases for denial offered by Ms. Rosenberg, if I understand the facts accurately, one of the grounds would not apply. She referred to the records as "inter-agency or intra-agency materials. 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Therefore, "inter-agency or intra-agency materials" would involve communications prepared by agency officials and transmitted to officials of the same or other agencies. Proposals, bids and related documentation submitted by a firm, which is not an "agency", could not in my view be characterized as "inter-agency or intra-agency materials" and, consequently, section 87(2)(g) could not be asserted to withhold the records in question.

The other ground for denial cited by Ms. Rosenberg, section 87(2)(c), states that an agency may withhold records or portions thereof when disclosure would "impair present or imminent contract awards..."

From my perspective, the capacity to deny on the basis of section 87(2)(c) is dependent on the specific facts that may be present. For instance, if an agency is seeking bids or proposals, and the deadline for submission of the proposals is a particular date, proposals submitted prior to that date could likely be withheld, for premature disclosure to a potential bidder would give that person an unfair advantage in the bidding process. In such a case, a bid could be tailored to ensure that it is most acceptable, to the disadvantage of earlier bidders.

Viewing the process from the vantage point of an agency, premature disclosure of bids or proposals might effectively preclude the agency from receiving the best or perhaps the lowest possible bids. As such, if bid documents or proposals are released before the deadline for their submission, disclosure might result in impairment to bidders and the agency seeking bids. However, when the deadline for the submission of bids has been reached, those who have submitted bids are placed on an equal footing, and disclosure often would no longer "impair" the process or result in any advantage or disadvantage to the parties.

At this juncture, since one firm has preliminarily been chosen, unless there are additional facts of which I am unaware, it is difficult to envision how disclosure of the proposals would "impair" the process of awarding a contract. If there are additional considerations or facts, it is reiterated that portions of the records might be withheld under section 87(2)(c); however, the remainder should likely be available.

Lastly, one aspect of your request involves financial statements submitted to the City by firms offering proposals. Without knowledge of the contents of those statements, I could not conjecture as to their availability. Nevertheless, I point out that section 87(2)(d) 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..."

Depending upon the nature of the firms, the industry, and the degree of detail found in financial statements, it is possible that the statements might be deniable, perhaps in part, in conjunction with section 87(2)(d) on the ground that they constitute trade secrets.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Susan R. Rosenberg
Patrick F.X. Mulhearn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4089

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

May 1, 1986

Mr. Irving Camper
[redacted]

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

Dear Mr. Camper:

I have received your letter of April 11, 1986 in which you requested assistance in obtaining records documenting your place of birth from the "New York City School System." You indicated that you have in your possession an old attendance card from a public school in Brooklyn which shows your place of birth as Pennsylvania. You further indicated that you requested documentation of your place of birth from the Bureau of Pupil Records, which referred you to particular schools that did not respond to your requests.

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

First, it is noted that the Committee on Open Government does not have the authority to compel an agency to grant or deny access to records or to enforce compliance with the Law. This office is authorized to render advisory opinions under the Freedom of Information Law.

Second, the Freedom of Information Law is applicable to records of an "agency", such as schools within the New York City school system and the New York City Board of Education. I ~~believe that the Board of Education is likely the source of the~~ record sought.

Third, under the Freedom of Information Law, a request for records should be directed to the "records access officer" at the agency that maintains the records sought. In this instance, the records access officer to whom your request should be directed is Ruth Bernstein at 110 Livingston Street, Brooklyn, New York.

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 section 87(2)(a) through (i) of the Law.

In regard to a request by you for records relating only to your own place of birth, it does not appear that any ground for denial could appropriately be asserted. Therefore, if the Board of Education maintains possession of the record in question, it should be available to you.

Fifth, I believe that the record which you seek may also be accessible to you under the federal Family Educational Rights and Privacy Act (20 USC section 1232g). 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" includes a person who has attained eighteen years of age with respect to whom an educational agency or institution maintains education records. Therefore, as a general matter, I believe that you have rights of access to records identifiable to you pursuant to that Act, as well as the Freedom of Information Law.

Sixth, it is noted that both the Freedom of Information Law and the regulations promulgated by the Committee prescribe time limits within which an agency may 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 days is necessary to review or locate the records and determine the rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten business days of the acknowledgment, the request is considered "constructively" denied.

In my view, a failure to respond within the designated time limits results in a denial of access and, as such, may be appealed. You have the right to appeal an initial denial of access under section 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..."

Moreover, copies of appeals and the determinations that follow must be sent to this office.

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 assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Enc.

cc: Ruth Bernstein, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4090

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

May 5, 1986

Mr. Robert Walker
[redacted]

Dear Mr. Walker:

I have received your letter of May 2 in which you requested from this office a "copy of the agreement both the N.Y. State Bureau of Disability Determinations and the Social Security Administration".

In this regard, it is emphasized at the outset that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. The Committee does not have custody or control of records generally, including the contract in which you are interested, nor does it have the capacity to compel an agency to grant or deny access to records. In short, this office cannot provide a copy of the contract, because the Committee does not maintain a copy of the contract.

As a general matter, a request for a record should be sent to the "records access officer" at the agency or agencies that you believe would maintain the record. In this instance, it is suggested that a request should be directed to:

Ms. M. Elizabeth Lyon, Records Access Officer
New York State Department of Social Services
40 North Pearl Street
Albany, New York 12243

In the alternative, a request could be made under the federal Freedom of Information Act and directed to the Social Security Administration.

Lastly, I point out that both the federal Freedom of Information Act and the New York Freedom of Information Law require that an applicant "reasonably describe" the record sought. Therefore, when submitting a request, it is suggested that you include sufficient detail to enable the agency 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4091

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

May 5, 1986

Mr. Ronald DeFeo
#75-A-4053
Box B
Clinton Correctional Facility
Dannemora, New York 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. DeFeo:

I have received your letter of April 17 in which you described problems in obtaining records of the Department of Correctional Services.

Specifically, according to your letter, on January 31, you requested information concerning the reason for your transfer. In a determination on appeal sent to this office by Counsel to the Department , you were advised that the appeal was premature, and that your request should be sent to the superintendent of your facility. As of the date of your letter to this office, the information sought has not been made available.

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 regulations concerning the procedural implementation of the Law. In turn, section 87(1) requires each agency to adopt regulations consistent with the Committee's regulations and the Law.

Second, the Department of Correctional Services has promulgated the appropriate regulations. Those regulations indicate that a request for records kept at a facility should be sent to the facility superintendent; for records kept at the Albany offices of the Department, a request may be sent to the Assistant Commissioner for Administration. In view of the foregoing, it appears that your difficulty arose because your request should have been sent to the facility superintendent, rather than Mr. Mahoney.

Third, if the Superintendent denies access to the records in writing or by means of a failure to respond to the request within the requisite time limits, you may 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 records the reasons for further denial, or provide access to the record sought."

As you may be aware, an appeal may be directed to Counsel to the Department.

Lastly, it is questionable in my view whether records concerning reasons for transfer are available. 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..."

While some aspects of inter-agency or intra-agency materials are accessible, those portions consisting of advice, opinion, recommendation and the like may in my view be withheld. As such, your rights to records regarding a transfer are likely dependent upon the specific contents of records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4092

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

May 5, 1986

Mr. Donald V. Brandt
[redacted]

Dear Mr. Brandt:

Your letter of March 26 addressed to Governor Cuomo has been forwarded to the Committee on Open Government.

Your inquiry deals generally with actions that may be taken when violations of the federal Freedom of Information Act or the state Freedom of Information Law occur.

In this regard, it is noted that the Committee on Open Government is responsible for oversight of the state Freedom of Information Law, and that it has no authority with respect to its federal counterpart. Nevertheless, I am generally familiar with the federal Freedom of Information Act, which states in part that:

> "Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission,

> after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority to the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends."

Under the Freedom of Information Law, section 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."

Further, the article included in your correspondence concerning a proposal to strengthen the Freedom of Information Law by Nassau County District Attorney Denis Dillon has resulted in the introduction of legislation. I have been informed that the bill A.2405-B, a copy of which is enclosed, is progressing through 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4093

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

May 6, 1986

Mr. Hans Pecher
[redacted]

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

Dear Mr. Pecher:

I have received your letter of April 17, which again pertains to a settlement reached between the Southern Cayuga School District and its former superintendent.

An opinion dated April 7 was sent to you in which it was suggested that, based upon the materials that you enclosed, disclosure of the records sought would violate the terms of a settlement agreement that appeared to have been approved by Federal District Court. The agreement, a copy of which you forwarded, refers "This action, commenced in U.S. District Court for the Northern District of New York..." However, your requests for court records indicate that no case was officially "commenced". Further, you enclosed a copy of a letter on the letterhead of the Clerk of the United States District Court in which William Murphy, Deputy Clerk, wrote:

> "I have searched through our civil records and I find no action against KATE S. WOODWARD, JOHN REJMAN, BRIAN PAYSON, ROBERT CHASE, MARGARET PARMLEY, RALPH ALLEN, ARTHUR DiSANTO, THE BOARD OF EDUCATION OF THE SOUTHERN CAYUGA CENTRAL SCHOOL DISTRICT"(emphasis supplied by Mr. Murphy).

Assuming that no court approved or authorized the settlement, I do not believe that disclosure would result in any sanction, such as contempt, that could be imposed by a court. Rather it appears that rights of access to the records in question would be governed by the Freedom of Information Law.

It is emphasized that I am not suggesting that the records in which you are interested are available. On the contrary, depending upon their contents, the record might justifiably be denied. As you may be aware, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". If, for example, the records sought contain unproven changes or allegations, it is likely that a denial would be proper.

In short, while the District might not have been prohibited by a court from disclosing the records, as I was led to believe, the records might nonetheless remain deniable, depending upon their contents, and particularly upon privacy considerations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: A. Edward DiMiceli
Louis Contiguglia

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4094

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

May 6, 1986

Mr. Herbert A. Smith, Jr.
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 Mr. Smith:

I have received your letter of April 17 concerning marriage records.

Specifically, you asked whether the form used by the Town Clerk, acting as registrar of vital records, which is provided by the State Health Department, is a "public record". You also asked whether the language of section 19 of the Domestic Relations Law indicating that certain marriage records are open to inspection whenever "necessary or required for judicial or other proper purposes" constitutes a specific statutory exemption falling within the scope of section 87(2)(a) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, since section 19 of the Domestic Relations Law governs access to marriage records kept by town and city clerks, the Freedom of Information Law is not in my opinion applicable. Stated differently, I believe that the cited provision of the Domestic Relations Law is the statute that determines rights of access.

Second, in my opinion, section 19 does not specifically exempt marriage records from disclosure, for the purpose for which a request is made forms the basis for determining whether or not the records are available.

Third, as you may be aware, there are differences of opinion between myself and officials of the State Health Department relative to rights of access to marriage records. The first sentence of section 19 states that:

> "Each town and city clerk hereby empowered to issue marriage licenses shall keep a book supplied by the state department of health in which such clerk shall record and index such information as is required therein, which book shall be kept and preserved as a part of the public records of his office."

From my perspective, that portion of a license or "book" indicating that "X" is married to "Y" should be considered a "public record". In ensuing portions of section 19, reference is made to affidavits, consents and similar information that may be required and upon which access is conditioned upon a showing of judicial or other proper purposes. In my opinion, it would be those aspects of marriage records that may be withheld or made available depending upon the circumstances surrounding the request. Nevertheless, it appears that the Bureau of Vital Records of the State Health Department disagrees with my point of view. To provide you with additional information concerning differing views, enclosed is a copy of a letter that I sent to the Director of the Bureau of Vital Records on March 3, 1983, which was written in response to a column distributed to local registrars concerning marriage records. Also enclosed is a response to that letter offered by Counsel to the Health Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4095

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

May 6, 1986

Mr. Wesley C. Fisher Sr.
#81-A-3964
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. Fisher:

I have received your letter of April 12, 1986 in which you requested assistance regarding access to records.

Specifically, you have advised this office that you have been "convicted of the death" of an individual whom you brought to the Peekskill Community Hospital and who subsequently died. You are now seeking access to the "records of the exact procedure performed by the doctor or any of the nurses in this instant matter" (emphasis yours). You further stated that you are not seeking the medical records of the patient as you are already familiar with that person's medical history.

Additionally, you are inquiring as to your right of access to all police records pertaining to you in regard to this matter; including "arrest reports, search warrants and invoice slips". In this regard, I would like to offer the following comments.

First, since you alluded to the application of the Freedom of Information Law to federal agencies, it is noted that the New York Freedom of Information Law is a New York State statute which governs rights of access to records maintained by an "agency". The term "agency" is 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."

The federal Freedom of Information Act, also known as the FOIA, is applicable only to rights of access to records maintained by federal agencies.

Second, based upon Law's definition of "agency" the records of the Peekskill Community Hospital are governed by the New York Freedom of Information Law only if that hospital is a state or municipal hospital. The law does not apply to records maintained by a private hospital.

Third, 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.

Fourth, the Freedom of Information Law pertains to existing records. Therefore, if, for example, a record of the procedures followed by the doctors and nurses in regard to the deceased does not exist, the hospital, assuming that it is subject to the Freedom of Information Law, would not in my view be required to create such a record in response to a request [see Freedom of Information Law, section 89(3)].

Fifth, assuming that such a record does exist, based upon the facts that you have given me, I believe that the record could possibly be properly denied under one or more of several grounds for denial under section 87(2) of the Freedom of Information Law.

Under section 87(2)(a), records may be exempted from disclosure by state statute. Further, a statute entitled the Personal Privacy Protection Law may apply. That statute deals with access to and disclosure of personal records maintained by state agencies. If the Peekskill Community Hospital is a state hospital, the Personal Privacy Protection Law would be applicable. Under that statute, medical records may generally be withheld.

Under section 87(2)(b) of the Freedom of Information Law, disclosure of the requested records may constitute an "unwarranted invasion of personal privacy".

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, unless one of the other grounds for denial applies.

Sixth, you indicate that a lawsuit may be pending or ongoing in regard to certain incidents which occurred at Peekskill Community Hospital related to your inquiry. If that is so, such records may be confidential under the Civil Practice Law and Rules. Specifically, section 3101(d)(2) of the CPLR states that material prepared solely for purposes related to litigation are generally non-disclosable.

Seventh, you are also inquiring as to your right of access to various police department records which you indicate were not made available to you during your trial. You further indicate that the District Attorney's Office has recently refused you access to these records based on the ground that disclosure would "hinder the judicial process". Additionally, you state that you have "gone to the courts with these issues" but that disclosure of the disputed records was not ordered. However, you do not indicate whether you were represented by legal counsel during your trial or at any time thereafter.

It appears to me that you have raised several issues here which go beyond the reach of this office. The Committee on Open Government is authorized to furnish advisory opinions regarding the Freedom of Information, Personal Privacy Protection and the Open Meetings Laws. You have raised questions which appear to involve other areas of the law, such as the Criminal Procedure Law, and which should be handled by an attorney representing you.

Eighth, according to the facts you have presented, it appears that the denial of access by the District Attorney's Office was based upon section 87(2)(e) of the Law. Section 87(2)(e) states that an agency may deny access to records or portions thereof that:

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

As such, the capacity to withhold under section 87(2)(e) is dependent upon the facts and the specific contents of records.

Ninth, under the Freedom of Information Law, an initial request for records should be directed to the "records access officer" at the agency that maintains the records sought. If your request to the District Attorney's Office was not directed to the Access Officer, you can direct a new inquiry to that officer.

Tenth, it is noted that both the Freedom of Information Law and the regulations promulgated by the Committee prescribe time limits within which an agency may 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 addi-

tional 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)].

Lastly, for your use and information, I am enclosing copies of the Freedom of Information Law, the Personal Privacy Protection Law and "Your Right to Know", which explains the provisions of the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4096

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

May 7, 1986

Ms. Deborah Schneer
Staff Attorney
Prisoners' Legal Services of
New York
2 Catharine Street
Poughkeepsie, NY 12601

<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. Schneer:

I have received your letter of April 18, as well as the materials attached to it.

According to your letter:

> "Upon arrival into the state prison system, each inmate is given a battery of standardized tests in a variety of skill and subject areas. Educational data is also kept on each inmate, including such information as IQ score, previous educational history, and special skills. Retesting is done in some instances after enrollment in programs designed to upgrade skill levels."

Recently, in your capacity as attorney for particular inmates, you have requested "psychological and educational evaluations and test results" concerning those inmates, including "academic and vocational reports all computer print-outs containing educational data and test results, and bi-lingual cross-reference test results, as well as specific tests administered". Your requests have been denied pursuant to section 87(2)(g) of the Freedom of Information Law, notwithstanding your contention that the records in question should be made available.

In this regard, I offer the following observations.

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 authority to withhold "records or portions thereof" that fall within the scope of one or more of the ensuing grounds for denial. In my opinion, 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 an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

Third, the provision cited as the basis for denial, 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 reflective of advice, opinion, recommendation, suggestion and the like could in my view be withheld.

Under the circumstances, since I am unfamiliar with the specific contents of the records sought, only general guidance can be offered. While the records could be characterized as "intra-agency" materials, it appears that some should be available, while others might justifiably be withheld. For instance, if a traditional academic type of test is given, such as a vocabulary or math test, the result would in my view be

"statistical or factual" and, therefore, should be available. Similarly, factual data regarding educational history or achievement would also constitute factual information. The results of other types of tests, however, might be in the nature of opinions. For instance, the results of a psychological test might involve the equivalent of a diagnostic opinion. Such an opinion or evaluation could in my view likely be withheld.

In short, as suggested earlier, without knowing more of the nature of the records in question, specific guidance cannot be shared. However, it would appear that a blanket denial on the basis of section 87(2)(g) would be inappropriate.

I hope that I 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-4097

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

May 7, 1986

Mr. Harold Mondshein
[redacted]

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

Dear Mr. Mondshein:

I have received a copy of your letter to Mr. Malcolm D. MacDonald, Esq., dated April 17, 1986, together with your note directed to Mr. Robert Freeman of this office.

In brief, your letter to Mr. MacDonald is the most recent of several requests for records directed to the New York City Office of Collective Bargaining. In response to your previous requests, you were given some of the information requested, but you were also informed that other records sought do not exist. You have also directed two previous inquiries regarding this matter to the Committee on Open Government. In response to your letters dated January 2, 1986 and March 2, 1986, this office advised you, in part, that the Freedom of Information Law does not generally require an agency to create or prepare a record in response to a request. In response to your March 2, 1986 letter, you were advised also that, under the Freedom of Information Law, upon request, an agency shall certify that it does not have possession of the records requested or that such records cannot be found after diligent search.

In conjunction with that advice, your April 17, 1986 correspondence to Mr. MacDonald includes a request for certain records with a request for such certification, where applicable.

Additionally, you are asking this office whether the Board of Collective Bargaining meeting took place during a certain period of time and, if so, whether that fact "should be revealed". In this regard, I offer the following comments.

First, it is noted that the Committee on Open Government does not maintain records generally. Further, we are not familiar with the specific records that might be kept or prepared by the Office of Collective Bargaining.

Second, the Committee does not have the authority to compel an agency to grant or deny access to records or to enforce compliance with the Law. This office is authorized to render advisory opinions under the Freedom of Information Law. Therefore, this office cannot give you an answer as to whether a particular Board meeting took place.

Third, you asked whether the fact that the meeting took place should be revealed, assuming that such a meeting did take place. I refer you to the letter directed to you dated January 9, 1986, from Ms. Cheryl Mugno of this office. In brief, Ms. Mugno advised you that, based upon the information you presented, insofar as such records exist and are maintained by the Office of Collective Bargaining, they should be made available to you.

Fourth, your April 17, 1986 request to the Board of Collective Bargaining includes a request for "certification" in regard to those records requested by you which "can not be located". According to the facts you have presented, I believe that the Board or Office of Collective Bargaining is required under the Freedom of Information Law to furnish you with such certification as to any of the requested records which it does not possess or maintain or which cannot be found after a diligent search.

Fifth, in the event that you do not receive the requested certification where it is applicable, you may seek recourse by bringing a court proceeding for review of the matter pursuant to Article 78 of the Civil Practice Law and Rules.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4098

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

May 9, 1986

Mr. Isidore Gerber
[redacted]

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

Dear Mr. Gerber:

I have received your letter dated April 14, 1986 and the materials attached to it. Please note that your April 14th letter was received by this office several days after we received your April 15, 1986 letter, to which we have already replied.

You raise several questions in regard to the sufficiency of the tentative budget and related documents prepared by the Village of Liberty. Additionally, you raise questions regarding the procedures followed by the Village Clerk in response to your April 8 request for budget related records under the Freedom of Information Law. In this regard, I offer the following comments.

First, you state that the tentative budget "lacked information needed by the public" and that it "does not 'ear-mark' and does not specify what 'debt service' is to be paid with the federal revenue-sharing funds". The sufficiency of the tentative budget and of related documents are issues relating to the Village Law, not to the New York State Freedom of Information Law. It is the Village Law that sets forth the requirements for the preparation , filing, form and content of tentative village budgets. The Freedom of Information Law governs rights of access to records maintained by an agency. Further, the Freedom of Information Law authorizes the Committee on Open Government to render advisory opinions under the Freedom of Information Law. Therefore, this office has no authority, nor does it have the expertise to interpret or render opinions regarding the proper application of the Village Law.

Second, you enclosed with your letter a copy of your Application for Public Access to Records directed to the records access officer of the Village of Liberty, dated April 8, 1986. Additionally, you enclosed a copy of the response from the Village Clerk, dated April 11, 1986. The clerk's response states, in part, that she "do(es) not understand your request for 'all other detailed appropriations in the budgets'". You indicate that you advised the clerk as to what you meant by that phrase. You explained to the clerk that you meant "specific purchases through the process of 'work-sheets'". However, you do not indicate whether your explanation to the clerk took place prior or subsequent to the clerk's issuance of the April 11, 1986 letter.

Third, you state that you filed an appeal in regard to the denial of your request for records. Based on the facts you have presented, it does not appear that there was a denial of your request for records, for the clerk was unsure as to the nature of the records sought.

Fourth, as this office advised you by letter dated May 1, 1986, the Freedom of Information Law requires that an applicant request records "reasonably described". It was also advised that the staff of the Committee is not familiar with the specific documentation prepared in conjunction with the Village budget process or with the nature of "work-sheets". Therefore, I cannot offer you an opinion as to whether the requested records were "reasonably described".

Fifth, you wrote that you filed your appeal after being informed by the clerk that "she did not have more records". The Freedom of Information Law pertains to existing records. Therefore, if records requested by you do not exist, the Village would not in my view be required to create such records in response to a request [see Freedom of Information Law, section 89(3)].

Sixth, as this office has previously advised you, assuming that such worksheets exist, insofar as they consist of figures such as estimates or projections of proposed expenditures, they constitute statistical or factual tabulations that are in my view accessible under the Freedom of Information Law.

Seventh, you refer to "the Supreme Court case of Gerber against the Village of Liberty Aug 11th, 1978..." I am unable to comment on the applicability of that case, since I do not have any record of it. If you wish to send a copy of the court opinion to this office for our records, please do so.

Finally, for your use and information, I am enclosing a copy of "Your Right to Know", which describes 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4099

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

May 12, 1986

Mr. Dennis Buckley
Office of Counsel
NYS Department of Agriculture
and Markets
State Campus
Building #8
Albany, New York 12235

Dear Mr. Buckley:

As we discussed, I have received correspondence from Mr. Theodore Weber, who has been denied access to records relating to dog licensing by the Town of Fremont.

According to the materials attached to Mr. Weber's letter, in response to a request, the Town Clerk cited a statement which appears on a list sent to the Town by the Department of Agriculture and Markets. The full text of the statement is:

> "The following list is the property of the New York State Department of Agriculture and Markets and is supplied solely for official use in the enforcement of Article 7 of the Agriculture and Markets Law. Use of this list for any other purpose is not authorized and may constitute an unwarranted invasion of personal privacy under the Freedom of Information Law."

In my opinion, for the reasons described below, the statement may be misleading, and it is respectfully suggested that the Department consider modifying its terms.

First, although the Department prepared the list in conjunction with its statutory duties, once the list is in the physical custody of a municipality, such as a town, I believe that it becomes a "record" of the town. Here I point out that section 86(4) of the Freedom of Information Law defines "record" 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."

Since the Town is an "agency" [see section 86(3)], the list transmitted to the Town by the Department in my view constitutes a record of the Town that is subject to rights of access granted by the Freedom of Information Law. Moreover, even though a record may be maintained by two or more agencies, any of those agencies in receipt of a request for the record would be required to respond to a request in accordance with the Freedom of Information Law.

Second, in a related vein, while a record may be prepared or "supplied solely for official use", an assertion of confidentiality, absent specific statutory authority, may be meaningless. When confidentiality is conferred by statute, records fall outside the scope of rights of access pursuant to section 87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". In this instance, however, I do not believe that any statute specifically exempts the records in question from disclosure. If that is so, the records are subject to whatever rights exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. In short, without appropriate statutory authority, I do not believe that the Department can impose restrictions on a town's use or dissemination of a list in possession of a town, even though the list was prepared by and sent to a town by the Department.

Third, the text quoted earlier states that disclosure of ~~the list~~ "~~may constitute an unwarranted invasion of personal~~ privacy under the Freedom of Information Law". While a denial on that basis may be justified in some instances, it may not be appropriate in others. Section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

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

In turn, section 89(2)(b) provides examples of unwarranted invasions of personal privacy. Most relevant under the circumstances is section 89(2)(b)(iii), which provides that an unwarranted invasion of personal privacy includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

As indicated in several annual reports of the Committee and in judicial decisions, the provision quoted above represents the only circumstance in the Freedom of Information Law in which the purpose for seeking a record is relevant to a determination of rights of access. As a general matter, when a record is accessible under the Freedom of Information Law, it is available to any person, regardless of status or interest [see M. 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]. However, in the case of a list of names and addresses or the equivalent of such a list, the purpose for which the request is made is a factor that may be considered to determine to grant or deny a request. For instance, under the terms of section 89(2)(b)(iii), if a list of names and addresses is requested for "commercial or fund-raising purposes", the list may be denied [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Person-Wolinski Associates v. Nyquist, 377 NYS 2d 897 (1975); Goodstein v. Shaw, 463 NYS 2d 162 (1983); Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (Sept. 5, 1980)]; conversely, if the same list is sought for other than commercial or fund-raising purposes, I believe that it would generally be available [see New York Teachers Pension Associates, Inc. v. Teachers' Retirement System of City of New York, 98 Misc. 2d 118, aff'd 71 AD 2d 250 (1979); Smigel v. Power Authority, 387 NYS 2d 962, 54 AD 2d 668 (1976)]. In view of the foregoing, it is reiterated that the list prepared and supplied by the Department may be accessible, or perhaps deniable pursuant to the provision in the Freedom of Information Law regarding the disclosure of names and addresses.

I hope that I have been of some assistance. If you would like to discuss the matter, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Theodore Weber
Paul Kellam

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1400

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

May 12, 1986

Mr. Chester Matusiak
80-A-3952
Box 149
Attica, NY 14011-0149

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

Dear Mr. Matusiak:

I have received your letter of April 22 in which you requested an advisory opinion concerning the applicability of the Freedom of Information Law.

Specifically, you asked whether "the Freedom of Information Law is applicable to obtain a copy of [your] inmate visiting records". You added that you are "referring to entries of visits which [you] have had during [your] incarceration."

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 section 87(2)(a) through (i) of the Law.

Second, it is emphasized that section 89(3) of the Freedom of Information Law requires that an applicant request records "reasonably described". Based upon a decision rendered by the ~~Court of Appeals, an applicant has met the burden of "reasonably~~ describing the records sought if the agency can locate the records based upon the terms of a request [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. As such, rights of access might be dependent, in part, upon the manner in which records of visitation are kept. For example, if records of visits to particular inmates are kept separately or a part of a file pertaining to an individual inmate, it is likely that a record of

visits to that inmate could be readily located. However, if there is only a log book or similar file that identifies visitors to a facility chronologically and not by means of inmates' names, it might be all but impossible to locate records of your visitors, unless you could indicate the dates of their visits. In short, to reiterate, your capacity to gain access to records of visits may be dependent upon the manner in which visitation records are kept and the Department's ability to locate such records.

Third, assuming that records of visits can be located, I believe that those records, or perhaps portions thereof that pertain to you would be available. If such records identify other inmates and their visitors, those portions of the records pertaining to others could likely be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)].

Lastly, the regulations of the Department of Correctional Services indicate that a request for records kept at a facility may be directed to the facility superintendent.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-33
FOIL-AO-4101

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

May 12, 1986

Mr. Y. Friedman
[redacted]

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

Dear Mr. Friedman:

I have received your postcard, which reached the Office of Information Services at the Department of State on April 25, and which has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information and Personal Privacy Protection Laws.

As requested, enclosed are copies of those statutes, as well as explanatory brochures concerning the Freedom of Information Law and the Personal Privacy Protection Law that may be useful to you.

You have asked whether "a state agency can require [you] to go to its Albany office to see/view records ordinarily kept in its New York City office, but for purposes of the agency, it wishes [you] to view only at its Albany office."

In my opinion, the answer to your question may be dependent on whether the record sought is available under the Freedom of Information Law, or whether it is available under the Personal Privacy Protection Law.

First, with respect to the Freedom of Information Law, by way of background, section 89(1)(b)(iii) of the Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the Law (see attached, 21 NYCRR Part 1401). In turn, section 87(1) requires each agency to adopt regulations consistent with the Law and the regulations promulgated by the Committee. One aspect of the regulations involves the locations where records are available

for inspection and copying. Assuming that the record sought is available only under the Freedom of Information Law, I believe that an agency is required to make a record available for inspection only at the location or locations designated in the regulations. As such, records can be inspected at that location or locations. In the alternative, upon payment of the appropriate fees, the agency could send copies to you.

Second, assuming that the record is available to you as a "data subject" pursuant to the Personal Privacy Protection Law [see section 92(3)], section 94(1)(k) provides that:

> "whenever a data subject is entitled under this article to gain access to a record, [the agency shall] disclose such record at a location near the residence of the data subject whenever reasonable, or by mail."

Therefore, if the record is available to you under the Personal Privacy Protection Law, and if it is "reasonable" to permit you to view the record in New York City rather than in Albany, the Personal Privacy Protection Law would in my opinion require that you be permitted to inspect the record "at a location near" your residence.

I hope that I 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 - 4102

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

May 12, 1986

Mr. Walter Speller
83-A-7958
Box 618
Auburn, NY 13021

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

Dear Mr. Speller:

I have received your letter of April 20, 1986 in which you requested assistance regarding access to records.

Specifically, you state that you forwarded five dollars together with a request for a Master Index to the Department of Correctional Services and that you have not yet received a response from that Department.

Additionally, you are inquiring as to the correct procedure to follow in requesting access to your "1983 post-conviction records from the criminal prosecutor". In this regard, I would like to offer the following comments.

First, it is noted that the Committee on Open Government does not have the authority to compel an agency to grant or deny access to records or to enforce compliance with the Law. This office is authorized to render advisory opinions under the Freedom of Information Law.

Second, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations pertaining to the procedural implementation ~~of the Law. In turn, section 87(1) requires that each agency~~ adopt regulations in conformity with the Law and consistent with the regulations promulgated by the Committee. Please note that the Department of Correctional Services has promulgated the appropriate regulations. One of the components of the regulations involves the designation of one or more "records access

officers" who are responsible for receiving and handling requests made under the Freedom of Information Law. The regulations indicate that, with respect to records kept at a facility, the records access officer is the facility superintendent or his designee. With respect to records kept at the Department's central offices, the records access officer is the Deputy Commissioner for Administration, Department of Correctional Services, Building 2, State Campus, Albany, New York 12226.

Third, the regulations promulgated by the Department of Correctional Services, section 5.13 states in part that:

> "The record 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...Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying."

Fourth, your inquiry in regard to your "1983 post-conviction records from the criminal prosecutor" is somewhat unclear as to the nature of the records you seek to obtain. If the records you are seeking are records that would be maintained at your facility, your request should be directed to the superintendent of the facility. If the records are maintained by the Department of Correctional Services' central offices or another public agency, your request should be directed to the records access officer of that agency.

Finally, please note that under the Freedom of Information Law, a request for records must "reasonably describe" the records sought. Therefore, when requesting records, it is suggested that the request be as detailed and specific as possible.

I am enclosing for your use and information copies of the Freedom of Information Law, the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services, and "Your Right to Know", which describes the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4103

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

May 13, 1986

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 April 28, 1986 in which you inquired as to the correctness of the fees being charged for obtaining copies of certain court records.

Specifically, you point out that the Criminal Court of the City of New York is charging $10.00 for each set of minutes you have requested and that the fees for copying vary from court to court. In this regard, I offer the following comments.

First, it is noted that under the Freedom of Information Law, section 87(1)(b)(iii), the fee for obtaining copies of records is, generally, not to exceed twenty-five cents per page, subject to certain exceptions.

Second, as this office advised you by letter dated April 17, 1986, the Freedom of Information Law is applicable to records of an "agency". Further, in its definition of the term "agency", the Freedom of Information Law specifically excludes the courts. Therefore, neither the courts nor their records fall within the requirements of the Freedom of Information Law. The fees set by the courts may be regulated under other statutes under court rules.

Third, the Committee on Open Government is authorized to render advisory opinions under the Freedom of Information Law. The Committee is not authorized to advise as to the propriety of fees set by governmental entities that are not subject to the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4104

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

May 13, 1986

Mr. William Everett Sternberg
[redacted]

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

Dear Mr. Sternberg:

I have received your letter of April 29 concerning fees for copies of records.

Specifically, you wrote that on April 16 you sent a request under the Freedom of Information Law to the Otsego County Clerk concerning copies of a transcript of a hearing pertaining to yourself which was held on April 14. In response, the court reporter indicated that you should send her $6.25 for a five page transcript. You have questioned the fee, for in your view, the Freedom of Information Law permits a charge of a maximum of twenty-five cents per photocopy.

You have requested my views on the matter and, in this regard, I offer the following comments.

From my perspective, the propriety of the fee is dependent upon whether the Freedom of Information Law applies. As a general matter, 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 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, while the Freedom of Information Law pertains to records of an "agency", the courts and court records fall outside the requirements of the Freedom of Information Law.

It is noted, too, that county clerks perform a variety of functions. In some instances, they maintain records of an agency, such as a county. In others, they maintain records as clerks of a court.

If the record in question may be considered as an "agency record", I would agree that the Freedom of Information Law would govern and that the agency could charge up to twenty-five cents per photocopy pursuant to section 87(1)(b)(iii) of the Freedom of Information Law. On the other hand, if the record is kept by the clerk acting in his or her capacity as clerk of a court, the Freedom of Information Law would not in my opinion apply. It is likely that, under those circumstances, the provisions of section 8020 of the Civil Practice Law and Rules, entitled "County clerks as clerks of a court" would govern the fees that may be assessed for copies.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Otsego County Clerk
Claudia W. Fisher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4105

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

May 14, 1986

Mr. Robert J. Troise
[redacted]

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

Dear Mr. Troise:

As you are aware, your letter of April 8 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee is responsible for advising with respect to the New York Freedom of Information and Personal Privacy Protection Laws.

You have asked whether you can obtain records pertaining to yourself kept by employers, insurance companies, courts and law enforcement agencies, and whether there is a difference between federal and state laws concerning freedom of information.

In this regard, I offer the following comments.

First, as a general matter, the New York Freedom of Information Law pertains to records of state and local government in New York. The federal Freedom of Information Act is applicable to records maintained by federal agencies. Under the New York statute, the term "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."

Therefore, while governmental entities are required to comply with the Freedom of Information Law, the Law does not apply to records of private firms or persons, such as private sector employers, insurance companies, or a repair shop that might have done work on a car previously owned by another person.

In terms of rights of access to agency 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 section 87(2)(a) through (i) of the Law. Similarly, the federal Act provides generally that federal agency records are available, unless they fall within exemptions appearing in the act. There are differences between the state and federal statutes for several reasons. The federal Act was enacted by Congress; various state legislatures have enacted local versions of access laws based upon the needs of the respective states. One key difference is that the federal Act refers specifically to national security issues; the New York law does not, for the state is not involved in such matters.

There are also state and federal privacy statutes. The New York Personal Privacy Protection Law pertains to records maintained by state agencies only, unlike the Freedom of Information Law, which applies to state agencies, as well as local governments, such as cities, counties, towns, villages and school districts, for example.

Lastly, neither the state Freedom of Information or Personal Privacy Protection Laws, nor their federal counterparts, pertain to the courts or court records. However, court records are often available under other provisions of law.

Enclosed for your information is a copy of "Your Right to Know", which describes the state Freedom of Information Law, as well as a copy of "You Should Know", which concerns 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

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL - AU - 12
FOIL-AO-4106

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

May 15, 1986

Hon. Clarence D. Rappleyea
Minority Leader
The Assembly of the State
of New York
Room 933
Legislative Office Building
Albany, NY 12248

<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 Assemblyman Rappleyea:

I received today your letter of May 8 in which you questioned the "legality" of a document sent to you by a constituent.

The document in question is essentially a waiver that authorizes a school district to obtain and use personal information derived from a variety of sources for the purpose of determining suitability for employment by the district. More specifically, the document states that:

> "The intent of this authorization is to give my consent for full and complete disclosure of records of educational institutions; financial or credit institutions, including records of loans, the records of commercial or retail credit agencies (including credit reports and/or ratings); and other financial statements and records wherever filed; medical and psychiatric treatment and/or consultation, including hospitals, clinics, private practitioners, and the U.S. Veterans Administration; employment and pre-employment records including background reports, efficiency ratings, complains or grievances filed by or

> against me and the records and recollections of attorneys at law, or of other counsel whether representing me or another person in any case, either criminal or civil, in which I presently have,or have had an interest."

The applicant who signs the authorization also states that he or she understands that information obtained in conjunction with the authorization "will be considered in determining...suitability for employment..."

In this regard, I offer the following observations.

It is noted at the outset that the text of the authorization raises a series of issues, most of which do not relate to the Freedom of Information Law. Further, it is likely that other state and federal enactments may be relevant.

In terms of the Freedom of Information Law, there is nothing in the Law that pertains to the collection of personal information by an agency. As such, the Freedom of Information Law does not prohibit an agency from seeking personal information.

Viewing the matter from a different perspective, some of the information that might be requested by the District would involve records kept by agencies subject to the Freedom of Information Law. 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 Public Officers Law, section 87(2)(b)]. However, the Law also states that, unless a different ground for denial may be asserted, "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when the person to whom a record pertains consents in writing to disclosure" [section 89(2)(c)(ii)]. Consequently, the authorization, if signed, would likely permit other agencies to disclose to the District some records pertaining to an applicant for employment.

The authorization in my opinion might nonetheless in many circumstances be of questionable utility. For instance, in the case of agency records subject to the Freedom of Information Law, the "waiver" would be of significance only when the individual to whom the record pertains has a right to the record. Stated differently, if the subject of the record has no right to the record, there is no right to be conferred. Further, the individual may have no right of access in certain cases. For

instance, patient records kept by mental hygiene facilities are not accessible as of right to patients or former patients [see Mental Hygiene Law, section 33.13]. In such a case, I believe that a facility would be prohibited from disclosing, notwithstanding the authorization.

The authorization likely pertains to records kept by entities other than governmental entities. In those situations, the non-governmental entities could likely disclose, but they would not be obliged to do so.

The breadth of the terms of the authorization also raises questions concerning areas beyond my expertise, such as the Human Rights Law regarding job discrimination and federal statutes. While I am not completely familiar with those provisions, it may not be legal to ask for a complaint, such as a criminal charge, which did not result in a conviction. It is possible, too, that in the area of medical histories, the language of the authorization might contravene section 504 of the federal Rehabilitation Act of 1973. If those statutes are applicable, it is conceivable that civil rights might be violated.

A related issue is whether prospective employees must sign the authorization as a condition for application. Whether signing the form is mandatory or optional may also relate to civil rights law provisions.

Lastly, the School District, a municipal entity, is not subject to the Personal Privacy Protection Law, which applies only to state agencies. If the principles and requirements of that statute were to be applied, the authorization in my view would conflict with law. One of the basic principles of the Personal Privacy Protection Law is that a state agency may seek only that personal information that is relevant and necessary to its statutory duties. From my perspective, much of the information sought (i.e., financial or credit information) is likely irrelevant. Moreover, the Personal Privacy Protection Law also states that "Any agreement purporting to waive a data subject's rights under this article is hereby declared to be void as against public policy" (Public Officers Law, section 98). As such, if the Personal Privacy Protection Law applied to local agencies, the authorization would likely represent a violation of 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-4107

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

May 15, 1986

Mr. Rudolph Williams
85-A-0004 #D3/27
900 Kings Highway
Warwick, NY 10990

Dear Mr. Williams:

I have received your letter of May 9, in which it appears that you requested medical records pertaining to you from this office.

In this regard, 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 maintain records generally, such as those in which you are interested.

To seek records, a request should be directed to the records access officer at the agency or agencies that you believe would maintain the records. Further, section 89(3) of the Freedom of Information Law requires that an applicant "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 you are aware, the courts and court records are not subject to the Freedom of Information Law. Consequently, I do not believe that the time limitations appearing in the Freedom of Information Law concerning responses to requests are applicable to the courts.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4108

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

May 15, 1986

Mr. Jacob Hikel
84-B-111
P.O. Box 51
Comstock, NY 12821

Dear Mr. Hikel:

I have received your letter of May 14 in which you requested anything that may be more up to date than the booklet previously sent to you. You also asked how you may obtain various records of the Department of Correctional Services.

In this regard, the brochure that I sent to you is up to date. However, also enclosed is a copy of the full text of the Freedom of Information Law.

It is noted that each agency, including the Department of Correctional Services, has promulgated regulations involving the procedural implementation of the Freedom of Information Law. According to the Department regulations, a request for records kept at a correctional facility may be directed to the facility superintendent. If records are kept at the Department's central offices in Albany, a request may be directed to the Deputy Commissioner for Administration.

Enclosed for your consideration is a copy of the regulations of the Department of Correctional Services promulgated 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-4109

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

May 19, 1986

Mr. Abdul Aziz Aliym
84-A-1026
Box 500
S.H.U._____9
Elmira, NY 14902

Dear Mr. Aliym:

I have received your letter of May 11, which reached this office on May 16.

You have requested copies of the Freedom of Information Law and the Committee's annual report, as well as "any and all information concerning [you] - such as the accusatory instrument, misdemeanor complaint, felony complaint and warrant of arrest - and so forth".

Enclosed as requested are copies of the Freedom of Information Law and the Committee's latest annual report. However, with respect to the remaining materials, I point out that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law; it does not maintain custody or control of records generally, such as those pertaining to you. In short, the Committee does not maintain the records concerning you that you requested.

To seek those records, requests should be directed to the records access officer at the agency or agencies that you believe would maintain the records. It is emphasized, 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, you should include sufficient detail to enable agency officials to locate the records, such as descriptions of events, names, dates, index and docket numbers, and similar details.

Further, some of the records sought may be maintained by a court. While the courts and court records are not subject to the Freedom of Information Law, court records are often available pursuant to different provisions of law. As such, you might want to seek records from the clerk of the courts in which proceedings were conducted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4110

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

May 19, 1986

Mrs. Judy Freeman
[redacted]

The staff of the Committee on 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. Freeman:

I have received your letter of May 2, as well as the materials attached to it.

The documentation pertains to the purchase of residential property to be used as a home for the developmentally disabled. You wrote that it is your belief that tax dollars are being improperly spent and that the procedures followed have been inappropriate and inadequate.

In all honesty, I cannot offer specific guidance because it is unclear what the specific nature of the legal issues might be. However, perhaps the following general comments may be useful to you.

First, the Freedom of Information Law pertains to records maintained by agencies, entities of state and local government. As such, the Law applies to records of state agencies, as well as municipalities.

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, to seek records, a request may be directed to an agency's "records access officer", who is required to respond within five business days of the receipt of a request. If a request is denied, in whole or in part, the reasons for the denial must be explained in writing, and you must be informed of your right to appeal.

Of possible relevance, too, is the Open Meetings Law. Reference was made in a news article to a statement that there "was no publicity" about a meeting. In this regard, the Open Meetings Law pertains to meetings of public bodies, such as a town board. Further, like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings must generally be conducted open to the public, except when an "executive session" may appropriately be convened pursuant to section 105 of the Law.

In terms of "publicity", section 104 requires that notice of the time and place be given to the news media, and to the public by means of posting, prior to all meetings. It is noted, however, that the notice need not include reference to an agenda or the topics to be discussed.

If I knew more about the nature of information you are seeking, perhaps better guidance could be provided. Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4111

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

May 21, 1986

Mr. Harold Mondshein
[redacted]

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

Dear Mr. Mondshein:

I have received your letter of May 1 in which you asked that I advise the New York City Off-Track Betting Corporation of its responsibilities under section 89(3) of Freedom of Information Law.

It appears that you are objecting to a response of April 22 by the Off-Track Betting Corporation to a request. Specifically, you have questioned the failure of the Off-Track Betting Corporation to "particularize" each of your requests "instead of lumping 1, 3, 4, 6 and 7 as they did in their April 22, 1986" letter. In that letter, the items that you identified numerically were "denied" and Mr. Shagan indicated that "no such documents can be located in the files of the Corporation except insofar as they have been previously furnished to you".

From my perspective, a denial occurs when existing records are withheld based upon one or more grounds for denial listed in section 87(2) of the Law. Under the circumstances, since the records in question could not be located, it does not appear that a "denial" in fact occurred. When a denial of existing records is made, I would agree that the basis for the denial must be indicated. In this instance, however, I do not know how the agency could "particularize", since the records in question could not apparently be found. In fact, in a later letter of April 29 sent to you by Mr. Shagan, he specified that the records in question could not be found after having made a "diligent search".

In sum, since the records were not denied but rather could not be located, I do not believe that the Off-Track Betting Corporation was required to "particularize" to a greater extent than is indicated in its responses to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Shagan
Julie Pack

4112

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-[redacted]

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

May 21, 1986

Mr. Paul Feiner
Legislator
Westchester County Board of
Legislators
803 Michaelian Office Building
White Plains, NY 10601

<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, except as otherwise indicated.</u>

Dear Mr. Feiner:

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

According to the correspondence attached to your letter, you requested a copy of the County Executive's schedule for a particular time period. The request was initially denied by the records access officer, who wrote that the County Executive's schedule "is a confidential, internal memorandum". Correspondence was sent to this office by the County, as required by section 89(4)(a) of the Freedom of Information Law, indicating that you appealed the denial to the County Attorney. The County Attorney indicated that the County Executive's schedule is posted in the Public Affairs Office at the Michaelian Office Building. As such, his view is that your appeal is considered moot.

Most recently, you contacted me by phone and explained that the posted schedule only pertains to public appearances of the County Executive. Consequently, your question involves rights of access to a more detailed schedule, if such a schedule exists.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and section 86(4) of the Law defines "record" expansively to include:

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

Due to the breadth of the language quoted above, a schedule "kept" in the County Executive's office or other County office would in my view constitute a "record" subject to rights of access. I point out, too, that the Court of Appeals has interpreted the definition of "record" broadly. In a case involving materials relating to a lottery conducted by a volunteer fire company, it was held that:

> "The statutory definition of "record" makes nothing turn on the purpose for which a document was produced or the function to which it relates. This conclusion accords with the spirit as well as the letter of the statute. 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" [Westchester-Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980); see also, Washington Post v. Insurance Department, 61 NY 2d 557 (1984)].

Based upon the Court of Appeals' interpretation of the definition of "record", again, if a more detailed schedule exists, I believe that it would constitute a "record".

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

Third, although the records access officer characterized the schedule as a "confidential, internal memorandum", one of the grounds for denial, due to its structure, would likely grant access to the schedule in whole or 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, or final agency policy or determinations must be made available. A schedule might properly be characterized as "internal" or as "intra-agency" material; however, those portions consisting of factual information would likely be available.

The remaining ground for denial of possible 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."

Whether disclosure of a particular record would result in an unwarranted invasion of personal privacy often results in the making of subjective judgments. Nevertheless, the courts have found in various contexts that public employees enjoy a lesser degree of privacy than others, reasoning that public employees are held to be more accountable than others.

Specifically, it has generally 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980; Capital Newspapers v. Burns, 109 AD 2d 92, 490 NYS 2d 651 (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, Nov. 22, 1977, Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

It is your view that the people of Westchester County are entitled to know when the County Executive carries out his duties in that position. In your letter of appeal to the County Attorney you suggested that, when the Governor:

> "...is out of the state he doesn't keep the fact a secret. If the County Executive (who has continued to receive his full time salary of nearly $100,000) is not ashamed of the fact that he will be out of Westchester more than he is in Westchester --- he, too, should provide [you] with schedule information."

Since your intent appears to involve obtaining information indicating when the County Executive expends time in the performance of his duties as County Executive (or perhaps when he does not), I note that a recent decision may serve as the basis for an analogy relative to rights of access. In a case in which attendance records concerning the use of sick leave were requested with respect to a particular police officer, it was stated that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to so 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 (Matter of Scott, Sardano & Pomeranz v. Records Access Officer, City of Syracuse, __ N.Y.2d __, __ N.Y.S.2d __, __ N.E.2d __ [June 4, 1985]; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d pp. 79-80, 476 N.Y.S. 2d 69, 464 N.E.2d 437)" [Capital Newspapers v. Burns, 109 AD 2d 92, 490 NYS 2d 651, 653 (1985)].

While your request does not pertain to the use of sick leave, and while an elected official might not be required to report during specific hours, it appears that similar contentions may be made in the context of the issue that you have raised, i.e., that the public has the right to know when a paid public officer is involved in performing his officials duties.

In sum, if a detailed schedule exists in addition to the posted schedule, I believe that it would be available under the Freedom of Information Law in conjunction with the comments offered in the preceding paragraphs.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Martha Furlong
Henry Logan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4113

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

May 22, 1986

Mr. Roland Tucker
82-A-5222
Great Meadow Correctional Facility
P.O. Box 51
Comstock, New York 12821-0051

<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. Tucker:

I have received your letter of May 1 concerning the Freedom of Information Law.

According to your letter and the correspondence attached to it, you requested from the Suffolk County Police Department correspondence between the Department and the Federal Bureau of Investigation (FBI). The request was denied on the ground that the "letter is an inter-departmental communication and is therefore exempted from availability under the Freedom of Information Law". You have requested assistance and a "laymans interpretation of inter-agency and intra-agency communication".

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 Law to include:

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

As such, the Freedom of Information Law is generally applicable to records maintained by entities of state and local government in New York. Although there are no judicial determinations on the subject, it is my view that communications between an agency as defined by the Freedom of Information Law and an entity of the federal government would not constitute "inter-agency" materials, for a federal entity, such as the FBI, falls outside the scope of the definition quoted earlier.

Second, from my perspective, "inter-agency" material consists of those communications among or between agencies. "Intra-agency" materials consist of those communications among or between officials of one agency.

Third, the provision concerning inter-agency and intra-agency materials in the Freedom of Information Law is section 87(2)(g), which states that an agency may withhold records that:

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

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

Lastly, the foregoing should not be construed to suggest that the records that you seek must be available, for there may be other grounds for denial that would be applicable in whole or in part.

I hope that I 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

FOIGAO-414

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

May 22, 1986

Ms. Sandra L. King
President
King Contractors, Inc.
36 Beach Road
Port Jefferson, NY 11777

Dear Ms. King:

I have received your letter of May 19 in which you requested from the Committee a "tape of a conference" held at the offices of the Department of Transportation in November of 1985.

According to your letter and the correspondence attached to it, you requested a copy of the tape from Ms. Patricia Junger of the Department on March 24. However, you have not yet received any response to the request.

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. The Committee does not maintain possession of records generally, such as the tape in question, nor does the Committee have the authority to compel an agency to grant or deny access to records. In short, this office cannot make the tape available to you, because we do not have control or possession of the tape.

Second, in order to learn more of the situation, I have contacted Ms. Junger on your behalf. She informed me that a transcript of the conference has been prepared, and that it was sent to you on or about May 13. I was also told that the time needed to transcribe the tape was the reason for the delay in response.

Third, for future reference, the Freedom of Information Law and the regulations promulgated by the Committee, which govern the procedural aspects of the Law [21 NYCRR Part 1401], 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 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

cc: Patricia Junger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4115

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

May 22, 1986

Ms. Harriet B. Oliver
Oliver & Oliver
Attorneys at Law
156 Madison Avenue
Albany, NY 12202

<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, unless otherwise indicated.</u>

Dear Ms. Oliver:

I have received your letter of April 28, 1986 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you state that you represent a client who sustained serious injuries as the result of an automobile accident. The accident occurred in the Town of Colonie, in March of this year. The driver of the vehicle in which your client was a passenger was subsequently indicted on several criminal charges arising out of the accident.

Shortly after the accident, your office made a request for records under the Freedom of Information Law to the Town of Colonie. After some delay, the accident report was made available, but you were advised that your Application for Public Access to Records could not be located. Your office completed a second application which was denied on the ground that there was a "pending criminal investigation". Upon your appeal, the denial was affirmed on the ground the "such records have been compiled for law enforcement purposes and disclosure of the same would substantially interfere with pending criminal proceedings arising out of the incident for which such Traffic Safety Investigation File was generated". In this regard, I offer the following comments.

First, 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.

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.

Third, the ground for denial claimed by the Town of Colonie in its determination on appeal is set forth in section 87(2)(e)(i) which states that an "agency may deny access to records or portions thereof that: ...are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings...". At this juncture, it appears that the investigation of the incident has been completed, and that the provision in question has been cited relative to the effect of disclosure upon a judicial proceeding.

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 [see King v. Dillon Supreme Court, Nassau County, December 19, 1984].

Section 87(2)(e)(i) is based upon the potentially harmful effects of disclosure. Therefore, in my opinion, the question here involves the extent to which those records compiled for law enforcement purposes, or portions of such records, would "interfere" with a judicial proceeding, if disclosed. To the extent that the requested records would result in such interference, I believe 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 a judicial proceeding. To that extent, it appears that the requested records should likely be made available.

Fourth, additionally, section 66-a of the Public Officers Law deals specifically with reports and records of motor vehicle accidents. Under section 66-a as well as under the Freedom of Information Law, such records are generally available. The ex-

ception to the general rule of access as set forth in section 66-a closely parallels the ground for denial set forth in section 87(2)(e)(i) of the Freedom of Information Law. Section 66-a states that the custodians of such reports or records "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."

Thus, under section 66-a of the Public Officers Law, consistent with the Freedom of Information Law, unless disclosure would interfere with the investigation or prosecution of a crime connected with the accident, accident reports and related records should generally be disclosed.

Fifth, during a telephone conversation with the Colonie Town Attorney's Office, it was indicated to me that a possible basis for denial of the requested records exists under the Civil Practice Law and Rules, Section 3101(d). It is noted that no such basis for withholding the records is set forth in either the original denial of access or in the affirmance of that denial upon your appeal. However, since the question has been raised, I offer the following brief comments. Section 3101(d) of the Civil Practice Law and Rules states, in part, that "material...prepared in anticipation of litigation or for trial...may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain...the materials by other means...".

It appears that there is some question as to whether the Civil Practice Law and Rules, Section 3101(d), is applicable in this situation. The records are being requested under the Freedom of Information Law by a member of the public who is not involved in litigation with the agency maintaining the records. Section 3101(d) relates specifically to "the party seeking discovery". In this instance, your client is not a "party" to any action involving the agency nor are you requesting records under discovery provisions.

Further, it has been held that, unless records are prepared solely for litigation, section 3101(d) cannot be cited as basis for denial. Stated differently, if records are prepared for multiple purposes, one of which might be eventual use in litigation, they could not be withheld pursuant to section 3101(d) [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234].

In sum, in my opinion, the records sought are available, except to the extent that disclosure could interfere with a judicial proceeding.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4116

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

May 23, 1986

Richard R. Blythe, Deputy Commissioner
Dorothy Yenik-Organist, Deputy Commissioner
Broome County Board of Elections
Government Plaza
Binghamton, New York 13902

Dear Commissioners Blythe and Yenik-Organist:

I have received from Mr. Thomas P. Zolezzi, Special Counsel to the State Board of Elections, a letter indicating that the Broome County Board of Elections has raised questions concerning rights of access to its records. Mr. Zolezzi also forwarded copies of correspondence involving your questions, which focus upon the release of dates of birth.

In this regard, at the suggestion of Mr. Zolezzi, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and section 86(4) of the Law defines "record" expansively to include:

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

As such, records maintained by a county board of elections would, in my view, be subject to the rights of access.

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

Third, one of the grounds for denial involves the capacity to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)]. In my opinion, if only the Freedom of Information Law applied to the records in question, those portions of the records indicating a date of birth could be redacted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. However, I believe that provisions governing disclosure of the particular records at issue are found in other statutes.

Specifically, pursuant to section 5-210(4) of the Election Law, which became effective on April 1, 1986, local boards are required to use a:

> "...uniform statewide application form ...designed by the state board of elections, which shall be compatible with local systems of voter registration data collection and storage, and shall elicit the information required for the registration poll record."

The cited provision also describes the items of information to be included in the form, one of which is the date of birth [section 5-210(4)(j)(iii)]. In turn, the first sentence of section 3-220(1) of the Election Law states that:

> "All registration records, certificates, lists, and inventories referred to in, or required by, this chapter shall be public records and open to public inspection under the immediate supervision of the board of elections or its employees and subject to such reasonable regulations as such board may impose."

Fourth, section 89(6) of the Freedom of Information Law provides that:

> "Nothing in this article shall be construed to limit or abridge any otherwise right of access at law or in equity of any party to records."

Under the circumstances, since the Election Law requires the disclosure of registration records, which include the date of birth, nothing in the Freedom of Information Law may be asserted to withhold those records. Therefore, although a date of birth might justifiably be denied as an unwarranted invasion of personal privacy with respect to other kinds of records, the specific direction provided in the Election Law in my opinion requires disclosure of registration records containing dates of birth.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Zolezzi
Mary Jane Nugent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4117

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

May 23, 1986

Mr. Robert F. Bensing
Staff Attorney
Prisoners' Legal Services of
New York
22 Broad Street
P.O. Box 1215
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 Mr. Bensing:

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

As an attorney for Prisoners' Legal Services, you represent a client who alleged that he was beaten in disciplinary housing unit. Thereafter, you requested "a computerized listing showing other inmates who were stationed in [your] client's section of the unit". You apparently received a document identifying your client but which excluded the names of others "to insure against an unwarranted invasion of privacy". The purpose for your request is to locate potential witnesses to the incident, and it is your view that the response effectively precludes you from so doing.

You alluded to Department Directive 2010, which, according to your letter, "specifically adopts FOIL's standard of invasion of privacy". The Directive refers to the capacity to deny records under certain circumstances when "such information is not relevant to the work of the party requesting it".

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, in the event of a judicial proceeding challenging a denial, it is emphasized that the agency has the burden of proving that the records sought fall within one or more of the grounds for denial [see Freedom of Information Law, section 89(4)(b)]. In this instance, since the denial is based upon a contention that disclosure would result in "an unwarranted invasion of personal privacy", it may be difficult for the agency to demonstrate how disclosure would result in such an invasion.

Second, in a related vein, what constitutes an unwarranted invasion of personal privacy often involves the making of subjective judgments. In short, reasonable people may differ with respect to whether disclosure of a particular item of personally identifiable information would be innocuous, thereby resulting in a permissible invasion of personal privacy, as opposed to offensive, thereby resulting in an unwarranted invasion of personal privacy. Without additional knowledge regarding the effect of disclosure upon the inmates identified in the computer listing, it is difficult to advise with certainty in terms of the effects of disclosure, and, therefore, rights of access.

Third, having reviewed section P of Directive 2010, it appears that the descriptions of unwarranted invasions of personal privacy appearing in the Directive may be inconsistent with the analogous language in the statute. Like the Freedom of Information Law, the Directive lists examples of unwarranted invasions of personal privacy, one of which refers to:

> "Disclosure of information of a personal nature when such disclosure would result in economic or personal hardship to the subject <u>and such information is not relevant to the work of the party requesting it</u>" (emphasis added).

The provision in the Freedom of Information Law upon which the language quoted above appears to be based is section 89(2)(b)(iv), 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..." (emphasis added).

The language of the statute refers to information being irrelevant to the work of an agency requesting or maintaining it; however, the language of the Directive refers to information being irrelevant to the work of the party requesting it. From my perspective, based upon the terms of the Freedom of Information Law and its judicial interpretation, the purpose for which a request is made is generally irrelevant to rights of access. 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 M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. The only instance in which the purpose for which a request is made or the use of records is relevant would involve a request for a list of names and addresses and whether that type of information would be used for commercial or fund-raising purposes [see Freedom of Information Law, section 89(2)(b)(iii)]. It is clear that your request does not involve commercial or fund-raising purposes. Further, based upon the preceding analysis, it is my view that the language of the Directive is inappropriate and that rights of access cannot be conditioned upon the purpose for which the request is made.

To attempt to have the Department review the language of its Directive, as well as its response to your request, a copy of this opinion will be forwarded to the Office of Counsel.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Robert Gaffigan
Jose Hernandez Cuevas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4118

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

May 23, 1986

Mr. Louis Carter
Albany County Jail
Albany, NY 12211

<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. Carter:

I have received your letter of May 2 concerning the Freedom of Information Law.

Specifically, you wrote that you submitted a request under the Freedom of Information Law to the Undersheriff at the Albany County Jail. Three weeks have passed without a response. You have asked how you may "compel" the Undersheriff to respond to your request.

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

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 concerning the procedural implementation of the Law. The Committee has done so by means of 21 NYCRR Part 1401. In turn, section 87(1) requires the governing body of a public corporation, such as Albany County, to adopt similar regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee.

Second, one of the requirements of the regulations involves the designation of a "records access officer". The records access officer is the person to whom a request should be sent and who is responsible for coordinating responses to requests. In my view, your request should have been sent to the records access officer for Albany County. Further, I believe that the person designated as records access officer is Mr. Guy Paquin, County Clerk.

Lastly, it is noted that section 89(3) of the Freedom of Information Law requires an applicant request records "reasonably described". 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.

Enclosed is an explanatory brochure 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

OML-AO-1282
FOIL-AO-4119

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

May 27, 1986

Mr. Jim Kenyon
Reporter
WSTM-TV
1030 James Street
Syracuse, NY 13203

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

Dear Mr. Kenyon:

I have received your letter of May 7 in which you raised questions concerning the Freedom of Information and Open Meetings Laws.

According to your letter and the correspondence attached to it, you requested records pertaining to "tests of air and ceiling samples" conducted at Hancock Airport. You expressed the belief that samples were tested in the 1970's "for asbestos and other harmful materials". You were informed by Dennis S. Lerner, Assistant Corporation Counsel, that the information is not subject to disclosure under the Freedom of Information Law "because these are interdepartmental materials which are not final determinations". As such, he denied the request on the basis of section 87(2)(g) of the Freedom of Information Law.

The remaining issue deals with the status of an "Asbestos Committee" under the Open Meetings Law. You wrote that:

> "The committee is comprised of a panel of Syracuse Department personnel, the Corporation Counsel, private consultants and a Syracuse Councilor. [You were] told their purpose is to investigate the asbestos problem at public buildings throughout the city, including Hancock Airport. The committee will make recommendations regarding the handling of these problems."

You were told that the meetings of the Committee could be closed because it is a "non-governmental body".

In this regard, I offer the following comments.

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

Second, if the records are "interdepartmental materials", I would agree that section 87(2)(g), one of the grounds for denial, is applicable. However, due to the structure of that provision, I believe that the information sought should be made 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. Under the circumstances, assuming that test results and analyses consist of "statistical or factual tabulation or data", they would be available under section 87(2)(g)(i), whether or not a "final determination" has been made. In other words, any of the the three types of information described in subparagraphs (i), (ii) or (iii) of section 87(2)(g) are accessible. In this instance, while the records sought might not be reflective of or related to any "final determination", they are nonetheless available to the extent that they consist of statistical or factual information as described in section 87(2)(g)(i).

The second issue is more difficult in terms of providing specific direction, for there is no indication in your letter of the means by which the Asbestos Committee was created or the manner in which its members may have been designated.

For purposes of background, the Open Meetings Law is applicable to meetings of public bodies, and 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."

If each condition described in the definition is present, the Committee in question would constitute a public body.

On the basis of your letter, the Committee is an entity consisting of at least two members. While the act that created it might not refer to any quorum requirement, such a requirement might nonetheless exist in conjunction with section 41 of the General Construction Law. The cited provision states that an entity can carry out its duties only by means of a quorum, an affirmative vote of a majority of its total membership, "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body..." Further, since you indicated that the Committee "will make recommendations" regarding the asbestos problem, it would appear that it "conducts public business" and "performs a governmental function" for a public corporation, the City of Syracuse [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)]. If those conditions are present, the Asbestos Committee would be a public body subject to the Open Meetings Law. However, as indicated earlier, without additional information, unequivocal advice regarding the status of the Committee cannot be offered.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dennis S. Lerner
James Gelormini

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4120

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

May 27, 1986

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 5, as well as the materials attached to it.

According to the correspondence, on March 19, you submitted a letter to the records access officer at the Sachem Central School District seeking copies of request letters and application that you directed to the District, your appeals and District responses, and payment vouchers concerning those requests. The records sought pertain to January through June of 1984. The District Clerk responded on April 4, stating that:

> "it is not necessary to respond to these specific requests in that in each and every case, the record requested is either a copy of correspondence or information supplied to the District by yourself, or copies of information or records already provided directly to you by the School District."

She added that, although you could appeal the denial:

> "it is the District's position that your request constitutes the use of the School District as simply a duplicating service to meet your own needs."

You appealed the denial on April 7.

You have requested my opinion concerning the denial and asked whether the District forwarded a copy of your appeal or any determination thereon to this office. In this regard, I offer the following comments.

First, having searched our appeals file for the month of April, I was unable to locate either an appeal or a determination rendered on appeal by the District. Here I point out that section 89(4)(a) of the Freedom of Information Law, which enables any person denied access to records to appeal the denial, also states that "each agency shall immediately forwarded to the committee on open government a copy of such appeal and the ensuing determination thereon."

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, since your request involves records pertaining to you, I believe that they are available, to the extent that they continue to exist, for no ground for denial could, in my view, be asserted. Further, I believe that copies must be provided by the agency if you pay the requisite fees for photocopying.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeannette Caravella
Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4121

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

May 28, 1986

Mrs. Raye 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 Mrs. Elentuck:

I have received your letter of May 9 concerning requests made under the Freedom of Information Law.

You have asked that I review your appeals of March 31 and provide advice with respect to records that you requested from the New York City Board of Education and a community school district.

Based upon a review of the earlier correspondence, one appeal dealt with a contention that you are acting as an agent of your son, who agreed to stop making requests under the Freedom of Information Law. I believe that I dealt with that issue in a letter addressed to you dated April 16.

The other appeal concerns a request made on March 4, in which you sought a series of "lesson observation reports" concerning named teachers, similar reports concerning persons "in the employ of Community School District 24" who were ultimately rated unsatisfactory and who were dismissed, all "Pedagogical Supervisory Personnel Reports" prepared by a particular individual, and a report issued by the State Education Department relative to the findings of a tenure panel that investigated an incident pertaining to a particular individual.

In this regard, I offer the following comments.

In all honesty, I am unfamiliar with the contents of any of the materials that you requested. Consequently, I cannot provide specific direction. Nevertheless, it appears that two of the grounds for denial appearing in the Freedom of Information Law may be relevant, depending upon the nature and contents of the records.

First, all of the reports could likely be characterized as "inter-agency or intra-agency materials" that fall within the scope of section 87(2)(g) of the Freedom of Information Law. The cited provision states that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, to the extent that such materials contain opinion, advice, recommendation, suggestion and the like, I believe that they could be withheld.

The second ground for denial of likely significance is section 87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Once again, since I am unfamiliar with the records in question, or whether those records pertain to particular stages of certain proceedings, it is difficult to conjecture with respect to privacy implications.

Your remaining question pertains to the procedure and the responsibility of rendering determinations on appeal regarding records of the Central Board of Education and those of community school districts. As I understand your comments, the Chancellor has been designated by the Board of Education to function as appeals officer for community school districts. Different persons have been designated as appeals officers regarding records maintained by the Central Board of Education. You wrote that the Chancellor has not responded to your appeal following a denial by Community School District 24. It is your view that the Chancellor should determine your appeal, and that appeals concerning records of the Central Board and the appeals concerning records of community school districts should be treated separately. Based upon my understanding of the procedural implementation of the Law by the Board of Education, I would agree that appeals

concerning records of community school districts should be determined independently from appeals concerning records of the Central Board. In this instance, however, the issue appears to be the same that you raised earlier, that there may be a belief on the part of various Board of Education officials that you are serving as your son's agent.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4122

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

May 28, 1986

Mr. Richard J. Warren
Attorney and Counselor at Law
105 Main Street
Boonville, NY 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 dated May 5, 1986 in which you requested an advisory opinion.

Specifically, in your capacity as attorney for the Adirondack Central School District you indicate that the District has decided not to adopt a policy on directory information at this time. This decision was based on the conclusion that compliance with the "conditions for disclosure" would be too time consuming and expensive. You ask whether there have been any amendments to the federal Family Educational Rights and Privacy Act (20 USC Section 1232g), particularly in regard to the "conditions for disclosure". Secondly, you refer to a memorandum which you recently received from the United States Army Recruiting Command Legal Counsel. The memorandum indicates that "schools can release all this (directory) information to recruiting personnel without violating FERPA. The FERPA notice requirement does not apply to the release of the more narrow type of directory information to the U.S. Government for purposes of recruiting." Additionally, the memorandum states "Even if FERPA applies all that is required is that the school give public notice of what has been classified as 'directory information', and a reasonable time to respond. Actual notice to each student or parent is not required. Notice in a student handbook or school bulletin is sufficient." In this regard, I offer the following comments.

First, as you know, the federal Family Educational Rights and Privacy Act, commonly known as 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. It provides, in general, that any education records identifiable to a particular student or students are confidential, unless the parents of a student under the age of eighteen waive their right to confidentiality or unless a student eighteen years or over similarly waives his or her right to confidentiality.

An exception to the rule of confidentiality in the Buckley Amendment deals with "directory information", which is defined in section 99.3 of the regulations promulgated by the U.S. Department of Education to include:

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

Section 99.37 of the regulations, entitled "Conditions for disclosure of directory information", states the notification requirements which the educational agency or institution must follow prior to disclosing directory information. The required notification consists of giving "public notice" of: the categories of information designated as directory information, the right of the parent or eligible student to refuse to permit the designation of personally identifiable information as directory information, and the time period for informing the agency or institution, in writing, of such a refusal.

In response to your first question, I do not believe that there have been amendments to section 99 of the regulations promulgated under the Family Educational Rights and Privacy Act. If that is so, the notification requirements set forth in section 99.37 remain unchanged.

Second, you state that the District might be willing to provide directory information if it could do so by providing public notice in a school bulletin rather than attempting to provide actual notice to each student and/or parent.

In my opinion, the Buckley Amendment does not require actual notice to each student and/or parent. I believe it is sufficient that notice be given by such means as are reasonably likely to inform the parent or eligible student of the required information. There are several acceptable methods of noti-

fication available which would not be unduly time consuming or expensive for the District. For example, I believe that the District could include the proper notification in the Notification of rights required to be given to parents or eligible students under section 99.6 of the regulations; another acceptable method of notification would be to include the required information in a school bulletin distributed to parents.

Third, the memoranda of the USARC legal counsel indicate that those portions of the Buckley Amendment which relate to "directory information" do not apply to the armed forces. As suggested to you in a letter dated December 3, 1985, "under both the federal regulations and Chapter 786 of the Laws of 1984 [of New York State], ... military recruiters have the same rights to directory information as others. If a school district has not established a policy on directory information, ... 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 am unaware of any statutory law or case law which contravenes or supersedes the provisions of the Buckley Amendment relating to "directory information". Nor in my view has the USARC legal counsel cited any such authority in his memoranda.

Lastly, you might want to raise the issue with the official designated by the U.S. Department of Education to oversee the implementation of the Buckley Amendment, Ms. Pat Ballinger. Ms. Ballinger can be reached at (202) 732-2058, or by writing to the U.S. Department of Education, Room 3017, 400 Maryland Avenue, 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

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4125

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

May 28, 1986

Hon. Virginia Smith
Mayor
Village of Ticonderoga
Ticonderoga, NY 12883

<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 Mayor Smith:

Thank you for sending to this office copies of correspondence concerning a request made under the Freedom of Information Law by Mr. Douglas Young.

Having reviewed the materials, I must admit to being somewhat confused. The correspondence was precipitated by a request for records indicating payments made to the Village Attorney. In one of your letters of May 7 sent to Mr. Young, you wrote that he requested that the Village prepare a record, and that the Freedom of Information Law does not require that a record be created in response to a request. In a different letter, also dated May 7, you denied access to records on three grounds. Specifically, you wrote that:

> "The individual records you seek <u>might</u> be made available to you in order for you to independently review them and have copies made, but access to records does not require a Village official to disrupt and interfere with the regular business of the Village government to search for records and make copies thereof on your behalf. This would impose an unwarranted, undue hardship on the Village's officials and cannot be justified under any circumstances.

> "Secondly, full and complete access to the records you have requested cannot be granted because portions of those records are confidential under the attorney-client relationship and those portions of the records would first have to be deleted before you could review them.
>
> "Thirdly, it is my opinion that the requested records are incomplete and misleading because they do not contain payment agreement made between the Village and its Attorney, nor do they reflect the value of the services rendered to the Village in terms of costs saved by the efforts of the Village's Attorney. Such information is known only to the Village Board of Trustees and a cover letter of explanation would have to accompany the records. Such a letter would be a new record not otherwise kept by the Village."

In this regard, I offer the following comments.

It is noted at the outset that an opinion was written on April 4 to Mr. Young dealing with the issue of access to the records in questions. Copies were sent to you and to the Village Attorney. In that opinion, it was specified that the Freedom of Information Law pertains to existing records, and that the Law does not, unless otherwise indicated, require an agency to create or prepare a record in response to a request. It was also advised that, according to judicial decisions, attorney bills or vouchers, or portions thereof, indicating payments to the attorney are not subject to the attorney-client privilege, and, in the case of a municipal attorney, are subject to the Freedom of Information Law.

With respect to the grounds for denial stated in your letter of May 7, I believe that they are inconsistent with the Freedom of Information Law and its judicial interpretation.

The first basis for withholding concerns disruption of the office and "undue hardship" on Village officials. In short, when records are accessible under the Freedom of Information Law, I believe that the Law imposes an obligation upon an agency to search for and make them available. To illustrate that point, in a case involving a request for 1500 records that required deletions to be made, it was contended that the records could be withheld due to the burden imposed upon the agency. Nevertheless, the Court held that a "defense" of a denial based upon a "shortage of manpower" would "thwart the very purpose of the Freedom of Information Law" [United Federation of Teachers v. NYC Health and Hospitals Corp., 428 NYS 2d 823, 824 (1980)]. Under the circumstances, I do not believe that "hardship" to the Village would constitute a valid basis for withholding.

Secondly, you wrote that some portions of the records are subject to the attorney-client privilege, which must be deleted. If that is so, I agree; however, I believe that the deletions should be made, and that the remaining, accessible portions of the records should be made available. I point out that section 87(2) of the Law refers to the authority to withhold "records or portions thereof" in accordance with the grounds for denial listed in the Freedom of Information Law. In my view, the quoted language indicates a recognition on the part of the Legislature that, in some instances, a single record might be both accessible and deniable in part. I believe that it also imposes an obligation on an agency to review the records sought in their entirety to determine which portions, if any may justifiably be withheld. When a portion of a record may be withheld, that portion may be deleted, while making the remainder available.

Lastly, your opinion that existing records are incomplete and, therefore, misleading is, in my view, irrelevant to rights of access. As stated by the state's highest court on several occasions, either records sought fall within a ground for denial appearing in the Freedom of Information Law, or they do not; and if no ground for denial can be asserted, the records are accessible [see e.g., Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979)]. You added that certain, clarifying information is known only to the Board of Trustees, and that a "cover letter of explanation" would involve the creation of a new record that the Village is not required to prepare. I agree that the Village would not be obliged by the Freedom of Information Law to prepare such a letter of explanation; such a step would be discretionary. Nevertheless, the absence or preparation of such a letter does not alter rights of access to the records sought,

and disclosure cannot, in my opinion, be conditioned upon the preparation of a letter of explanation. In short, Mr. Young requested records indicating payments to the Village attorney; he did not request a record explaining the payments. I do not believe that rights of access to existing records differ, whether or not you decide that that records be accompanied by a letter of explanation.

I hope that the foregoing serves to clarify the Village's obligations under the Freedom of Information Law. If there are any questions, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas Young

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4124

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

May 28, 1986

Mr. Anthony C. Brandon
85-A-4828 F6-26
Clinton Correctional Facility
Dannemora, New York 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. Brandon:

I have received your letter of May 15 concerning rights of access to your pre-sentence report.

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

Although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, 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 in relevant part 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 sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court.

> "2. (a) 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 the prosecutor. 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 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4125

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

May 28, 1986

Ms. Abbey Shapiro
[redacted]

The staff of the Committee on 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. Shapiro:

I have received your recent letter in which you requested the assistance of the Committee on Open Government in obtaining certain records.

Specifically, you state that you made a request for records under the Freedom of Information Law to the New York City Board of Education which was denied. Further, you state that you have been "blacklisted by the employer" but "have not been able to refute the allegations if any against (you)" because you have not been granted access to the pertinent records. In this regard, I offer the following comments.

First, it is noted that the Committee on Open Government does not have the authority to compel an agency to grant or deny access to records or to enforce compliance with the Law. This office is authorized to render advice under the Freedom of Information Law.

Second, 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.

Third, your letter indicates that you have requested a number of records. However, you have not specified the records or the nature of the records that you are seeking. Further, you have not stated the grounds that were cited as the basis for the denial of your requests. Without more information, I am unable to determine what grounds for denial might apply to your requests or any portion thereof.

I point out that section 87(2)(g) of the Law permits an agency to withhold records that:

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

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

Fourth, under the Freedom of Information Law, an initial request for records should be directed to the "records access officer" at the agency that maintains the records sought. In this instance, the records access officer to whom your request should be directed is Ruth Bernstein, New York City Board of Education, 110 Livingston Street, Brooklyn, New York. If your previous request was not properly addressed, you can submit a new inquiry to the records access officer.

Fifth, you indicate that you are currently receiving unemployment benefits. Prior to making a determination of a claim for benefits, the Department of Labor acquires certain information from employers and employees. In this regard, section 537(1) of the Labor Law states in part that:

> "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."

Therefore, you may be able to obtain some of the records you are seeking by making a request for records at the Unemployment Insurance Office.

Sixth, please note that under the Freedom of Information Law, section 89(3), a request must "reasonably describe" the records sought. Therefore, when requesting records, it is suggested that the request be as detailed and specific as possible in order to enable agency officials to locate the records.

Finally, for your use and information, I am enclosing a copy of "Your Right to Know", which explains the provisions of the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4126

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

May 29, 1986

Mr. Harry Wenzel
83-A-4882
P.O. Box 367
Dannemora, NY 12929

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

Dear Mr. Wenzel:

I have received your letter of May 15 in which you requested assistance.

You wrote that in 1983 you were divorced and your ex-wife was awarded your entire pension for child support and alimony. You have unsuccessfully requested from the NYS Retirement System records indicating the amount paid to your wife and the date that payments began.

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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, under the circumstances, since the records deal with your pension, I do not believe that any ground for denial would apply. Further, the records would likely also be available to you pursuant to the Personal Privacy Protection Law, section 95(1), and the Retirement and Social Security Law, section 11(f).

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

Lastly, I have contacted the Retirement System on your behalf, and it is suggested that you submit a request to:

Mr. Alvian N. Smirensky
Director of Information Services
Division of Retirement
Alfred E. Smith Office Building
Albany, New York 12244

I hope that I 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-4127

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

May 30, 1986

Mr. Herbert J. Sweat
85-A-4212
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. Sweat:

I have received your letter of May 24 concerning your difficulty in obtaining records from the Dutchess County Supreme Court and the Office of the District Attorney. In addition, you requested copies of the Freedom of Information Law and the regulations promulgated by the Committee.

Enclosed are the materials that you requested. Further, I would like to offer the following general comments.

The Freedom of Information Law is applicable to records of an "agency", a term 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 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 Freedom of Information Law does not in my opinion apply to the courts or court records. Consequently, your request for records of the Supreme Court falls outside the requirements of the Freedom of Information Law. It is noted, however, that other statutes often grant rights of access to court records and that a request for court records should be directed to the clerk of the appropriate court.

The Office of the District Attorney in my view is an "agency" subject to the Freedom of Information Law. When submitting a request to a district attorney, it is suggested that you direct the request to the designated "records access officer".

Also enclosed for your consideration is an explanatory brochure that may be useful to you, for it contains a sample letter of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4128

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

May 30, 1986

Ms. Marjorie T. Coleman
Director of Legal Services
Daily News
220 East Forty Second Street
New York, New York 10017

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

Dear Ms. Coleman:

As you are aware, I have received your letter of May 8, as well as the correspondence attached to it. Since the receipt of those materials, Derrick D. Cephas, General Counsel to the Urban Development Corporation (UDC) has forwarded a determination on appeal pertaining to the request that is the subject of your inquiry.

By way of background, Barbara Ross, a reporter for the Daily News, requested from the UDC records relating to proposals concerning the so-called Times Square Project. It was specified that the records sought included "proposals, correspondence and minutes of meetings regarding submissions" from several named developers. Some of the records sought were made available, others were denied pursuant to section 87(2)(c) of the Freedom of Information Law. It was also stated that the request, insofar as it included "unspecified correspondence" regarding the proposals "is overbroad and fails to reasonably describe the documents..." Subsequently, Ms. Ross appealed, and Mr. Cephas reversed the initial denial in part. The documents to which reference was specifically made that were denied on appeal concern the proposal made by Park Tower Realty. Mr. Cephas wrote that the Park Tower proposal is exempt because disclosure "would impair on-going contract negotiations with Park Tower, a conditionally designated developer of the 42nd Street Development Project."

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, 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 grounds for denial. In my view, the quoted language represents a recognition on the part of the Legislature that a single record, report or proposal, for example, might be both available and deniable in part. I believe that the language also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Third, the basis for the denial, section 87(2)(c), provides that an agency may withhold records or portions thereof that:

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

From my perspective, the key word in section 87(2)(c) is "impair", and the potential for harm as a result of disclosure is the determining factor regarding the propriety of a denial under that provision.

Section 87(2)(c), as it relates to the impairment of "contract awards" is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency seeks information, such as bids concerning the purchase of goods and services, or concerning proposals. If, for example, an agency seeking proposals has received a number of proposals, but the deadline for their submission has not been reached, premature disclosure to another possible submitter would provide that person or firm with an unfair advantage vis a vis those who already submitted proposals. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals has been reached, often the passage of that event results in the elimination of harm. Further, as Ms. Ross indicated in her appeal, it has been held that bids or proposals are available after a contract has been awarded [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196 (1980)]. In this instance, a "conditional designation" has been made. As such, it would appear that the

process of submitting and comparing proposals has ended. Consequently, it is difficult, on the basis of the correspondence, to ascertain how disclosure would "impair" the process, particularly since other, presumably competing proposals have been disclosed.

The other situation where section 87(2)(c) has successfully been asserted to withhold records pertained to real estate transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price [see Murray v. Troy Urban Renewal Agency, Sup. Ct., Rensselaer County, April 24, 1980, rev'd 84 AD 2d 612, 56 NY 2d 888 (1982)]. In that case, one of the parties, the agency, maintained records not possessed by the other parties, and disclosure would have "impaired" the agency's ability to obtain an optimal return for the property. That kind of application of section 87(2)(c) does not appear to be analogous to the facts at issue. Further, in this instance, the contents of the proposal are known to both the developer and the agency.

In short, at this juncture, since the developer has effectively been chosen, and since both parties, Park Tower Realty and the UDC, are familiar with the contents of the proposal, it is difficult, based upon my understanding of the facts, to envision how section 87(2)(c) could justifiably be asserted.

Lastly, although it is unclear whether the scope of the records sought continues to be at issue, it is noted that the requirement that a request "reasonably describe" the records sought has been considered by the Court of Appeals. The Court found that the standard is met when "the respondent agency may locate the records in question" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 83 (9184)]. In addition, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, pertain to the responsibilities of the designated records access officer, who has the duty to "assist the requester in identifying requested records, if necessary" [section 1401.2(b)(2)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Derrick D. Cephas
Gail Port

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4129

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

May 30, 1986

Dorothy Fuerst, M.A.
[redacted]

The staff of the Committee on 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. Fuerst:

I have received your letter dated May 12, 1986 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you wrote that your request for records pertaining to the disciplinary action taken against a certain individual was denied by the New York City Department of Investigation. Upon your appeal, the denial was affirmed. The grounds for the determination were listed as section 87(2)(e) of the Freedom of Information Law, whereby an agency may deny access to certain records compiled for law enforcement purposes, and sections 1113 and 1114 of the New York City Charter. However, an earlier letter from the Department indicated that the investigation regarding that individual had been completed and the file closed. 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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, section 87(2)(e), the section cited in the affirmance of the denial, states that records may be withheld that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;

> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

The provision quoted above would, in my view, be inapplicable with respect to a record indicating disciplinary action if, as the Department of Investigation advised you, the investigation was concluded and the file closed. Assuming that the file is closed, there would be no investigation, proceeding or trial with which disclosure could interfere. Additionally, any portion of the requested records which identify a confidential source or disclose confidential information or criminal investigative techniques could be deleted.

Third, the usage of sections 1113 and 1114 of the New York City Charter as a ground for affirmance of the denial is, in my view incorrect. Section 1401.1(d) of the regulations promulgated under the Freedom of Information Law (21 NYCRR) states that:

> "Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records."

Sections 1113 and 1114 of the New York City Charter are in my view far more restrictive than the Freedom of Information Law. Therefore, those provisions of New York City Charter would be inapplicable to the extent that they are more restrictive than the Freedom of Information Law.

Fourth, with respect to records involving disciplinary action taken against a public employee, I believe that two other paragraphs of section 87(2) are relevant. Section 87(2)(b) permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". In addition, section 87(2)(g) allows an agency to withhold certain inter-agency or intra-agency materials.

The courts have held on several occasions that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the

performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980]. Conversely, it has been held that records concerning public employees that are not relevant to the performance of their official duties may be denied on the ground that disclosure would indeed result in an unwarranted invasion personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Minvera v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1984].

Based upon the judicial determinations cited above, I believe that, if the record in question is reflective of final disciplinary action taken against a public employee, it is available, for, as stated in Geneva Printing and Donald C. Hadley v. Village of Lyons, (Sup. Ct., Wayne Ct., March 25, 1981), such records "deal with a matter of public concern, that being a public employee's accountability for misconduct". On the other hand, if allegations of misconduct were not proven or accepted, the records relating to such allegations may, in my view, be withheld for disclosure would result in an unwarranted invasion of personal privacy.

Section 87(2)(g) provides that an agency may withhold inter-agency or intra-agency materials which are not:

> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

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

Although you did not provide great detail, it appears that the records in which you are interested represents a "final determination" which would be available under section 87(2)(g)(iii).

Finally, I am enclosing copies of the Freedom of Information Law and "Your Right to Know" which describes the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Encs.

cc: Bruce Fogarty
Dolores R. Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1284
FOIL-AO-4130

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

May 30, 1986

Hon. Victoria Siegel
Mayor
Village of Bayville
34 School Street
Bayville, NY 11709

The staff of the Committee 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 Mayor Siegel:

As you are aware, I have received your letter of May 14 in which you requested an advisory opinion.

The facts, as I understand them, are as follows. Approximately two years ago, there was a proposed development of two minor subdivisions in the Village of Brookville. Based upon our telephone conversation, the subdivisions involved two units in one case, and four in the other. You also stated that the County Health Department obtains jurisdiction to approve or disapprove subdivisions when there are five or more units. As such, two years ago, you received letters from the Health Department and the County Planning Commission indicating that neither had jurisdiction. Nevertheless, in April of this year, you received a letter from Mr. Stanley Juczak of the Land Resource Management Bureau of the County Board of Health indicating that the developments were "being judged illegal by his department because they had not been notified". When you questioned the apparent reversal, "his response was that he received a phone call". Thereafter, you requested records concerning the issue under the Freedom of Information Law. The request was denied based upon a contention that the records are "Part of Investigatory Files". It is your view that, as chief executive officer of the Village, you are entitled to the records.

In this regard, I offer the following comments.

First, the phrase "part of investigatory files" appeared in the Freedom of Information Law as originally enacted in 1974 [see original Freedom of Information law, section 88(7)(d)]. Under the original statute, an agency could withhold records that were "part of investigatory files compiled for law enforcement purposes". However, in 1977, the original statute was repealed and replaced with a completely revised version, effective January 1, 1978.

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

The provision most closely associated with the former exception concerning "investigatory files" is section 87(2)(e), which states that an agency may withhold records that:

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

Unlike the original provision, which excepted investigatory files compiled for law enforcement purposes irrespective of the status of an investigation, the language quoted above permits an agency to withhold records "compiled for law enforcement purposes" only to the extent that disclosure would result in the harm described in subparagraphs (i) through (iv) of section 87(2)(e).

Under the circumstances, the "reversal" by County agencies appears to indicate that any "investigation" has been completed and that, therefore, section 87(2)(e) could not be asserted as a basis for withholding. Further, it is questionable in my view whether records maintained by the Planning Commission or Health Department regarding a subdivision could be characterized as records "compiled for law enforcement purposes". In short, it does not appear that section 87(2)(e) is applicable.

Third, you wrote that you are interested in knowing who contacted Mr. Juczak. If a record containing that information exists, it would be subject to rights of access. Without additional knowledge concerning the nature of the communication, it is difficult to provide specific direction. It appears that the only ground for denial of potential significance might be section 87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". However, it is possible that there may be no privacy considerations, particularly if the call was made by a public employee.

Fourth, viewing the matter from a different perspective, it appears that one or perhaps two public bodies might have been involved in the decision-making process regarding the subdivisions. In my view, both the County Planning Commission and Board of Health constitutes public bodies subject to the Open Meetings Law. If either or both of those entities took action, the nature of the action would be recorded by means of minutes required to be prepared pursuant to the Open Meetings Law. Specifically, section 106(1) of the Open Meetings Law provides that:

> "Minutes shall be taken at all open meeting 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. As such, you might want to seek minutes, as well as other materials related to action 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: Nassau County Planning Commission
Nassau County Board of Health
Stanley Juczak

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4131

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

June 2, 1986

Mr. Leonard Mott
#86-C-269
Wyoming Correctional Facility
P.O. Box 501
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. Mott:

I have received your recent letter in which you requested advice in regard to the Freedom of Information Law.

Specifically, you state that you intend to make a request under the Freedom of Information Law for records "such as documents (or) transcripts from a possible hearing" relating to the discharge of a certain district attorney. You ask to whom your request for records should be directed.

First, 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.

Second, since you have not specified what procedures were taken in regard to this matter or the nature of existing records, I cannot conjecture as to the extent to which any of the grounds for denial would apply.

Third, a request for records under the Freedom of Information Law should be directed to the "records access officer" at the agency that maintains the records sought. In this instance your request should be directed to the records access officer at the office of the District Attorney where the individual in question was employed. Further, the Freedom of Information Law re-

quires that an applicant "reasonably describe" the records sought. Therefore, when making a request, it is suggested that you include sufficient detail to enable agency officials to locate the records sought.

Additionally, records relating to the discharge of this individual may be maintained by another agency. However, without more information as to what actions were taken, I cannot surmise what other agency may maintain such records.

Finally, for your use and information, I am enclosing a copy of "Your Right to Know" which describes the Freedom of Information Law and contains a sample letter of 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

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4132

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

June 2, 1986

Marvin D. Miller, Counselor
State University Agricultural and
Technical College
1090-A Suffolk Avenue
Brentwood, New York 11717

The staff of the Committee 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. Miller:

I have received your letter of May 15, 1986 in which you requested advice under the Freedom of Information Law.

According to your letter, you are researching the relationship between the scientists of the Eugenics Record Office of Cold Spring Harbor and German eugenicists as well as the activities of both groups in 1930. You have learned that a German eugenicist was scheduled to meet with a scientist from the Eugenics Records Office in New York on May 4 or 5, 1930, for a visit to the Kings Park State Mental Hospital. Additionally, you state that during that time, the Eugenics Record Office was conducting projects at the Hospital. Pursuant to your recent request to review pertinent records, an official at the Kings Park State Mental Hospital advised you that no such records exist. You indicate that the hospital maintains an archive and that "if (no such records exist) then the many investigations conducted at the hospital by the field workers were either lost, misplaced or destroyed". In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records. If indeed "no such records exist", the Freedom of Information Law is not applicable. Moreover, since there has been no denial of access to existing records, the appeals process provided in the Freedom of Information Law would, in my view, not be available to you.

However, under section 89(3) of the Law, upon your request, an agency must certify that it does not have possession of such record or that such record cannot be found after diligent search. Therefore, you may make a request to the records access officer at the hospital for a certification in regard to the records you have requested.

Second, even if the records do exist, based upon the facts you have provided me, I believe that such records could properly be denied under section 87(2)(a) of the Freedom of Information Law when read in conjunction with section 33.13 of the Mental Hygiene Law.

Section 87(2)(a) permits an agency to withhold records that "are specifically exempted from disclosure by state or federal statute". Section 33.13 of the Mental Hygiene Law states that clinical records of patients in mental hygiene facilities are confidential and may be released only under circumstances specifically enumerated in that statute.

I have spoken on your behalf with an attorney at Counsel's Office for the Office of Mental Health in regard to this matter. She advised me that in her opinion, the records which you have requested would, if they exist, be considered confidential under section 33.13.

Further, in my view, it is doubtful that any of the specifically enumerated exceptions to the general rule of confidentiality [section 33.13(c)(1-9)] would be applicable in this instance. It is also noted that under section 33.13(f), any disclosure made pursuant to section 33.13 "shall be kept confidential by the party receiving such information and the limitations on disclosure in this section shall apply to such party."

Third, for your information I have also spoken with Tom Mills of the New York State Archives in regard to this matter. He advised me that he does not believe the State Archives maintains any of the records that you requested concerning alleged eugenics projects at the Kings Park State Hospital. He further stated that, to the best of his knowledge, the hospital maintains all of its clinical records going back to approximately 1900.

Finally, I am enclosing copies of section 33.13 of the Mental Hygiene Law and "Your Right to Know" which outlines 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4133

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

June 3, 1986

Mr. Mart i.l.v.e.s. Goldrich-Nowak
[redacted]

Dear Mr. Goldrich-Nowak:

I have received your letter of May 29. You have requested a variety of materials from this office, including all advisory opinions of the Committee.

In this regard, it is noted that, under the Freedom of Information Law alone, this office has prepared more than 4,000 advisory opinions since 1974. In addition, more than 1,000 advisory opinions have been rendered under the Open Meetings Law. Due to the volume of opinions, the Committee does not have the resources to publish the opinions or distribute complete sets of the opinions to interested persons. However, to attempt to enable people to view the opinions, they are sent to various law libraries across the state. The location nearest you where the opinions can be found is the library at the Appellate Division, Second Department, in Brooklyn.

To enable users to locate opinions of particular interest, appended to the Committee's annual report is an index to advisory opinions. The index prepared with respect to opinions rendered under the Freedom of Information Law identifies the opinions by means of more than 400 "key phrases". For example, one of the key phrases of possible relevance to you is "Privacy of Deceased Persons", and I have enclosed the opinions for your consideration. The report also contains summaries of judicial decisions rendered under the Freedom of Information Law, and an index to the opinions. As such, enclosed is the latest annual report, which includes the index to advisory opinions and the summaries of judicial decisions. Also enclosed as requested is a pamphlet, "Your Right to Know", which describes the Freedom of Information Law in some detail.

The remainder of your letter concerns a variety of issues concerning the privacy of deceased persons. As you are aware, 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". In determining issues relative to privacy, often subjective judgments must be made. Stated differently, one reasonable person viewing an item of personal information might consider disclosure to be offensive, thereby resulting in an unwarranted invasion of personal privacy; however, an equally reasonable person might find the same information to be innocuous, thereby resulting in a permissible invasion of privacy. Further, the facts relating to records may be relevant to rights of access. While it is my general feeling that disclosure regarding a deceased would not constitute an unwarranted invasion of personal privacy, there may be other privacy considerations, such as those involving family members, for example. In short, I cannot cite for you any specific rule concerning the privacy of the deceased that would be applicable in every instance. Further, in addition to the Freedom of Information Law, there are numerous other statutes that deal with particular records containing personal information. In those instances, it is likely that the specific direction provided by a different statute would supersede 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-4134

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

June 3, 1986

Mr. Norman L. Rubens
85-C-928 Unit B1-9
Collins Correctional Facility
Helmuth, New York 14079

<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. Rubens:

I have received your letter and attachment dated May 16, 1986 in which you requested the assistance of the Committee on Open Government.

Specifically, you state that you have made requests to "every criminal court in New York City" for a court order directing that the record of a certain criminal matter be closed. According to your letter, the charge in question was dismissed in 1964. You have also enclosed a copy of a NYSIS report showing the charge outstanding from 1964. In this regard, I offer the following comments.

The Freedom of Information Law generally pertains to rights of access to records maintained by units of state and local government, except the State Legislature and the courts.

In this instance, you are seeking the issuance of a court order. As such, you are attempting to elicit the creation of a new record, rather than seeking an existing record. Therefore, I do not believe that the Freedom of Information Law is relevant or that the issue falls within the scope of the authority or the expertise of this office.

However, for assistance in regard to your question, I suggest that you contact the Division of Criminal Justice Services, Identification and Data Systems, 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4135

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

June 3, 1986

Dr. Charles Kremer, President
Committee to Bring Nazi War Criminals
to Justice in the U.S.A., Inc.
135 West 106th Street - 2M
New York, New York 10025

Dear Mr. Kremer:

I have received your letter of May 31.

You have requested "freedom of information" and suggested that a particular group supplied this office with inaccurate information about you.

In this regard, it is noted that the Committee on Open Government is responsible for advising with respect to the New York Freedom of Information Law. As a general matter, the Committee does not maintain custody or control of records. Further, this office does not maintain records concerning you or the events that you described.

I point out, too, that the Freedom of Information Law pertains 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In view of the subject matter of your inquiry, it is unlikely in my opinion that an entity of state or local government in New York would maintain the type of information you seek. It is possible that the information sought may be maintained not by the New York State Department of State, within which the Committee is housed, but rather the United States Department of State. Assuming that the information in question is maintained by a federal agency, it is suggested that a request be sent to the appropriate federal agency or agencies pursuant to the federal Freedom of Information Act [5 U.S.C. 555].

In the event that you seek records pursuant to the New York Freedom of Information Law, enclosed is a copy of "Your Right to Know", which describes that statute.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4136

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

June 3, 1986

Ms. Alice P. Green
President
The Albany Justice Center, Inc.
815 Central Avenue
Albany, New York 12206

<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, except as otherwise indicated.</u>

Dear Ms. Green:

I have received your letter of May 17 in which you requested an advisory opinion under the Freedom of Information Law.

Your inquiry pertains to a denial of a request for "the 1985 Management Study Report on the Albany Police Department". The denial by Mr. Harold Greenstein was rendered following an appeal and was sent to this office as required by section 89(4)(a) of the Freedom of Information Law. According to Mr. Greenstein's determination, two pages of the report consisting of statistical data were disclosed. The remainder was denied pursuant to two provisions in the Freedom of Information Law, sections 87(2)(e) and 87(2)(g). Specifically, Mr. Greenstein wrote that, other than statistical information previously made available, the remaining portions "are recommendations only which fall within the purview of Section 87(2)(g)(ii) and (iii)." He added that:

> "Disclosure of the Study Report, including both recommendations and factual data (excluding that factual data already disclosed) would reveal non-routine criminal investigative techniques and would generally hamper law enforcement investigations."

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 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 authority to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. The quoted language in my view represents a recognition on the part of the Legislature that a single record or report might be both accessible and deniable in part. 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.

Third, the initial ground for denial cited by Mr. Greenstein, 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 portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Under the circumstances, I believe that the report could be characterized as "intra-agency material". While certain statistical data was made available, the remainder was denied. Although I am unfamiliar with the contents of the report, I point out that it has been held that factual information appearing in narrative, rather than in numerical or tabular form, has been determined to be available under section 87(2)(g)(i). For instance, in Ingram v. Axelrod, a decision rendered by the Appellate Division, Third Department, the Court stated that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subjective analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. 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" [90 AD 2d 568, 569 (1982)].

In short, even though factual information may be "intertwined" with opinions, the factual portions, if any, should in my opinion be available.

The other basis for withholding offered by Mr. Greenstein is section 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, it is questionable whether section 87(2)(e) could be asserted. If the study was prepared with respect to the management of the Police Department, it does not appear that it could be characterized as a record "compiled for law enforcement purposes". Further, Mr. Greenstein suggested that disclosure would "generally hamper law enforcement investigations". The specific language of section 87(2)(e)(i) refers to disclosures that would "interfere" with law enforcement investigations. In my view, unless the report refers to a particular investigation or investigations, it would be difficult for the agency to demonstrate how disclosure would "interfere" with ongoing investigations [see Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., NYLJ, June 24, 1982].

With respect to section 87(2)(e)(iv), it has been held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the non-routine procedure by which an agency obtains its information....
>
> "Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel..." [Fink v. Lefkowitz, 47 NY 2d 567, 572 (1979)].

Once again, without knowledge of the contents of the report, the applications of section 87(2)(e)(iv), particularly in view of the breadth of its assertion, is conjectural. In my opinion, unless every aspect of the report, insofar as it per-

tains to "criminal investigative techniques and procedures" pertains to "non-routine" techniques and procedures, that basis for denial may have been asserted more broadly than the statute permits.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Harold Greenstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4137

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

June 4, 1986

Mr. Roger Hicks
83-C-341
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. Hicks:

I have received your letter of May 19 concerning the use of the Freedom of Information Law.

You have asked:

> "whether or not an individual may be allowed to receive official jail records pertaining to another individual, without their consent, where the case has been deposed of by a plea of guilty on the individuals behalf, where the case is not the object of an investigation of a serious crime and where there is no compelling reason for secrecy."

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

First, without greater knowledge concerning the nature of the records in which you are interested, specific guidance cannot be given. However, 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, a request should be directed to the "records access officer" at the agency or agencies that you believe maintains the records sought.

Third, 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, descriptions of events and similar information in order to enable agency officials to locate the records.

Lastly, enclosed is "Your Right to Know", which describes the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4138

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

June 4, 1986

Mr. Harold Mondshein
[redacted]

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

Dear Mr. Mondshein:

I have received your letter of May 19, as well as the materials attached to it. Once again, your inquiry pertains to events involving the Board of Collective Bargaining that allegedly occurred in March of 1983.

Having reviewed the correspondence, I believe that Mr. MacDonald's letter to you of May 14 fully responded to your request. However, you have asked for my opinion as to whether you may raise certain questions.

In this regard, as I believe I have previously advised, the Freedom of Information Law pertains to existing records; as a general matter, it does not require that agency officials create or prepare a new record in response to a request for information. Stated differently, the Freedom of Information Law is a vehicle under which any person may seek records; it is not a vehicle that permits a member of the public to cross-examine government officials.

As such, in response to your question, the Freedom of Information Law does not in my opinion require officials of the Office of Collective Bargaining to answer your questions; rather it requires that they respond to requests for existing records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Malcolm D. MacDonald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4139

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

June 5, 1986

Mr. Frank T. Strafaci
Attorney at Law
569 Bay Ridge Parkway
Brooklyn, NY 11209

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

Dear Mr. Strafaci:

I have received your letter of May 23 in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, your client, the Barretta Research Service Corporation, has encountered difficulty in obtaining copies of certificates of occupancy and related materials kept by the Town of Brookhaven.

Specifically, you wrote that:

> "Barretta Research has met the following responses:
>
> 1. refusal to allow Barretta Research direct access for copies of public records requested (namely certificates of occupancy and building department permits).
>
> 2. delays ranging from four to six weeks for receipt of copies of requested documents (although the files are physically accessable [sic]).
>
> 3. imposition of a fee of $12.00, as a search fee, for copies of requested documents.

4. Imposition of a policy requiring a deed description and a survey before such documents are released to Barretta Research, which policy in [your] view constitutes an illegal condition precedent."

In this regard, I offer the following comments.

First, with respect to "direct access", it is not completely clear what you mean. I believe that, as custodian of records, Town officials are required to maintain custody and control of Town records. Their responsibility is to make records available to the extent required by law. However, I do not believe that they are required to permit the public to search through a filing cabinet for records, for example. Stated differently, there may be considerations relative to theft, alteration of records, misfiling, administrative efficiency and procedure, as well as additional issues relative to rights of access, which might preclude the public from gaining physical access to files. In view of those considerations, I believe that agency officials may search for and make available particular records, rather than enabling members of the public to conduct their own searches.

Second, with regard to delays, I point out that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, prescribe 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 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)].

Third, unless a statute specifically so permits, I do not believe that a search fee may be imposed. As indicated to you in an opinion rendered in 1984, section 87(1)(b)(iii) of the Freedom of Information Law 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. In my opinion, only an act of the State Legislature, a statute, would permit the assessment of a search fee or a fee higher than twenty-five cents per photocopy.

Further, I am unaware of any statute which authorizes fees in excess of twenty-five cents per photocopy relative to the records in question. Although section 261 of the Town Law authorizes a town board to set fees for the charges and expenses incurred for zoning and planning, I do not believe that this section could read to permit fees in excess of twenty-five cents per photocopy for town zoning and planning records. In my view, section 261 permits towns to set reasonable fees for the issuance of certain building certificates and permits; but it does not authorize a town to set fees for copies of such documents.

It is noted, too, that section 1401.8(a)(2) of the regulations promulgated by the Committee states that no fee may be charged for a search for records.

Lastly, you wrote that the Town imposes a "policy requiring a deed description and a survey before such documents are released". Without knowing more of the nature of the Town's system of filing its records, I cannot conjecture as to your contention that the policy "constitutes an illegal condition precedent". As a general matter, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe"

the records sought. If an agency can locate records based on the terms of a request, the applicant would in my view meet the requirement of reasonably describing the records [see M. Farbman & Sons v. New York City, 62 NYS 2d 75 (1984)]. As such, the issue in my view is whether the policy in question is 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:jm

cc: Town Attorney, Town of Brookhaven

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4140

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

June 5, 1986

Mr. Karl Ahlers
#82-A-4134
Drawer B
Stormville, NY 12582

Dear Mr. Ahlers:

I have received your letter dated May 19, 1986 in which you requested advice from the Committee on Open Government.

Specifically, your inquiry concerns requests to four agencies, the Federal Bureau of Investigation, two offices of district attorneys, and the State Police. The Bureau responded by stating that a determination would be made at some point in the future. The other recipients of your requests either denied the requests in writing or constructively by means of a failure to respond. You have initiated proceedings under Article 78 of the Civil Practice Law and Rules with respect to those agencies.

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law is a New York State statute which governs rights of access to records maintained by an agency. Section 86(3) defines the term "agency" to include units of state and local government, except the State Legislature and the courts. Regarding your request to the FBI, the Bureau is a federal agency and, as such, is not an "agency" as that term is defined under the Freedom of Information Law. Therefore, the New York Freedom of Information Law is not applicable to your request. Generally, rights of access to records of federal agencies are governed by the federal Freedom of Information Act.

Second, pursuant to policy adopted by the Committee, an advisory opinion will not be prepared when it is known that litigation pertaining to the Freedom of Information Law has been commenced.

Third, the Freedom of Information Law specifically excludes from its coverage the courts and court records. As such, the Committee has no jurisdiction or authority with respect to the preparation of records by the courts or judicial proceedings.

Lastly, it is suggested that you discuss the issues 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4141

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

June 5, 1986

Mr. Walter Speller
#83-A-7958
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. Speller:

I have received your letter dated May 21, 1986 in which you requested the advice of the Committee on Open Government.

Specifically, you inquire as to the "correct procedure to follow in requesting access to your 1983 preliminary proceeding records from the criminal prosecutor... In particular, certain formal 'motions' that (you) had submitted (pro se) to the court." In this regard, I offer the following comments.

First, the Freedom of Information Law generally governs access to records maintained by units of state and local government, except the state legislature and the courts.

Second, records of preliminary court proceedings including motion papers such as you describe are records which would likely be maintained by the court before which the proceedings were held or to which such matter may have been transferred. Thus, you may direct a request to the appropriate court.

It is noted that, as indicated above, the Freedom of Information Law does not pertain to records maintained by the courts and therefore, rights of access to court records falls outside the scope of the Committee's jurisdiction. However, I believe that under the Judiciary Law and other statutes, many court records would be available upon your request and payment of the appropriate fee.

Third, I believe that the records in question might also be maintained by the office that handled the prosecution of your case.

If your case was prosecuted under federal law by a federal prosecutor, you may direct a request to that office. It is noted that access to records maintained by federal agencies is not governed by the New York Freedom of Information Law, but rather by the federal Freedom of Information Act (5 U.S.C. 552).

If you were prosecuted under New York State law, the matter would have been handled by the district attorney's office in the County in which the charges were brought. The office of a district attorney is an agency to which the Freedom of Information Law pertains.

A request under the Freedom of Information Law should be directed to the "records access officer" of the agency that maintains the records sought. Further, as noted in our previous correspondence, under the Freedom of Information Law, a request for records must "reasonably describe" the records sought. Therefore, when making a request, it is suggested that the request be as detailed and specific as possible to enable agency officials to locate the records sought.

Finally, I appreciate hearing that you found my previous letter, of May 12, helpful and informative. I hope that the same is true of this letter. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-27
FOIL-AO-4142

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

June 5, 1986

Mr. Charles Mendelson
[redacted]

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

Dear Mr. Mendelson:

I have received your letter of May 25 in which you raised questions pertaining to the Freedom of Information Law.

You asked whether, under the Freedom of Information Law, your identity is protected and you are entitled to confidentiality when you allege that public employees are derelict in their duties or that others fail to comply with law.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is permissive. Section 87(2) of the Law states, in brief, that all records of an agency are available, except that an agency may withhold records or portions thereof that fall within the scope of the grounds for denial that follow. As such, while an agency is permitted to withhold records under certain circumstances, the Freedom of Information Law generally does not require that such records be withheld.

Second, section 87(2)(b) of the Law permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". 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, an agency may, depending upon the facts, delete identifying details concerning the complainant prior to granting access to the remainder. However, as suggested earlier, the Freedom of Information Law does not require that the identity of a complainant be withheld, unless the Personal Privacy Protection Law or some other statute is applicable.

The Personal Privacy Protection Law, enacted in 1984, pertains only to records of state agencies; it does not apply to local governments, such as New York City. Assuming that a complaint or allegation analogous to that described in your letter is directed to a state agency, if the agency determines that disclosure would constitute an unwarranted invasion of personal privacy, the Personal Privacy Protection Law [see section 96(1)], when read in conjunction with the Freedom of Information Law [see section 89(2)(a)], would prohibit disclosure to the public.

Enclosed are copies of the Freedom of Information Law, the Personal Privacy Protection Law, and explanatory brochures pertaining 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4143

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

June 6, 1986

Mr. Robert J. Passenant
[redacted]

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

Dear Mr. Passenant:

I have received your letter of May 27 concerning the Freedom of Information Law

According to your letter, on May 19, you went to the office of the Town Clerk of the Town of Babylon to inspect an application for a variance sought by a neighbor. You apparently completed a request form and were told that you would be notified concerning when you could see the application. You questioned why you could not see the application when the request was made.

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 of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, I believe that the record in question is accessible under the Freedom of Information Law, for none of the grounds for denial could be applicable.

Second, while an agency may respond instantly to a request, the Freedom of Information Law states that a response must be given within five business days of the receipt of a request. Both the Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, prescribe 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 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 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 Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4144

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

June 9, 1986

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 May 27 as well as the materials attached to it.

According to your letter, the State Insurance Department requires that requests made under the Freedom of Information Law be submitted on its prescribed form. You added that one of the questions on the form is the "Reason for Request". It is your view that the purpose for seeking records is irrelevant, and that aspect of the form should be stricken. Although you completed the form, stating that the request was for a "non-commercial purpose", you were informed that your application was "unacceptable and insufficient".

You have requested my views on the matter and, in this regard, I offer the following comments.

First, with respect to the use of a form, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot validly be cited as a basis for withholding or delaying access to records. Section 89(3) of the Freedom of Information Law merely requires that a request be made in writing that "reasonably describes" the records sought. Therefore, in my view, any request made in writing that reasonably describes records should suffice. I believe, too, that the purpose of the Freedom of Information Law is to facilitate the process by which records are made available by government. A requirement that a specific form be used would in my opinion likely have the opposite effect in some cases. For instance, if this agency required that a form be completed, a

member of the public in Queens would be required to write to this office, request the form, have the form sent to Queens, require the applicant to complete it and return it to Albany. In short, such a procedure would simply involve an unnecessary amount of time, and, in my view, would be contrary to the intent of the Law.

Second, I am in general agreement that the purpose for which a request is made is irrelevant and has no bearing upon rights of access. It has been held that accessible records should be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; also, M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. The only instance in the Law in which the reason for a request may be determinative with respect to disclosure pertains to section 89(2)(b)(iii). The cited provision is one among a series of examples of unwarranted invasions of personal privacy. To the extent that disclosure would constitute an unwarranted invasion of personal privacy, an agency may deny access to records. More specifically, section 89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

The language quoted above represents what might be characterized as an internal conflict in the Freedom of Information Law, for it specifically refers to the purpose for which a request is made for a list of names and addresses. In one judicial determination involving such a list, it was found that an agency could inquire as to the purpose for a request, stating that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents' denials of petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgment for that of the respondents" [Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980)].

As such, there is one precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses.

In conjunction with the facts that you presented, it is questionable whether section 89(2)(b)(iii) would apply, for you are seeking names, rather than names and addresses. Even if your request could be construed to involve names and addresses, I believe that an assertion or certification that a list would not be used for commercial or fund-raising purposes would likely render section 89(2)(b)(iii) inapplicable as a basis for a denial.

Lastly, as a general matter, it has been advised that a license or determination concerning licensees are available, for the purpose of a license is to enable the public to know that a person or firm is qualified to engage in an activity in which the state has an interest.

In an effort to communicate my views on the subject, copies of this opinion will be sent to the Insurance Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: E. Joseph Smith
Records Access Officer, Insurance Department
Counsel, Insurance Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4145

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

June 9, 1986

Mr. Albert Curtis
63-A-118
Queensborough Correctional Facility
47-04 Van Dam Street
Long Island City, New York 11101

Dear Mr. Curtis:

Your letter addressed to the Governor's office and the Secretary of State of May 30 has been forwarded to the Committee on Open Government.

Your letter involves a request for records apparently maintained by the Division of Parole. In this regard, it is noted that the Committee is responsible for advising with respect to the Freedom of Information Law. As a general matter, this office does not maintain custody and control of records of state agencies. In short, neither the Committee, the Department of State, nor the Governor's office maintain the records in which you are interested. Nevertheless, I offer the following comments and suggestions.

First, requests made under the Freedom of Information Law should be directed to the "records access officer" at the agency that you believe maintains the records sought. In this instance, a request should be sent to the Division of Parole, 97 Central Avenue, Albany, New York 12206.

Second, 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 sufficient detail to 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4146

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

June 10, 1986

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 upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. McCrary:

I have received your letters dated May 16, 1986 and June 2, 1986 in which you requested assistance under the Freedom of Information Law.

According to your letter of May 16, around the time you were convicted of a crime in 1974, your automobile was taken into the custody of the New York City Police Department. Shortly thereafter, the car was "released to a man" under circumstances which you have been unable to determine. You have made several requests to the Police Department for records related to this matter. Following the denial of a recent request, you instituted an appeal in March of this year. As of May 16, you had not received a determination on your appeal. That determination was issued on May 23 by Edward Leopold, Assistant Deputy Commissioner of Criminal Justice Matters. In your subsequent letter of June 2 you complained that under the appeal determination you were denied "information and documents that (you are) legally entitled to." In this regard, I offer the following comments.

First, I have reviewed the May 23 appeal determination and copies of the records provided to you. It does not appear that you have been denied any of the records you requested except for "the address of the person to whom (your) car was given."

You requested "a legible name...of the person to whom (your) car was given by the property clerk." The Police Department provided you with a copy of the "receipt bearing the signa-

ture of the person who received that vehicle." The appeal determination states that the property clerk's office "was unable to locate any other record". You also seek "the name and address and precinct of the property clerk who gave (your) car to the person". The appeal determination states that "the Property Clerk's Office was unable to locate any records indicating his or her name with the exception of what might be that individual's initials appearing on the Property Clerk's Motor Vehicle Invoice. I...include a clearer copy of that record than you had been provided previously." Finally, you requested "a certified copy of the arresting officer's arrest report, signed by the arresting officer himself." A copy of the arrest report was provided to you with a statement from Mr. Leopold that the report "is a true copy of a record of the Police Department." Mr. Leopold also advised you that, "the Arrest Report completed for your request was signed by the 'Booking Supervisor'".

Thus, according to the facts set forth in the appeal determination, in my view, the Police Department has made a good faith effort to locate and provide you with all of the records you requested with the one exception noted above.

Second, 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.

It is noted that the Freedom of Information Law pertains to existing records. Therefore, if any of the requested records no longer exist, or if the information sought does not exist in the form of a record, the Police Department would not in my view be required to create such a record in response to a request [see Freedom of Information Law, section 89(3)].

Third, with regard to your request for the address of the person to whom your car was given, it is stated that this record was denied on the basis of section 87(2)(b) of the Freedom of Information Law. That provision states that an agency "may deny access to records or portions thereof that...if disclosed would constitute an unwarranted invasion of personal privacy...". From my perspective, questions involving personal privacy often require the making of subjective judgments. Under the circumstances, it is clear that disclosure of the record in question would result in an invasion of privacy. The central issue involves the extent to which disclosure would constitute an unwarranted as opposed to a permissible invasion of privacy. Further, section 89(2)(b)(i) through (v) of the Freedom of Information Law lists examples of disclosure which would result in an unwarranted invasion of privacy.

In my view, rights of access to the home address of the individual to whom the vehicle was released are dependent upon the facts and circumstances concerning the transaction, and it is likely that only a court could render a judgment relative to privacy considerations.

Fourth, you state that the documents provided to you "are almost completely illegible". Upon receipt of your May 16 letter, I contacted Mr. William Smarrito of the New York City Police Department to discuss the status of your appeal with him. He advised me that the appeal determination had been issued with duplicate copies, made as legible as possible, of documents previously provided to you. Additionally, I have reviewed the copies of the documents which you enclosed with your June 2 letter. It appears that the relevant information is, for the most part, legible. The illegibility of the signature of the recipient of the car appears to be due, to a great extent, to poor handwriting.

Fifth, under section 89(3) of the Law, upon your request, an agency must certify that it does not have possession of the record sought or that such record cannot be found after diligent search. Therefore, you may make a request to the Police Department for a certification in regard to those records which the department indicated it could not locate or does not possess.

Finally, for your use and information, I am enclosing copies of the Freedom of Information Law and "Your Right to Know", which describes 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

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4147

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

June 10, 1986

Ms. Maggie Polk
Editor
Glen Cove Record Pilot
15 Glen Street
Glen Cove, NY 11542

The staff of the Committee on 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. Polk:

I have received your letter of May 28 concerning a request made under the Freedom of Information Law.

By way of background, several weeks ago the Mayor of the City of Glen Cove denied your request for a copy of a report prepared by the Bureau of Municipal Police, a unit of the Division of Criminal Justice Services. However, you wrote that the Mayor released the same report to a private citizen. Most recently, your request for the report was refused by the Mayor on the ground that a subcommittee on police operations had not yet submitted its final report. You pointed out, however, that the subcommittee has already released a partial report and that the City Council has sent a Home Rule message to the State Legislature pertaining to the issues that were apparently raised by the subcommittee and in the report that you seek.

You have asked that I inform the Mayor that the report is subject to the Freedom of Information Law and should be made 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. 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, of significance is section 87(2)(g), which states that an agency may withhold records that:

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

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

Under ordinary circumstances, it would be my view that those portions of the report in question consisting of statistical or factual information must be made available, while other portions consisting of opinion or advice, for example, could be withheld. However, assuming that the report has been released to a "private citizen" who has no particular relationship with the City or any specific function relative to the issue, it would appear that the capacity to deny has effectively been waived. As indicated by the courts, when records are made accessible to the public, 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; M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Third, from my perspective, the completion or absence of completion of a subcommittee report has no bearing upon rights of access to the record that you are seeking. In short, it does not appear that the release of one such document is contingent upon the completion or release of the other.

As requested, a copy of this opinion will be sent to Mayor Suozzi.

I hope that I have 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. Vincent A. Suozzi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4148

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

June 10, 1986

Mr. Andrew Santi
[redacted]

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

Dear Mr. Santi:

I have received your letter of May 26 concerning the Freedom of Information Law.

According to your letter, various New York City agencies have failed to respond to your requests in a timely manner. In this regard, I offer the following comments.

It is noted at the outset that the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401) prescribe 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 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: Ms. Carol Matossian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4149

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

June 11, 1986

Mr. Noel Hunter
#79-A-1976
47-04 Van Dam Street
Long Island City, NY 11101

Dear Mr. Hunter:

Your letter addressed to the Governor's office and the Secretary of State of June 3 has been forwarded to the Committee on Open Government.

Your letter involves a request for records apparently maintained by the Division of Parole. In this regard, it is noted that the Committee is responsible for advising with respect to the Freedom of Information Law. As a general matter,this office does not maintain custody and control of records of state agencies. In short, neither the Committee, the Department of State, nor the Governor's office maintain the records in which you are interested. Nevertheless, I offer the following comments and suggestions.

First, requests made under the Freedom of Information Law should be directed to the "records access officer" at the agency that you believe maintains the records sought. In this instance, a request should be sent to the Division of Parole, 97 Central Avenue, Albany, New York 12206.

Second, 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 sufficient detail to 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:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4150

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

June 11, 1986

Mr. James 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 letter of May 27.

You wrote that you would like to know of your rights to records pertaining to you that are maintained by the courts, the City of Elmira, and a local drug and alcohol rehabilitation center. 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, which is applicable to records of agencies. Section 86(3) of the Law defines "agency" to include:

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

As such, the Freedom of Information Law is generally applicable to records maintained by entities of state and local government; it does not apply to the courts or to private facilities, for example. Therefore, the Freedom of Information Law would not pertain to records of the rehabilitation center if the center is not part of a unit of government.

Second, while the Freedom of Information Law does not apply to the courts and court records, other provisions of law often grant significant rights of access to court records. Requests for court records should be made to the clerk of the appropriate court.

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

It is noted that an applicant seeking records under the Freedom of Information Law must "reasonably describe" the records sought. Therefore, when making a request, you should provide as much detail as possible, such as names, dates, identification numbers, descriptions of events and similar information in order to enable agency (or court) officials to locate the records sought.

Lastly, enclosed is "Your Right to Know", which more fully describes the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4151

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

June 11, 1986

Mr. Eugene Wedgeworth
83-A-0431 G6-346
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. Wedgeworth:

I have received your letter of June 9. You wrote that it is your understanding that you can obtain from this office information concerning the means by which you may request and obtain copies of "photo arrays and/or line-up photographs".

In this regard, the Committee on Open Government is charged with the responsibility of advising with respect to the Freedom of Information Law. The Committee does not maintain possession of records generally. Further, this office has no authority to compel an agency to grant or deny access to its records. In terms of the information that you are seeking, I have no specific documentation that pertains directly to the subject matter.

Nevertheless, I offer the following comments.

First, in general, the Freedom of Information Law is based upon a presumption of 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, section 89(3) of the Law requires that an applicant request records "reasonably described". Therefore, when making a request, you should include sufficient detail to enable agency officials to locate records sought.

Third, a request should be sent to the "records access officer" at the agency or agencies that you believe would maintain the records in which you are interested.

Lastly, without additional facts concerning the records in which you are interested, I cannot provide specific direction. It is noted that section 87(2)(e) states that records compiled for law enforcement purposes may be withheld under circumstances specified in the Law. Whether or not those circumstances may be present is dependent upon the facts surrounding the case.

Enclosed for your consideration is "Your Right to Know", which describes the Freedom of Information Law in detail and which contains a sample letter of request that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 1288
FOIL-AO - 4152

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

June 11, 1986

Mrs. Maureen Powell
[redacted]

The staff of the Committee on 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. Powell:

I have received your letter of May 27 in which you raised a series of issues pertaining to the Open Meetings and Freedom of Information Laws.

The majority of your questions concern executive sessions held by the Board of Education of the Roosevelt Union Free School District to discuss "personnel". In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. All meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be convened in accordance with section 105 of the Law. Further, it is noted that in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Second, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, section 105(1) states in relevant part that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Third, the focal point of your inquiry concerns the sufficiency of motions to enter into executive sessions and the nature of the discussions that transpire during executive sessions. It appears that a variety of issues have been considered during executive sessions following a motion to discuss "personnel matters". For example, following a recent District vote on the budget and the selection of Board members, issues arose concerning bussing students to the polls. As I understand your letter, after some discussion of the issues, the Board went into an executive session on the ground that "it's personnel."

It is noted that, under the Open Meetings Law as originally enacted, the so-called "personnel" exception for executive session differed from the language of the analagous exception in the current Law. In its initial form, section 105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" in a tangential manner or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

In an attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding section 105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

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

Due to the insertion of the term "particular" in section 105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in section 105(1)(f) are considered. The issue that you described concerning the bussing of students to the polls would not in my view have been proper under the "personnel" ground for entry into executive session, or any other grounds.

Further, judicial decisions indicate that a motion containing a recitation of the language of the grounds for executive session or "personnel", for example, without more, fails to comply with the Law. For instance, in reviewing minutes that referred to various bases for entry into executive session, it was held that:

> "[T]he minutes of the March 26, 1981 meeting indicate that the Board voted on two separate occasions to enter executive session to discuss 'personnel' and 'negotiations' without further amplification. On May 28, 1981, the Board again entered into executive session on two occasions. The reasons given for doing so were to discuss a 'legal problem' concerning the gymnasium floor replacement and for 'personnel items'. Again, on June 11, 1981, the Board voted to enter executive session of 'personnel matters'.
>
> "We believe that merely identifying the general areas of the subjects to be considered in executive session as 'personnel', 'negotiations', or 'legal problems' without more is insufficient to comply with Public Officers Law section 100[1].

> "With respect to 'personnel', Public Officers Law section 100[1][f] permits a public body to conduct an executive session concerning certain matters regarding a 'particular person'. The Committee on Public Access to Records has stated that this exception to the open meetings law is intended to protect personal privacy rather than shield matters of policy under the guise of privacy... Therefore, it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person. When entering into executive session to discuss personnel matters of a particular individual, the Board should not be required to reveal the identity of the person but should make it clear that the reason for the executive session is because their discussion involves a 'particular' person...
>
> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle v. Board of Education, Sup. Ct., Chemung Cty., Oct. 20, 1981; see also Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983].

In another case in which a ground for executive session was quoted from the Law, the Court stated that:

> "...any motion to go into executive session must 'identify the general area' to be considered. It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation.' This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity, the pending, proposed or current litigation to be discussed during the executive session. Only through such an identification will the purposes of the Open Meetings Law be realized. Democracy, like a precious jewel, shines most brilliantly in the light of an open government. The Open Meetings Law seeks to preserve this light" [emphasis added by court; Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981)].

The remaining issues that you raised pertain to rights of access to records under the Freedom of Information Law. Like the Open Meetings Law, the Freedom of Information Law is based on a presumption of access. All records of an agency are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i).

With respect to budget information, section 1716 of the Education Law, entitled "Estimated expenses for ensuing year", states that:

> "It shall be the duty of the board of education of each district to present at the annual meeting a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each. The amount for each purpose estimated necessary for payments to boards of cooperative educational services shall be shown in full, with no deduction of estimated state aid. This section shall not be construed to prevent the board

> from presenting such statement at a special meeting called for the purpose, nor from presenting a supplementary and amended statement or estimate at any time. Such statement shall be completed at least seven days before the annual or special meeting at which it is to be presented and copies thereof shall be prepared and made available, upon request, to taxpayers within the district during the period of seven days immediately preceding such meeting and at such meeting. The board shall also as a part of the notice required by section two thousand four of this chapter give notice that a copy of such statement may be obtained by any taxpayer in the district at each schoolhouse in the district in which school is maintained during certain designated hours on each day other than a Saturday, Sunday or holiday during the seven days immediately preceding such meeting."

Additionally, records prepared in the budget process, such as estimates and similar statistical or factual materials, must, according to case law, be made available under the Freedom of Information Law [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

Lastly, you wrote that, when a request is made under the Freedom of Information Law, a form must be completed, and that requests must be approved by the Superintendent.

I point out that, although an agency may require that a request may be made in writing, nothing in the Law refers to the use of a particular form. In short, it has been advised that any request made in writing that reasonably describes the records sought should suffice.

With respect to an approval by the Superintendent, I direct your attention to section 89(1)(b)(iii) of the Freedom of Information Law, which requires the Committee on Open Government to promulgate general regulations concerning the procedural aspects of the Law. In turn, section 87(1) requires the governing body of a public corporation, such as a school board, to adopt agency regulations consistent with the Law and the Committee's regulations, which are found in the New York Code of Rules and Regulations (21 NYCRR Part 1401). One of the aspects of the regulations involves the designation of a "records access

officer", a person who has the duty of responding to requests made pursuant to the Freedom of Information Law. If the Superintendent is the designated records access officer, certainly that person's approval would be appropriate. If a different official has been designated as records access officer by the Board, that person is responsible for making an initial decision to grant or deny access. Nevertheless, there is nothing that would preclude one official from conferring with another prior to determining rights of access.

Enclosed is "Your Right to Know", which describes both the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

cc: Board of Education
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4153

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

June 12, 1986

Mr. John DiStaola
84-A-6209
Clinton Correctional Facility
Box 367
Dannemora, New York 12929

Dear Mr. DiStaola:

I have received your letter of May 29, in which you complained with respect to the actions of Mr. Irwin R. Vogel, Law Secretary to Judge Richard Daronco.

By way of background, you requested a copy of a pre-sentence report from the County Probation Department, which denied the request, but referred you to Judge Daronco. Mr. Vogel apparently responded on behalf of the Judge, stating that an attorney had been assigned to your case. You then wrote to Mr. Vogel to seek his reasons for the denial and to suggest that he neglected to inform you of your right to appeal. As such, you have requested that I provide the name and/or address of the person to whom an appeal may be sent and that I confirm your right to appeal. You also asked that I provide the procedure for initiating a complaint against your attorney.

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. Further, the Freedom of Information Law is applicable to records of an "agency", a term defined by 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 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 definition quoted above, the Freedom of Information Law does not apply to the courts or court records.

While an applicant for records may appeal a denial of a request for "agency" records, the right to appeal conferred by section 89(4)(a) of the Freedom of Information Law does not apply to records maintained by a court, for the courts fall outside the requirements of the Freedom of Information Law. In short, I do not believe that Mr. Vogel was obliged to inform you of your right to appeal, because the appeal process found in the Freedom of Information Law did not apply.

Second, with respect to your right to a pre-sentence report, section 390.50 of the Criminal Procedure Law governs rights of access to such reports. The cited provision requires that a pre-sentence report be kept confidential, unless a judge determines that the report should be made available under the conditions specified in that statute.

Lastly, information regarding the procedure for initiating a complaint against an attorney is outside the jurisdiction or expertise of this office.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Irwin R. Vogel, Law Secretary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4154

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

June 12, 1986

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 Mr. Silberman:

I have received your letter of May 30, as well as the correspondence attached to it. Your inquiry concerns a complaint submitted to the New York City Department of Investigation, the results of an investigation and your request for a report of the investigation, which has been concluded.

Specifically, you wrote that you requested a copy of the report on May 15, but that as of the date of your letter to this office, you had received no response. You also asked that I comment with respect to a "written commitment" by the Department that the report would be made available to you.

Having reviewed the correspondence, I offer the following comments.

First, with regard to the failure to respond to the request, in which you sought permission "to come in immediately to look at the report", 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.

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)].

Second, the portion of letter prepared by Ms. Susan Ross, Senior Examining Attorney for the Department, states in relevant part that "A report will be completed shortly, at which time Mr. Silberman will be informed of the Department's findings. Mr. Silberman will be able to request a copy of the report." While I may be interpreting the statement quoted above too literally, it might be construed to mean that there was a commitment to inform you of the Department's findings, and that you, like any other member of the public, could request a copy of the report. Stated differently, perhaps the statement concerning the capacity to request a copy of the report could be construed to mean that those portions of a report that are accessible under the Freedom of Information Law would be made available. Without familiarity as to the contents of reports prepared by the Department, I could not conjecture with respect to rights of access to such reports. For instance, if there was a substantial investigation, there may be privacy considerations relative to persons identified in a report.

Lastly, in an effort to learn more of the situation, I have contacted the Department on your behalf. I was informed that, in situations in which a complaint is found to be unsubstantiated, there may be no report. In the case of your complaint, while you were supplied with the findings, I was told that no report was prepared. Under the circumstances, if no

report exists, the Freedom of Information Law would not require the Department to create or prepare such a record on your behalf [see Freedom of Information Law, section 89(3)]. Further, your letter of May 15 to Mr. Rucker might not have been considered as a request made under the Freedom of Information Law. For future reference, it is suggested that requests for Department records be directed to the Department's designated records access officer pursuant to the Freedom of Information Law and the appropriate rules and regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

cc: Steven Rucker
Susan Ross

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4155

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

June 13, 1986

Mr. Richard R. Behrens
[redacted]

Dear Mr. Behrens:

I have received your letter of May 30, which again pertains to a bill sent to you by the New York City Human Resources Administration (HRA).

Although Ms. Doris Robinson of HRA responded to your earlier inquiries and forwarded a computer printout concerning the matter, you wrote that you want additional information, such as records pertaining to your application in order "to plumb the depths of this strange bill". You added that knowledge of the bill might have an adverse impact upon your reputation.

In this regard, I have contacted Ms. Robinson on your behalf. At this juncture, it is unclear whether any of the additional records you seek continue to exist. However, as Ms. Robinson informed you on May 13, the search is continuing and if any such records are found, they will be made available to you.

Further, with respect to any impact upon your character or reputation, the public would not in my view have rights of access to any of the information in question. In brief, section 136 of the Social Services Law requires that records identifiable to applicants for or recipients of public assistance be confidential. Similarly, records pertaining to individual claims for unemployment insurance benefits are confidential pursuant to section 537 of the Labor 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: Doris Robinson

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4156

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

June 13, 1986

Mr. Morris Frumoff
[redacted]

Dear Mr. Frumoff:

I have received your letter of June 9 in which you requested information from this office.

In this regard, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. The Committee does not maintain custody or control of records generally. As such, the Committee cannot provide the information sought, because this office does not possess the information. Nevertheless, I offer the following comments and suggestions.

First, as a general matter, a request made under the Freedom of Information Law should be sent to the "records access officer" at the agency that maintains the records sought. Under the circumstances, your request should be sent directly to the New York City Human Resources Administration. For your information, the request may be sent to the attention of Ms. Doris S. Robinson, Human Resources Administration, Office of Legal Affairs, Freedom of Information, 220 Church Street, New York, NY 10013.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request you should include sufficient detail to enable agency officials to locate the records sought.

Lastly, assuming that your request involves employees of the agency, it is noted that section 87(3)(b) of the Freedom of Information Law requires each agency to maintain a record identifying every officer or employee of the agency by name, public office address, title and salary.

Enclosed for your consideration is "Your Right to Know", which more fully describes 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-4156

COMMITTEE MEMBERS

LIAM BOOKMAN
R. WAYNE DIESEL
WILLIAM T. DUFFY, JR.
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WALTER W. GRUNFELD
LAURA RIVERA
BARBARA SHACK, Chair
GAIL S. SHAFFER
GILBERT P. SMITH
PRISCILLA A. WOOTEN

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

June 13, 1986

Mr. Morris Frumoff
[redacted]

Dear Mr. Frumoff:

I have received your letter of June 9 in which you requested information from this office.

In this regard, it is emphasized that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. The Committee does not maintain custody or control of records generally. As such, the Committee cannot provide the information sought, because this office does not possess the information. Nevertheless, I offer the following comments and suggestions.

First, as a general matter, a request made under the Freedom of Information Law should be sent to the "records access officer" at the agency that maintains the records sought. Under the circumstances, your request should be sent directly to the New York City Human Resources Administration. For your information, the request may be sent to the attention of Ms. Doris S. Robinson, Human Resources Administration, Office of Legal Affairs, Freedom of Information, 220 Church Street, New York, NY 10013.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request you should include sufficient detail to enable agency officials to locate the records sought.

Lastly, assuming that your request involves employees of the agency, it is noted that section 87(3)(b) of the Freedom of Information Law requires each agency to maintain a record identifying every officer or employee of the agency by name, public office address, title and salary.

Enclosed for your consideration is "Your Right to Know", which more fully describes 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-4157

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

June 17, 1986

Sister Honora Shea
[redacted]

Dear Sister Honora:

I have received your letter, as well as the voluminous materials attached to it. You have asked for assistance in the matter of your "personal privacy".

It is your view that your privacy "is being invaded" relative to your "medicals", "as a tenant", and as a "religious and private citizen". In this regard, as indicated in the publications sent to you by this office, the Committee on Open Government is responsible for advising with respect to the Freedom of Information and Personal Privacy Protection Laws. As a general matter, both of those statutes pertain to records maintained by government. It appears that your concerns deal largely with events or information bearing little or no connection with government. If my assumption is accurate, neither the Freedom of Information Law nor the Personal Privacy Protection Law would be relevant to the matters described in your correspondence.

If you are concerned about public disclosure of records by government relating to your financial, medical or psychiatric condition, for example, those types of records are generally outside the scope of public rights of access. One of the bases for withholding records listed in the Freedom of Information Law concerns disclosures that would result in "an unwarranted invasion of personal privacy". In addition, the Law includes examples of unwarranted invasions of personal privacy, such as:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

Moreover, there are other laws that preclude public disclosure of certain kinds of records. For example, the Social Services Law, section 136, makes confidential records that would identify an applicant for or recipient of public assistance. Similarly, section 33.13 of the Mental Hygiene Law prohibits public disclosure of clinical records kept by a mental hygiene facility.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4158

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

June 18, 1986

Mr. Frederick L. Ricci
Organizing Specialist
National Education Association
of New York
Rochester Service Center
100 Allen's Creek Road
Rochester, New York 14618

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

Dear Mr. Ricci:

I have received your letter of June 3, as well as the materials attached to it.

One of the documents appended to your letter is a request for records made under the Freedom of Information Law and directed to Mr. Roger G. McGahey of Erie Cattaraugus BOCES #2. In brief, the request involved salary information concerning teachers, non-instructional staff, and contracts for each unit. You also specified in your request that you were "prepared to pay any fees for copying the requested information". Thereafter, you received a bill indicating charges of $2.00 for eight photocopies, and $103.80 for six hours of services rendered to cover "salary & fringes" at the rate of $17.30 per hour. It is your view that no fee, other than a fee for copying, may be imposed.

In this regard, I offer the following comments.

First, I am in general agreement with your contention. ~~Section 87(1)(b) of the Freedom of Information Law refers to the~~ authority of an agency to promulgate rules and regulations "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 procedural implementation of the Law and:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

Based upon the language quoted above, unless a statute other than the Freedom of Information Law permits an agency to assess a fee in excess of twenty-five cents per photocopy, no additional fee could in my opinion be charged. As such, I believe that only a fee for photocopying may be imposed, and that a fee for "salary and fringes" cannot validly be charged. Further, the regulations promulgated by the Committee [21 NYCRR Part 1401 et seq.] prohibit the assessment of a fee for searching for records, unless such a fee is prescribed by a different statute [section 1401.8(a)].

Second, it is possible that there may have been a misunderstanding. Here, I point out that section 89(3) of the Freedom of Information Law states in part that:

> "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight."

Stated differently, unless specified in section 87(3), an agency is not required by the Freedom of Information Law to create a new record in response to a request. As a general matter, if an applicant requests information that does not exist in the form of a record or records, the agency would not be obliged to prepare a new record containing the information sought. If that was the case with respect to your request, I believe that the agency should have responded accordingly. However, there is no indication in the material that the information sought did not exist in the form of a record or records.

Lastly, one of the instances in which an agency must create a record involves salary information which in some respects is analogous to the information sought. Specifically, section 87(3)) 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..."

In view of the foregoing, I believe that every agency is required to maintain, on an ongoing basis, the payroll record described in section 87(3)(b).

As you requested, a copy of this opinion will be sent to Mr. McGahey.

I hope that I have 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. Roger G. McGahey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1290
FOIL-AO-4159

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

June 19, 1986

Mr. Harold Mondshein
[redacted]

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

Dear Mr. Mondshein:

I have received your letter with its attachment, dated June 2, 1986, in which you requested an advisory opinion from the Committee on Open Government.

Specifically, you stated that the Board of Collective Bargaining held a "special meeting" on March 22, 1983. As evidence that this meeting took place, you point to a statement in correspondence which you received from General Counsel Malcolm McDonald. Mr. McDonald wrote:

> "After consulting informally with the other two impartial Members of the Board, Members Collins and member Friedman after the Board meeting of of March 22, 1983, Board Chairman Arvid Anderson instructed Trial Examiner Berger on March 23 or March 24, 1983 to inform you that your request of March 7, 1983 was denied."

You indicated that your June 2, 1986 request under the Freedom of Information Law to Mr. McDonald for a variety of records ~~includes a request for "a copy of the agenda/minutes or~~ memorandum of understanding, time of meeting and name of other persons present at this special meeting." In this regard, I offer the following comments.

First, as you have been previously advised, the Freedom of Information Law is based upon a presumption of 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 pertains to existing records. Therefore, if any of the records you requested do exist, I believe that they would be available to you, except to the extent that any of the grounds for denial are applicable.

However, if any of the requested records do not exist, the Office of Collective Bargaining would not, in my view, be required to create such records in response to a request [see Freedom of Information Law, section 89(3)].

Third, subdivisions (1) and (2) of section 106 of the Open Meetings Law contain what might be characterized as minimum requirements for the contents of minutes taken at meetings of public bodies, as follows:

> "1. Minutes shall be taken at all open meeting of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> "2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law."

It is my opinion that any additional details of the meeting other than those stated in section 106(1) and (2) may be included in the minutes at the discretion of the Board. Thus, there is no requirement under the Law that the time of the meeting or the names of persons present be included in the minutes.

Fourth, the term "meeting" for purposes of the Open Meetings Law has been construed to mean a gathering of at least a quorum of a public body for the purpose of conducting public business, regardless of whether any action is intended to be taken [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, in my view, gatherings of members of a public body, such as the Board, where a quorum is not present, are not "meetings" under

the Law and are not governed by the Law. Stated differently, until a quorum of a public body convenes, the Open Meetings Law does not apply. Further, if there is no meeting, there is no requirement that minutes be prepared.

It is also noted that you describe the gathering in question as a "special meeting". I do not know the meaning of that term as you used it, nor have you defined the term or pointed to any statutory or regulatory authority which refers to it. Thus, I can only treat the term "special meeting" as I would treat the term "meeting" in this advisory opinion.

Further, I point out that section 41 of the General Construction Law states, in relevant part, that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held... shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies..."

It is noted that the term "quorum" is described as "a majority of the...total number which the board...would have were there no vacancies..."

I believe that the Board of Collective Bargaining consists of eleven members. Mr. McDonald indicates in "item 5" quoted above, that three members of the Board were present on March 22, 1983 when Chairman Anderson "consult(ed) 'informally' with Member Collins and member Friedman". Thus, it does not appear that a quorum of the board was present at that time. If a quorum was not present, the gathering was not a "meeting" under the Open Meetings Law, and would not be subject to the requirements of the Law.

In my view, if the Open Meetings Law does not apply, there is no statutory requirement that minutes be taken. Thus, although your request for records is not, in my opinion, improper, if there was no "meeting" and no minutes were taken, the Board would not, in my opinion, be required to create such records in 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: Malcolm D. McDonald, Deputy Chairman/General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4160

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

June 19, 1986

Mr. Earl C. Knight
Negotiation Consultants & Co.
Executive Offices
Anthony Estates
Liebler Road
Boston, New York 14025

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

Dear Mr. Knight:

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

According to your letter, the East Aurora School District requested opinions from both the State Education and Civil Service Departments concerning the capacity "to subcontract supervisory Civil Service positions to an independent Corporation and to have those subcontractors supervise regular Civil Service Employees". You wrote that your request for the responses to the District by both state agencies was denied, and the application attached to your letter cites section 87(2)(g) of the Public Officers Law as the basis for the denial. Since you believe that the communications pertain to public business and may be used in setting policy, it is your view that they should be made available.

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, the provision cited by the District's records access officer, 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 portions of inter-agency or intra-agency materials that consist of opinion, advice or recommendations, for example, could in my view be withheld.

Under the circumstances, I believe that the records in question could be characterized as "inter-agency" materials. Therefore, their specific contents would determine the extent to which they would be accessible or deniable. If, for instance, the communications contain statements policy or factual information, to that extent, I believe they would be available. However, to the extent that they offer advice or opinions, it appears that those portions 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

cc: Barbara E. Teter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1291
FOIL-AO- 4161

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

June 19, 1986

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 dated May 25, 1986, with attachments, in regard to the Open Meetings Law and Freedom of Information Law.

According to your letter, you believe that Community Board No. 13 in Queens is regularly committing several violations of the Open Meetings Law and the Freedom of Information Law, as well as violations of a variety of other local, state and federal statutes. You describe a number of situations which have occurred or are ongoing and ask that the Committee on Open Government render an advisory opinion as to whether they constitute violations of the laws. In this regard, I offer the following comments.

First, it is noted initially that the Community Board as described in section 2800 of the New York City Charter is in my opinion an "agency" subject to the Freedom of Information Law and a "public body" required to comply with the Open Meetings Law.

Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

From my perspective, a community board is a municipal entity that performs a governmental function for a municipality, New York City. Therefore, it is in my view an "agency" subject to the Freedom of Information Law.

Section 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 construction law, or committee or subcommittee or other similar body of such public body."

In view of the foregoing, I believe that a community board is clearly a "public body" subject to the Open Meetings Law in all respects.

Second, the term "meeting", for purposes of the Open Meetings Law, has been construed to mean a gathering of at least a quorum of a public body for the purpose of conducting public business, regardless of whether any action is intended to be taken [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409 aff'd 45 NY 2d 947 (1978)]. Therefore, I believe that the Community Board must comply with the provisions of the Open Meetings Law when at least a quorum of the Board gathers to conduct public business.

Conversely, in my view, gatherings of the members of a public body, such as the Board, where a quorum is not present, are not "meetings" under the Law and are not governed by the Law. Stated differently, until a quorum of a public body convenes, the Open Meetings Law does not apply.

Third, based upon the definition of "public body" quoted above [section 102(2) of the Open Meetings Law], I believe that a committee or subcommittee of a public body, such as the Community Board, would constitute a public body and would be required to comply with the Open Meetings Law when a quorum of the committee or subcommittee is present.

You advise that during several recent meetings of the Board where a quorum of the Board was not present, the members present convened a "committee of the whole" in order to vote on matters under discussion. The action taken by the "committee" is then "put over to be RATIFIED (emphasis yours) at future meetings".

However, you do not define the term "committee of the whole" nor do you indicate whether this term is defined or referred to in any relevant body of laws or rules. Since I do not know the meaning of the term in conjunction with your reference to it, I cannot comment on the correctness of the Board's actions in convening and conducting business as a "committee of the whole".

Thus, in my opinion, there can be no violations of the Open Meetings Law by the Board at meetings where a quorum is not present. However, when a "committee of the whole" is convened, assuming that it is properly convened, and a quorum of that body is present, the committee is required to comply with the Open Meetings Law.

It is also noted that in my view a committee or subcommittee can only act within the scope of authority granted to it and cannot take final action. It is my opinion that a binding decision may be made only by the public body of which the committee is a part and it can do so only when a quorum of the entire body is present, unless there is specific legal authority that indicates otherwise.

Assuming that there is no by-law or rule that specifically establishes the "committee of the whole", I do not believe that members of the Board constituting less than a quorum of the entire Board could act to create or transform themselves into a "committee of the whole". Here I point out that section 41 of the General Construction Law states, in relevant part that:

> "Whenever three or more public officers are given any power or authority , or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute ~~a quorum and not less than a majority~~ of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words "whole number" shall be construed to mean the total number which the board,

> commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Thus, it appears that the Community Board could not properly convene a "committee of the whole" for the purpose of taking action where a quorum of the Board is not present at a Board meeting, if such a committee had not previously been created.

Fourth, you state that minutes of the Board's meetings "are never made available within a period of ten working days." Section 106 of the Open Meetings Law relates to minutes. Subdivision (1) of section 106 pertains to the contents of minutes of open meetings. Subdivision (2) concerns minutes that must be prepared when a public body takes action during an executive session. Subdivision (3) states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the language quoted above, I believe that a public body must prepare and make available minutes of open meetings within two weeks. When action is taken during an executive session, minutes must be prepared and made available, to the extent required by the Freedom of Information Law, within one week of an executive session.

It has been contended by some that minutes need not be made available until they have been approved. In this regard, I am unaware of any statutory requirement that minutes must be approved. Further, it has consistently been recommended that minutes be prepared and made available as required by the Law within two weeks, whether or not they have been approved. If ~~they have not been approved, it has been suggested that the min~~utes be marked "unapproved", "draft", or "unofficial", for example. By so doing, the public can learn generally what transpired at a meeting; concurrently, notice is effectively given that the minutes are subject to change.

Fifth, you indicate that the following items are generally not included in minutes of the Community Board's meetings: the final vote of each member on matters formally voted upon; a record or summary of motions made; the times of the openings and closings of public hearings; and the time of the Call to Order of executive sessions or Community Board meetings. Section 106, subdivisions (1) and (2) of the Open Meetings Law contain what might be characterized as minimum requirements for the contents of minutes. Section 106(1) and (2) state, in part:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereof.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

Accordingly, in my view, the Law does require minutes of open meetings of the Board to contain the final vote of each member present on matters formally voted upon and a record or summary of all motions. It is noted, too, that section 87(3)(a) of the Freedom of Information Law requires that each agency including a community board, shall maintain "a record of the final vote of each member in every agency proceeding in which the member votes." It is my opinion that any additional details of the meeting, other than those stated in section 106(1) and (2), may be included in the minutes at the discretion of the Board. Thus, there is no requirement under the Law that the time of the openings and closings of public hearings (assuming that the public hearings are "meetings" under the Law) or the time of the call to order of executive sessions or Board meetings be included in the minutes.

It is noted that I cannot conjecture as to whether the Open Meetings Law is applicable to the "public hearings" you mention. As stated above, the Law is generally applicable to ~~"meetings" of a "public body"~~. ~~If a hearing is conducted by a~~ hearing officer, for example, no public body would be involved [see Open Meetings Law, section 102(2)] and the Open Meetings Law would not be applicable. In addition, section 108(1) exempts quasi-judicial proceedings from the requirements of that statute. Since you have not described the "public hearings" to which you refer, I cannot render an opinion as to whether the Open Meetings Law is applicable to them.

Sixth, according to your letter, "notice of meetings have not appeared in...local newspapers or other news media (and) (n)otices to the public are never posted in one or more designated public locations."

According to section 104 of the Open Meetings Law, a public body must give notice of the time and place of its meetings to the news media and to the public by means of posting in one or more designated, conspicuous public locations prior to all meetings whether regularly scheduled or not.

Often public bodies comply with the Open Meetings Law by providing notice to the news media and posting a notice, but a newspaper, for example, might not publish the notice. There is nothing in the Open Meetings Law that requires a newspaper to print a notice of a meeting that it receives. Thus, there is no guarantee that a notice given to a newspaper will be printed. Therefore, so long as the Community Board complies with the notice requirements, a failure on the part of the news media to publish the notice would not in my view constitute a violation of the Open Meetings Law. However, a failure by the Board to post public notice in a public location prior to the meeting, would, I believe, violate the Law.

Seventh, you state that the site of the Board meetings "does not permit 'barrier free physical access' to physically handicapped persons." 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 that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

In my view, it is clear that the cited provision imposes no obligation upon a public body to construct a new facility or reconstruct or renovate an existing facility to permit barrier free access to physically handicapped persons.

~~The Law does, however, impose a responsibility to make~~ "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier free access to physically handicapped persons.

As a consequence, I believe that if a public body has the capacity to hold its meetings in a number of locations, meetings should be held in the facility that is most likely to accomodate the needs of persons with handicapping conditions. For instance, if a meeting can be held on the first floor rather than in the basement of a building, or if perhaps another available building permits "barrier free access", a "reasonable effort" would in my view involve holding the meetings in an alternative site.

Eighth, your letter describes a number of ongoing existing conditions at the meeting site. The conditions described relate to a lack of toilets, posting by the fire department, public assembly permit, lighted exit signs and ventilation. The Open Meetings Law generally grants rights to the public to receive notice of and to attend meetings of public bodies. The Law does not pertain to safety or sanitary standards of meeting sites. Matters related to physical building standards would, I believe, generally be governed by local ordinances such as the City Building Code.

Ninth, you inquire as to whether the Community Board is required under the Freedom of Information Law to designate a records access officer. The Committee on Open Government has promulgated regulations (21 NYCRR Part 1401) implementing the Freedom of Information Law pursuant to statutory authority found in section 89(1)(b)(iii) of the Law. Section 1401.2(a) states, in part, that the governing body of an agency "shall designate one or more persons as records access officer...who shall have the duty of coordinating agency response to public requests for access to records."

As indicated above, the Community Board is, in my view, an agency subject to the Freedom of Information Law. Therefore, I believe that the agency is required to comply with the regulations and designate a records access officer.

For your use and information, I am enclosing copies of the Freedom of Information Law, the Open Meetings Law and "Your Right to Know", a pamphlet which describes the Open Meetings and Freedom of Information Laws.

Finally, as you have requested, a copy of this letter is being sent to Mrs. Noreika, along with copies of the Freedom of Information Law, the Open Meetings Law and "Your Right to Know".

I hope 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 Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Encs.

cc: Mrs. Susan M. Noreika

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4162

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

June 19, 1986

Mr. James R. Long
[redacted]

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

Dear Mr. Long:

I have received your letter dated May 31, 1986 and the attachment in which you requested the assistance of the Committee on Open Government.

Specifically, you advise that by letter dated May 6, 1986, you made a request under the Freedom of Information Law to the Office of Professional Medical Conduct for certain records. You state that you have received no response to your request. In this regard, I offer the following comments.

First, on June 19, I contacted Ms. Kathleen Tanner, Director of the Office of Professional Medical Conduct, in regard to this matter. She advised me that your letter of request was temporarily misplaced but that it has now been located. She further indicated that a response would be prepared and sent to you immediately.

Second, the correct procedure when seeking records under the Freedom of Information Law is to direct a request to the "records access officer" of the agency which maintains the records sought. In this instance, I suggest that you direct any additional, related requests to the NYS Department of Health, Records Access Office, Corning Tower Building, Room 1025, Empire State Plaza, Albany, New York 12237, Attention: Donald McDonald, Records Access Officer.

It is noted, too, that under the Freedom of Information Law and the regulations promulgated under the Law [21 NYCRR 1401], the head or governing body of an agency is charged with the responsibility for making records available to the public in accordance with the Law. Section 1401.2(a) of the regulations states:

> "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."

Thus, where a request for records is received by an office of the agency other than the records access office, I believe that the office receiving the request should forward it to the records access officer.

I am enclosing a copy of "Your Right to Know", a pamphlet which describes the Freedom of Information Law and includes a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm
Encs.
cc: Kathleen Tanner
Donald McDonald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4163

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

June 23, 1986

Mr. Lowen A. Rouse
[redacted]

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

Dear Mr. Rouse:

I have received your letter dated June 4 in which you requested an advisory opinion from the Committee on Open Government.

According to your letter, you made a request for records under the Freedom of Information Law to the New York State Police. The record you sought was the "investigation report" regarding a matter which has been fully adjudicated under the Youthful Offender statute of the Criminal Procedure Law. Your request was denied under Article 720 of the Criminal Procedure Law. You state that you "do not understand this as the driver (the subject of the investigation report) had no criminal charges against him". 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 section 87(2)(a) through (i) of the Law.

Second, section 87(2) of the Law states that:

> "Each agency shall, in accordance with ~~its published rules, make available~~ for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:
>
> (a) are specifically exempted from disclosure by state or federal statute..."

In this instance, your request has apparently been denied on the basis of section 720.35 of the Criminal Procedure Law. That provision states that:

> "1. A youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority.
>
> 2. Except where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers, whether on file with the court, a police agency or the division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or private agency, other than an institution to which such youth has been committed, the division of parole and a probation department of this state..."

Thus, under the Criminal Procedure Law, records relating to a case involving a youthful offender, whether on file with the court, a police agency or the division of criminal justice services, may not be disclosed.

Therefore, according to the facts you have presented, the records you requested are, in my view, deniable under section 87(2)(a) of the Freedom of Information Law, on the ground that they are "specifically exempted from disclosure by state... statute" [Criminal Procedure Law, section 720.35(2)].

For your use and information, I am enclosing a copy of "Your Right to Know", a pamphlet which describes the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4164

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

June 23, 1986

Mr. Robert M. Porterfield
Reporter
Newsday
235 Pinelawn Road
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. Porterfield:

I have received your letter of June 4 in which you requested an advisory opinion under the Freedom of Information Law. Please accept my apologies for the delay in response.

According to your letter, several requests have been made by Newsday for records of the New York City Taxi and Limousine Commission (TLC). Although TLC officials have generally been cooperative, you wrote that recent requests for inspection reports of four taxi companies have been denied because they were subpoenaed or "due to the ongoing criminal investigations."

In this regard, I offer the following observations.

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, of particular relevance to your inquiry is the so-called "law enforcement purposes" exception to rights of access. Specifically, section 87(2)(e) states that an agency may withhold records that:

> "are compiled for law enforcement purposes and, which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;

> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Under the circumstances, although the records sought might relate to an investigation, it appears that they were prepared in the ordinary course of business and not for "law enforcement purposes". If that is so, section 87(2)(e) could not, in my opinion, justifiably be asserted as a basis for withholding the records sought.

Moreover, a judicial decision dealing with a somewhat similar issue held that records used in or relating to an investigation that were not compiled for law enforcement purposes could not be withheld pursuant to section 87(2)(e). In a case in which records were in possession of a district attorney pursuant to a grand jury subpoena, and in which the district attorney was involved in an investigation, the judge began his discussion of rights of access stating that:

> "...the minutes of the Village Board of the Incorporated Village of Hewlett Bay Park are public records subject to inspection under the Freedom of Information Act. The claim that this Court lacks the authority to order their production is without merit, because we deal here not with minutes of Grand Jury proceedings but with public records temporarily in the possession of the District Attorney. Nor does the issuance of a Grand Jury subpoena create an automatic and absolute bar on further disclosure. Section 190.25 of the Criminal Procedure Law cloaks the proceedings of the Grand Jury in deserved secrecy (Peo. v DiNapoli, 27 NY 2d 229). It does not, by itself, eradicate records otherwise public in nature (cf Jones v State, 62 AD 2d 44).

> "In opposing a request for disclosure, the party resisting disclosure has the burden of proof in establishing entitlement to the exemption (Hawkins v Kurlander, 98 AD 2d 14). I must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village board meetings serve a quite different function. Moreover, there is no showing that any other impediment to production exists. These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material" (King v. Dillon, Sup. Ct., Nassau Cty., Dec. 19, 1984).

Based upon the foregoing, as well as the precise terms of the Freedom of Information Law, if the inspection reports were prepared in the ordinary course of business, and if they remain in possession of the TLC, the "law enforcement purposes" exception to rights of access could not in my view be invoked.

Of potential significance is a different exception to rights of access. However, due to its structure, I believe that the records sought would likely be available in great measure if not in toto. 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.

Under the circumstances, an inspection report prepared by TLC officials could likely be characterized as "intra-agency" material. Nevertheless, to the extent that such reports contain statistical or factual information or perhaps final agency determinations, I believe that they would be available.

As you requested, copies of this opinion will be sent to the Office of General Counsel at the TLC as well as General Counsel to the New York City Department of Investigation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Arlyne R. Zwyer, Staff Attorney, TLC
General Counsel, NYC Dept. of Investigation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4165

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

June 23, 1986

Mr. John Bal
[redacted]

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

Dear Mr. Bal:

I have received your letter of June 3, as well as the correspondence attached to it.

The correspondence consists of a response to an appeal rendered by William J. Alexander, the Assembly Records Access Appeals Officer. Having reviewed Mr. Alexander's determination, there is little that I can add to it.

Your inquiry pertains to a denial of information sought that you requested by means of a series of questions. In the case of two of the four questions that were the subjects of your appeal, Mr. Alexander indicated that the records sought do not exist. In this regard, unless otherwise specified in the Freedom of Information Law, the Law does not require that a record be prepared or newly created in response to a request. Therefore, in short, if the records sought do not exist, the Assembly would not, in my view, be obliged to prepare new records on your behalf to fulfill a request made under the Freedom of Information Law.

In response to the third question dealt with in your appeal, your right to obtain copies of existing payroll records, upon payment of the requisite fees, was confirmed.

The last aspect of the determination on appeal pertains to the home address of a named member of the Assembly. It is reiterated that section 89(7) of the Freedom of Information Law states in part that nothing in the Freedom of Information Law "shall require the disclosure of the home address of an officer

or employee...". While the Freedom of Information Law does not require such a disclosure, it is suggested that a request for the home address of a state legislator be directed to the State Board of Elections.

I hope that 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 J. Alexander

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4166

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

June 23, 1986

Mr. James L. Green
#80-A-0357
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. Green:

I have received your letter of June 4 concerning the possible use of the Freedom of Information Law as a means of obtaining records pertaining to an arrest.

In this regard, I am not an expert regarding criminal practice or the Criminal Procedure Law. However, in terms of the use of the Freedom of Information Law, I offer the following general comments.

First, the Freedom of Information Law is applicable to records of agencies, and section 86(3) of the Law defines "agency" to mean:

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

As such, the law pertains to police departments and offices of district attorneys, for example. While it does not apply to the courts and court records, court records are often made available by the clerks of the courts pursuant to other provisions of law.

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

Third, a request should be directed to the "records access officer" at the agency or agencies that you believe maintain the records sought. When making a request, it is noted that section 89(3) of the Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include as much detail as possible in order to enable agency officials to locate the records.

Fourth, in the case of records relating to an arrest, of particular relevance is section 87(2)(e). The cited provision states that an agency may withhold records that:

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

In view of the language quoted above, rights of access must be determined on a case by case basis and in conjunction with the effects of disclosure.

Enclosed for your consideration is "Your Right to Know", which describes the Freedom of Information Law in detail.

Lastly, it is suggested that you confer with an attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4167

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

June 24, 1986

Mr. John R. Hamilton
[redacted]

The staff of the Committee 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. Hamilton:

I have received your letter of June 3, 1986, as well as the materials attached to it, in which you requested assistance under the Freedom of Information Law.

Specifically, you state that since April 17 of last year, you have made numerous requests under the Freedom of Information Law for records of the New York City Sanitation Department pertaining to "sanitation violations" which may have occurred on certain lots. You indicate that you have been in contact with a number of officials from the New York City Department of Sanitation Offices of Counsel, of the Commissioner and the Inspector General, as well as the New York City Department of Investigation in regard to this matter. However, you have received neither the records you requested nor any response to your requests as required by the Freedom of Information Law. In this regard, I offer the following comments.

First, I have contacted Mr. Francis Valentino, General Counsel to the Department of Sanitation, regarding this matter. He advised me that a search of department files will be made for the requested records and that any such records located would likely be made available to you. He further advised me that the response to your request will be prepared and sent immediately.

Second, Mr. Valentino also indicated that he believes many of the records you are seeking would be maintained by the New York City Department of Health and not by the Department of Sanitation.

Third, in accordance with the regulations (21 NYCRR Part 1401) promulgated by the Committee on Open Government pursuant to the Freedom of Information Law, a request for records should be directed to the "records access officer" at the agency that maintains the records sought. The records access officer for the New York City Department of Sanitation is Mr. Valentino. Thus, any additional requests for records maintained by that department should be directed to Mr. Valentino.

A request for records of the New York City Department of Health should be directed to Ms. Patricia Caruso, Secretary and Records Access Officer, New York City Department of Health, 125 Worth Street, New York, New York 10013.

Fourth, please note that under the Freedom of Information Law, a request for records must "reasonably describe" the records sought. Therefore, when requesting records, it is suggested that the request be as detailed and specific as possible in order to enable agency officials to locate the records.

It is noted that your recent letter to this office referred to the records you are seeking as "subpoenas". From the facts you have presented, it does not appear that the requested records would involve subpoenas.

Finally, for your use and information I am enclosing a copy of "Your Right to Know", a pamphlet which describes the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Enc.

cc: Francis J. Valentino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4168

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

June 25, 1986

Mr. Carl Mathison III
Executive Vice-President
Dutchess County CSEA
c/o Probation Department
28 Market Street
Poughkeepsie, NY 12601

<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. Mathison:

I have received your letter of June 4 in which you requested assistance concerning the use of the Freedom of Information Law.

According to your letter and the materials attached to it, you submitted a request to Dean Peverly of the Dutchess Community College on May 14. Dr. Thomas Toler, Records Access Officer for the College, responded on May 19, stating that you would be required to complete an application form prescribed by the College. You apparently did so. However, on May 30, Dr. Toler rejected three of the four aspects of your request on the ground that the records sought are "inter-agency documents and consequently do not fall within the FOI statute". You wrote that you "know of no such exclusion within the Freedom of Information Act".

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law that pertains to any requirement that a particular form be used or completed for the purpose of requesting records. Section 89(3) of the Law states that an agency may require that a request be made in writing, and that the request "reasonably describe" the records sought. Based upon the cited provision, it has consistently been advised that any written request that reasonably describes the records sought should suffice. Moreover, it has also been advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for delaying a response to a request or denying 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 section 87(2)(a) through (i) of the Law.

Third, although you stated that you are unfamiliar with the exclusion to which Dr. Toler made reference, one of the grounds for denial appearing in the Freedom of Information Law pertains to "inter-agency or intra-agency material". 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.

Under the circumstances, the records that were denied could likely be characterized as "intra-agency" materials. Nevertheless, it would appear that the records consist solely of statistical or factual information that would be accessible under section 87(2)(g)(i).

As Dr. Toler suggested, you have a right to appeal the denial. Here 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 ex-

> plain in writing to the person requesting the records 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."

In an effort to share this opinion with appropriate officials of the Dutchess Community College, copies of the opinion will be sent to Dr. Toler and the President of the College.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Thomas Toler
President, Dutchess Community College

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4169

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

June 26, 1986

Ms. Polly J. Feigenbaum
Krolick and DeGraff
One City Square
Albany, New York 12207

<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. Feigenbaum:

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

Your question is "whether or not building plans filed in the Village of Menands building department may be examined and copied by the general public". In this regard, I offer the following comments.

First, having reviewed the Village Law, I am unaware of any provision that would remove building plans from the scope of rights of access granted by the Freedom of Information Law or any other applicable provision of law.

Second, the documents in which you are interested in my view clearly fall within the definition of "record" appearing in section 86(4) of the Freedom of Information Law. The cited provision defines the term "record" broadly to include:

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

Based upon the language quoted above, I believe that building plans are "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, such as a village, are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, none of the grounds for denial could in my opinion appropriately be cited to withhold the records in which you are interested. It is noted, too, that the introductory of section 87(2) refers to the right to inspect and copy accessible records. Moreover, section 89(3) of the Law states in relevant part that, upon payment of or offer to pay the requisite fees, an agency must provide a copy of the records sought.

Lastly, access to plans and surveys that are marked with the seal of an architect or engineer has been the subject of several questions and substantial research. Professional engineers and architects are licensed by the Board of Regents (see respectively, Education Law, Articles 145 and 147). While section 7307 of the Education Law requires that an architect have a seal, and that state and local officials charged with the enforcement of provisions relating to the construction or alteration of buildings cannot accept plans or specifications that do not bear such a seal, I am unaware of any statute that would prohibit the inspection of such records under the Freedom of Information Law. Some have contended that an architect's seal, for example, represents the equivalent of a copyright. Having discussed the matter with numerous officials, including officials of the appropriate licensing boards, the seal does not serve as a copyright, nor does it serve to restrict the right to inspect and copy. Further, the interpretation of the Copyright Act by the U.S. Justice Department serves to provide guidance. In brief, I believe that there are two methods of copyrighting materials. The first involves the so-called "common law" copyright, which enables an author or architect, for instance, to place a "C" on a work. The Justice Department has advised that the federal Freedom of Information Act (5 USC 552) permits the public to inspect and copy those kinds of copyrighted materials. The other method of copyrighting involves the registration of a work with the U.S. Copyright Office. According to the Justice ~~Department, if materials have a registered copyright, they may be~~ inspected, but they may not be reproduced without the written consent of the copyright holder. Assuming that the view of the Justice Department is appropriate, plans and surveys of a building department are clearly available for inspection. In addition, they would be available for copying, unless a copyright has been registered with the U.S. Copyright Office.

As you requested, copies of this opinion will be sent to the Village Attorney and the Village 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
Executive Director

RJF:jm

cc: Kenneth S. MacAffer, Jr., Village Attorney
Thomas Morrissey, Building Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4170

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

June 26, 1986

Mr. Marc D. Bailey
#85-A-1004
Box 750
Wallkill, NY 12589

<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. Bailey:

I have received your letter dated June 4, and the attachments to it, in which you requested the assistance of the Committee on Open Government.

According to your letter and its attachments, you directed a request for records to James Flateau, Director of Public Information for the Department of Correctional Services. The records you requested were:

> "1. Any information dealing with the treatment and Incentive Wage Allowance attributable to 'cadre' inmates as outlined by D.O.C.S. (see Downstate C.F., Attica Annex, etc.)
>
> 2. Any information addressing the treatment in general, of 'medium security classified' inmates, i.e. freedom of movement, extra priveleges, etc., as opposed to 'maximum security classified' inmates."

Mr. Flateau's response stated that your request "should more appropriately be asked of your counselor". Shortly thereafter, you appealed the denial of your request to Thomas A. Coughlin, Commissioner of the Department of Correctional Services. As of the writing of your letter to this office, you had not received a determination on your appeal. In this regard, I offer the following comments.

First, this office has received from the Department of Correctional Services a copy of the determination of your appeal dated June 17 which was sent to you. Thus, you should have already received the determination.

Second, it appears from the determination that the Department provided you with the record sought in your first request.

In regard to your second request, it was determined that you did not reasonably describe the records sought. It was further stated, "We are unable to ascertain what, if any, records are available with respect to this portion of the request. However, Appellant is free to re-submit a more specific request...".

Under the Freedom of Information Law [section 89(3)], and the regulations of the Department of Correctional Services (7 NYCRR 5.11 and 5.10), a request for records must "reasonably describe" the records sought. Therefore, when requesting records in the future, it is suggested that the request be as detailed and specific as possible in order to enable agency officials to locate the records.

Third, pursuant to Correction Law, section 29(2) and the Freedom of Information Law, section 87(1)(b), the Department of Correctional Services has promulgated the regulations found in 7 NYCRR parts 5.11 and 5.20. As indicated in the appeal determination, the regulations specify the officials to whom requests for records should be directed. According to the determination, it appears that where an inmate requests records which would be maintained at the facility, such as documents or information contained in an inmate record, his/her request should be directed to the facility superintendent. Where an inmate requests records which are department records that would not be maintained at the facility, a request should be directed to the records access officer of the Department. The records access officer is the Deputy Commissioner for Administration, Department of Correctional Services, located at Building 2, State Office Building Campus, Albany, New York 12226.

As you were advised in the May 28 letter from the Commissioner, and as stated in the regulations, an appeal of a denial of access to records should be directed to Counsel, Department of Correctional Services, located at Building 2, State Campus, Albany, New York 12226.

For your use and information, I am enclosing a copy of the pertinent regulations of the Department of Correctional Services and "Your Right to Know", a pamphlet which describes the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4121

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

June 26, 1986

Mr. Harold Scott
#84-A-4541
Green Haven Correctional
Facility
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. Scott:

I have received your letter of June 10 concerning your difficulty in obtaining records from the New York City Police Department.

You wrote that you requested certain property clerk's invoices and "the guidelines upon which the Property Clerk's Office is suppose[d] to function". The records were apparently denied on the ground that they are "inter-agency or intra-agency material".

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, among the grounds for denial 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, to the extent that such materials contain advice, opinion, recommendation and the like, I believe that they could be withheld.

Under the circumstances, it appears that the records sought could properly be characterized as "intra-agency" materials. However, an invoice might contain factual information accessible under section 87(2)(g)(i). Guidelines concerning the functioning of the property clerk's office might consist of "instructions to staff that affect the public" available under section 87(2)(g)(ii), or perhaps agency policy accessible under section 87(2)(g)(iii). However, without greater knowledge of the contents of those records, I could not advise with certainty that they are accessible or deniable, in whole or in part.

It is noted, too, that a different ground for denial might be relevant, depending upon the nature and content of the records. 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."

If the documents in question can be considered to be records "compiled for law enforcement purposes", they could be withheld, where appropriate, based upon the potentially harmful effects of disclosure described in subparagraphs (i) through (iv) of section 87(2)(e). Again, since I do not have knowledge of the specific contents of the records, the extent to which section 87(2)(e) might be applicable is unknown to me.

Lastly, you asked whether the office of the New York City Medical Examiner is covered by the Freedom of Information Law. 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."

Based upon the language quoted above, I believe that the office of the Medical Examiner is an "agency" subject to the Freedom of Information Law. This is not to suggest that all records of the Medical Examiner are available, but rather that such records are subject to whatever rights of access might exist.

As requested, enclosed is a copy of "Your Right to Know", which more fully describes 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.

cc: Edwin Leopold, Deputy Commissioner

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4172

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

June 26, 1986

Mr. S. James Matthews
Corporation Counsel
City of Kingston
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 your correspondence.

Dear Mr. Matthews:

I have received your letter of June 11 and appreciate your interest in complying with the Freedom of Information Law.

According to your letter, the City of Kingston maintains a laboratory for the performance of various medical tests. The great majority of procedures performed by the laboratory are done for two not-for-profit facilities in the City of Kingston. Due to rising hospital costs, the hospitals that use the services of the laboratory are attempting to know "the number of procedures in various categories that are performed by the City laboratory for other than the two hospitals". You added that the laboratory has refused to disclose the information sought.

It is your view, as Corporation Counsel, that the Freedom of Information Law requires that the information in question be made available, so long as identifying details are excluded from such records. Since you also serve as a trustee of one of the hospitals, you requested my impartial opinion on the matter.

In this regard, I offer the following comments.

First, since the laboratory is an entity of the City of Kingston, I believe that, to the extent that the information sought exists in the form of a record or records, its records would be subject to rights of access granted by the Freedom of Information Law. I point out that the Law pertains 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since the laboratory is a municipal office and a governmental entity performing its duties for a municipality, I believe that it would be an "agency".

Second, the Freedom of Information Law in section 86(4) defines "record" to include:

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

Based upon the language quoted above, once again, to the extent that information sought has been prepared, such information would in my view constitute a "record" subject to rights of access.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, two of the grounds for denial may be relevant to your inquiry.

Section 87(2)(b) states that an agency may withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". However, section 89(2)(a) provides in part that "an agency may delete identifying details when it makes records available" in order to protect against disclosures that might otherwise constitute an unwarranted invasion of personal privacy. Further, section 89(2)(b) lists five examples of unwarranted invasions of personal privacy, the first two of which pertain to:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

To the extent that the records in question identify persons who may be the subject of medical or laboratory tests, I believe that identifying details could be deleted on the ground that disclosure of their identities would constitute an unwarranted invasion of personal privacy. If the records sought do not contain personally identifiable details, the provisions concerning privacy would not, in my view, be applicable.

The other ground for denial of relevance would, due to its structure, likely require disclosure of the information sought. 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.

Assuming that records have been prepared that indicate numbers of procedures or categories of procedures performed by the laboratory, those records could be characterized as "intra-agency materials". Nevertheless, that type of information would in my view constitute "statistical or factual tabulations or data" that must be made available pursuant to section 87(2)(g)(i).

Lastly, I point out that section 89(3) of the Law states that, as a general matter, an agency is not required to create a record in response to a request. If, for example, statistics have been requested but have not been prepared, the agency would not in my view be obligated to create such records in response to a request made under the Freedom of Information Law.

Nevertheless, as suggested earlier, if such records do exist, I believe that they would be accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4173

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

June 30, 1986

Mr. Steven M. Schapiro
Town Attorney
Town of Babylon
200 East Sunrise Highway
Lindenhurst, LI, NY 11757

Dear Mr. Schapiro:

Thank you for sending a copy of the determination on appeal rendered on June 3 concerning a request made under the Freedom of Information Law.

According to the application for records attached to your letter, a request was made for a particular variance. The request was denied initially, citing "litigation". You upheld the denial on the ground that the information sought is "compiled for law enforcement purposes".

If indeed the request involves a copy of a variance granted to an owner of real property, I believe that the record should be made available, even though it may be the subject of litigation.

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

If a record is prepared for litigation, I would agree that it could likely be withheld on the basis of section 3101(d) of ~~the Civil Practice Law and Rules, which generally makes confiden~~tial material prepared for litigation. In that circumstance, the records would in my view be deniable pursuant to section 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". However, if a record was prepared

in the ordinary course of business, or if it was prepared for multiple purposes, one of which might involve ensuing litigation, I do not believe that it could be considered as exempt in conjunction with section 3010(d) [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234; M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Further, assuming that my interpretation of the request is accurate, that it involves a copy of a variance granted by a zoning board of appeals, I do not believe that such a document could be characterized as a record "compiled for law enforcement purposes". If that is so, it is difficult to envision any basis for denial that might appropriately be asserted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-28
FOIL-AO-4174

162 WASHINGTON AVENUE ALBANY, NEW YORK 12231

June 30, 1986

Ms. Lynn F. Delevan
Dunkirk Teachers Association
Dunkirk, New York 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. Delevan:

I have received your letter of June 6 and the materials attached to it, in which you requested an advisory opinion from the Committee on Open Government.

Specifically, you state that the Dunkirk Teachers Association (DTA) requested records under the Freedom of Information Law from the Dunkirk School District regarding the levy of a fine by the Environmental Protection Agency (EPA) against the District. The request was denied in part. The DTA appealed the denial. The School District affirmed and cited "Public Officers Law, Article 95, Access to Records, Section D" as the basis for the denial. In this regard, I offer the following comments.

First, briefly, the Freedom of Information Law is based upon a presumption of 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 the facts you have presented, it does not appear that any of the grounds for denial could appropriately be asserted in ~~this instance~~.

Second, the citation for the statutory provision relied upon in the appeal determination, "Public Officers Law, Article 95, Access to Records, Section D", is an incorrect or perhaps inapplicable citation. It appears that the statutory provision intended to be relied upon is the Personal Privacy Protection

law, section 95 subdivision 6, subsection d. It is noted that the Personal Privacy Protection Law applies only to records maintained by state agencies, and that the statute in question specifically excludes units of local governments, such as school districts, from its coverage. Moreover, the provision cited in the denial states in relevant part that:

> "Nothing in this section shall require an agency to provide a data subject subject with access to:
>
> (d) attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals... except pursuant to statute...search warrant or other court ordered disclosure."

Assuming that section 95(6)(d) was intended to be cited, I point out that it relates only to providing a "data subject", a person who is the subject of a record with certain personal information. Stated differently, the provision relates to a request by an individual for access to records containing personal information pertaining to that individual. Thus, section 95(6)(d) is not relevant to the DTA's request for records.

Third, section 87(2)(e)(i) of the Freedom of Information Law deals with a similar category of records. It states generally that an agency may deny access to records that "are compiled for law enforcement purposes and which, if disclosed, would: interfere with law enforcement investigations or judicial proceedings..." However, according to the facts presented, any law enforcement investigations or judicial proceedings relating to the subject matter of the requested records were apparently concluded prior to the DTA's request. Therefore, disclosure would not likely "interfere" with any such investigation or proceeding and section 87(2)(e)(i) is not, in my view, applicable as a ground for denial in this instance.

Fourth, it is noted that one individual, Terry Wolfenden, Superintendent of Schools, responded to both the DTA's initial request for records and their appeal upon the denial of their request.

~~The Committee on Open Government has promulgated regula~~tions (21 NYCRR 1401) regarding the procedural implementation of the Freedom of Information Law, pursuant to the authority granted by section 89(1)(b)(iii) of the Law. Section 1401.7(b) of the regulations states, in relevant part, that "The records access officer shall not be the appeals officer".

In this instance, it appears that the same person is acting in the capacity of both records access officer and appeals officer. In my view, if this is so, the Teachers Association has effectively been denied the right to appeal.

It is suggested that this inconsistency with the regulations be brought to the attention of the Board of Education.

Finally, I am enclosing copies of the regulations to which reference was made earlier, and "Your Right to Know", a pamphlet which describes the Freedom of Information Law. As you requested, copies of this opinion with enclosures will be sent to Mrs. Nancy Renckens, President of the Dunkirk Board of Education and Mr. Joseph Sweeny, President of the Dunkirk Teachers Associations, as well as Terry Wolfenden, Superintendent of Schools.

I hope 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 Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Enc.

cc: Nancy Renckens
Joseph Sweeny
Terry Wolfenden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 1295
FOIL-AO-4175

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

July 1, 1986

Mr. James Strathearn
[redacted]

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

Dear Mr. Strathearn:

I have received your letter of June 12 in which you raised a series of questions relative to volunteer fire companies and an advisory opinion prepared at the request of Peter LaGrasse on December 16, 1986.

The first question is whether, under the Freedom of Information Law, the treasurer of an incorporated volunteer fire company has the right to "distribute financial statements of the Fire Co. at will, and without the authority of the Fire Co.?"

In this regard, it is assumed that the financial statements are available to the public under the Freedom of Information Law. With respect to the authority to disclose, by way of background, 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 aspects of the Law. The Committee has done so (see attached, 21 NYCRR Part 1401 et seq.). In turn, each agency is required to adopt similar procedural rules and regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee. One aspect of the regulations involves the designation of one or more "records access officers" who would have the duty of coordinating an agency's response to requests for records. I point out that section 1401.2(a) of the Committee's regulations states in part 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."

Therefore, if, for example, the treasurer had been authorized in the past to make records available, it would appear that he or she could continue to do so, unless specific direction to the contrary has been given.

Second, you asked whether the decision rendered in Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, gives the Treasurer "the right to distribute financial statements of the Fire Co. without authority from the Fire Co.?" In this regard, I do not believe that the decision specifies who or which officer may distribute records; rather the decision in my view stands for the principle that a volunteer fire company is considered an "agency" that must comply with the Freedom of Information Law.

Your third questions is whether my letter to Mr. LaGrasse is "the law". As stated at the top of the letter to Mr. LaGrasse, that document is an advisory opinion. As such, it is not "the law", but rather an interpretation of the Freedom of Information Law with respect to volunteer fire companies.

Fourth, you asked "what rights, if any, does the public have at" meetings of a fire company. Here I direct your attention to the Open Meetings Law (see attached). As a general matter, when the Open Meetings Law is applicable, the public has the right to attend and listen to the deliberations of public bodies. Although a public body may permit the public to speak or participate at meetings, there is nothing in the Open Meetings Law that confers upon the public the right to speak or otherwise participate at open meetings.

Lastly, you asked what I would "consider to be a generally accepted method of receiving requests for financial disclosure, and compliance". In my view, there are several considerations. First, while section 89(3) of the Freedom of Information Law permits an agency to require that a request be made in writing, an agency may make records available pursuant to an oral request [see regulations, section 1401.5(a)]. Second, the same provision of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought, and that the agency must respond to such a request within five business days of the receipt of the request. It is noted that a request need not identify a particular record, for it has been held that, if the agency can locate the records based upon the terms of a request, ~~the applicant has met the requirement that records be "reasonably~~ described".

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 section 87(2)(a) through (i) of the Law.

If a "financial statement" is prepared by officials of the fire company, as indicated earlier, it is assumed that the statement would be available. While certain aspects of "intra-agency materials" may be denied (i.e., opinion, advice or recommendations), those portions consisting of "statistical or factual tabulations or data" would be available pursuant to section 87(2)(g)(i) of the Freedom of Information Law.

Also enclosed for your consideration are copies of the Freedom of Information Law, model regulations designed to enable agencies to adopt appropriate regulations easily, and "Your Right to Know", which describes both the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4176

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 27

July 1, 1986

Mr. Kent Fuse
83-A-1605
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. Fuse:

I have received your letter of June 14, in which you complained that an official had denied access to transcripts of disciplinary proceedings.

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

First, although you referred to transcripts of disciplinary hearings, you did not indicate the nature of those hearings. Consequently, I cannot advise with certainty as to the extent to which the transcripts in question may be accessible or deniable, or whether they have been prepared.

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

Third, as you may be aware, a person denied access to records may appeal the denial. 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 records the reasons for further denial, or provide access to the record sought."

You indicated that your request was made on April 25; you did not, however, specify the date that the denial occurred. If more than thirty days have passed since the denial, it is suggested that you might renew your request. If the request is denied, as indicated above, you have the right to appeal such a denial within thirty days. It is noted, too, that the regulations promulgated by the Department of Correctional Services indicate 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-4172

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

July 1, 1986

Mr. Robert Ellis
H.D.M.
3 Block
4-B-13
14-14 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Ellis:

I have received your letter of June 15, as well as copies of requests sent to the Mount Vernon Police Department. You have requested advice pertaining to an appeal of a denial, as well as a pamphlet concerning rights of access to records.

In this regard, having reviewed your requests, I offer the following comments and suggestions.

First, in your requests, you cited the federal Freedom of Information and Privacy Acts. Those statutes pertain only to records maintained by federal agencies. Therefore, they do not apply to records of units of state and local government, such as the Mount Vernon Police Department. The New York Freedom of Information Law, however, is applicable to records of state agencies and local governments in this state.

Second, you requested virtually all records pertaining to you. Here I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. It is questionable whether your requests included sufficient detail to enable agency officials to locate records pertaining to you. For future reference, it is suggested your requests include as much detail as possible, such as names, dates, index and docket numbers, descriptions of events and similar information that would help to locate the records.

Third, with respect to the right to appeal, 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..."

Lastly, as you requested, enclosed is an explanatory pamphlet, "Your Right to Know". The pamphlet contains sample letters of request and appeal that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1298
FOIL-AO-4178

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 1, 1986

Mr. Harold Mondshein
[redacted]

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

Dear Mr. Mondshein:

I have received your letter of June 9 in which you requested an advisory opinion of the Committee on Open Government.

Once again, you write to this office regarding your attempts to obtain certain records of the Office of Collective Bargaining pertaining to two alleged meetings of the Board of March 15 and March 22, 1983. Specifically, you ask for the opinion of this office as to whether the Board is required to disclose the following records under the Freedom of Information Law:

> "1. Agenda of the aforesaid March 15, 1983 and March 22, 1983 public meetings and full Board meeting of April 20, 1983.
>
> 2. Minutes of the within three (3) meetings.
>
> 3. Time when March 22, 1983 public hearing started and was completed, and persons, other than the public Members and Chairman Anderson who ~~attended this public hearing~~."

In this regard, I offer the following comments.

First, as you know, this office has corresponded with you a number of times concerning this matter. Also, it appears that the opinion of this office, dated June 19, crossed in the

mail with your June 9 letter. I believe that the June 19 opinion together with the previous opinions of this office respond fully to all of the questions you are now asking.

Second, as you have previously been advised, a gathering of members of a public body is not a "meeting" under the Open Meetings Law unless a quorum is present. You request records of a "meeting" that allegedly took place on March 15, 1983. As evidence that the meeting took place you point to several bills which refer to a "Meeting of Public Members to review cases docketed for 3/23/83 consideration of the Board." There are, I believe, eleven members on the Board, of which three or four are "public members". Therefore, it appears that the March 15 gathering was not a "meeting" subject to the Open Meetings Law or the requirement in the Law that minutes be prepared.

Third, in regard to the March 22, 1983 meeting, you have already been provided with the minutes of that meeting. Also, this office has previously advised that the informal gathering which took place after the March 22 meeting did not appear to have a quorum present and was, therefore, not a "meeting".

Fourth, there is no requirement by law, of which I am aware, that written agendas be kept or that the starting or ending times of meetings or the names of persons attending a meeting or public hearing be recorded. If such records are maintained by the Office of Collective Bargaining, they would likely be available to you. However, you have already been advised by that office that all existing records regarding these matters, including minutes of meetings, have been provided to you.

Fifth, it appears from the May 14, 1986 letter of Malcolm D. McDonald, Deputy Chairman and General Counsel, that your request for a further hearing was denied in March, 1983, and that the matter was not raised again thereafter. Therefore, it appears that the matter would not have been discussed at an April 20, 1983 meeting that may have taken place. Of course, if there are any records of such a meeting or gathering, they would likely be available to you except to the extent that they fall under one or more of the grounds for denial set forth in the Freedom of Information Law.

In sum, based upon the facts presented in your numerous correspondences, it is my view that there has been no impropriety on the part of the Office of Collective Bargaining in its handling of your requests for records. Additionally, I believe that this office has fully advised you with respect to all Freedom of Information and Open Meetings Laws issues relevant to your requests. Thus, I do not believe there is anything further that the Committee on Open Government can add in regard to this matter.

Lastly, since receipt of your letter of June 9, I have also received your letters of June 25 and June 27. From my perspective, those letters do not raise any issues that have not been substantially considered in this and earlier correspondence. Consequently, I will consider that this and other advisory opinions are responsive to those letters as well.

Should any new questions arise that have not been considered, I will be happy to respond.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:ew

cc: Malcolm D. MacDonald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4179

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

July 2, 1986

Mr. Abdul Aziz Aliym
#84-A-1026
Box 500
S.H.U. - 9
Elmira, NY 14902

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

Dear Mr. Aliym:

I have received your letter of June 16 concerning a request made under the Freedom of Information Law.

According to your letter, you sent a request to the 44th Precinct of the New York City Police Department in the Bronx "requesting a complete xerox copy of any and all documents/records presently under that department/in their custody". Having waited "over 18 days" without receiving a response, you believed that you "exhausted the necessary avenue" and, therefore, initiated an Article 78 proceeding. You wrote, however, that your motion was returned with a note stating that:

> "The freedom of information law exempts all court records; in the absence of a court order, the clerk's office will not provide free copies of court papers."

You have asked that I look into the matter.

First, it is noted at the outset that, as a matter of ~~policy, the Committee does not prepare advisory opinions when a~~ lawsuit is pending concerning the Freedom of Information Law. Based upon your letter, it appears that you attempted to initiate such a lawsuit, but that it was dismissed. Consequently, in an effort to respond in good faith, it will be assumed that you are not currently involved in litigation concerning the subject matter that you described.

Second, with respect to your request, it is emphasized that the Freedom of Information Law requires that an applicant "reasonably describe" the records sought [see Freedom of Information Law, section 89(3)]. While that standard does not require that an applicant identify a record sought with particularity, it does require sufficient specificity to enable agency officials to locate the records. Under the circumstances, I do not believe that a request for all records in custody of the 44th Precinct would meet the requirement of "reasonably describing" the requested records. It is suggested that, when making a request, you include as much detail as possible in order to enable agency officials to locate the records.

Third, neither an initial denial made in writing nor a failure to respond to the request results in the exhaustion of administrative remedies that would enable you to seek judicial review of a denial. When a request is denied, or when an agency fails to respond to a request within the requisite time limits, an applicant must appeal before initiating a proceeding under Article 78. Here I direct your attention to section 89(4)(a) of the Freedom of Information Law which states in relevant part:

> "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, section 89(4)(b) 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..."

Lastly, it is noted that the courts and court records are specifically exempted from the Freedom of Information Law. In brief, the Freedom of Information Law is applicable to records of an "agency", a term defined in section 86(3) and which specifically excludes the courts from the scope of the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4180

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

July 3, 1986

Ms. Margaret C. Timm
Village Clerk
Sands Point
Box 188
Port Washington, NY 11050

<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. Timm:

I have received your letter of June 23 in which you seek an advisory opinion concerning a request made under the Freedom of Information Law.

The request, a copy of which is attached to your letter, is expansive and specific. For example, the first area of the request pertains in part to:

> "All information and reports on tests and samplings of water and soil and rocks made for the Village of Sands Point or its employees or consultants, concerning the property obtained by the Village of Sands Point from the United States government (formerly comprising part of the Naval Instruments area) for purposes of drilling and establishing a water will and storage for water area."

~~The second aspect of the request involves:~~

> "Access to all reports, information and memos, from 1975 to the present day, concerning the adequacy or inadequacy of water pressure, volume, and number and sites of water pumps, within the Village of Sands Point, for fire fighting within the Village

> of Sands Point, as relating to specific fires which actually occurred, and to fire-fighting hypothetically in times of low, moderate and peak water use within the Village. I seek access to all such reports, information and memos recorded by and/or for the Village of Sands Point and its officials and consultants."

In this regard, I offer the following comments.

First, section 89(3) of the Freedom of Information Law states in part that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if the specific types of records sought do not exist or have not been prepared, the Village would not, in my view, be required to create such records on behalf of an applicant in response to a request made under the Freedom of Information Law.

Second, the same provision states that an applicant must "reasonably describe" the records sought. In short, if agency officials can locate records based upon the terms of a request, the applicant would have met the requirement of "reasonably describing" the records [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. While the requests in this instance are rather specific, they include a variety of details and qualifiers which, depending upon the Village's record-keeping system, might make the information sought easy to locate, or perhaps impossible to locate.

Third, to the extent that the information exists in the form of a record or records, and that such records can be located, 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 section 87(2)(a) through (i) of the Law.

It would appear that the existing records falling within the scope of the request, including consultant's reports [see Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)] could be characterized as "intra-agency" materials. ~~Here I direct you attention to section 87(2)(g) of the Freedom of~~ Information Law, which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

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

FOIL-AO-4181

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

July 3, 1986

Ms. Janice McGuiness
President
The Civil Service Employees
Association, Inc.
Westchester County Local 860
196 Maple Avenue
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. McGuiness:

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

According to the materials, as President of CSEA, Local 860, you sent a letter to the City of White Plains in which you requested a "listing of CSEA bargaining unit employees holding provisional titles...". In response, you were informed on March 27 that you were required to submit a "freedom of information form".

You did so and resubmitted your request on April 9. As of the date of your letter to this office, you had not received a response.

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law pertaining to a particular form that must be used to request records. Section 89(3) of the Law permits an agency to require that a request be made in writing. The same provision requires that the applicant "reasonably describe" the records sought in a manner that enables agency officials to locate the records. As such, although an agency may create a request form, it has con-

sistently been 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. It has also been advised that any request made in writing that reasonably describes the records sought should suffice.

Second, the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401 et seq.), which govern the procedural aspects of the Law, 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, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if the agency does not maintain a list containing the information sought, it would not, in my view, be obliged to create such a list in response to your request.

Fourth, with respect to rights of access, assuming that the requested list does exist, the Freedom of Information Law is based upon a presumption of 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.

If such a list exists, I believe that it would be available, for it does not appear that any ground for denial could 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: Records Access Officer, City of White Plains

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1301
FOIL-AO-4182

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

July 7, 1986

Ms. Sharon R. Kibbe
Ms. Caroline K. Drake
[redacted]

The staff of the Committee on 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. Kibbe and Ms. Drake:

I have received your letters of June 18 and 19 respectively, as well as the materials attached to them.

You have raised a series of issues concerning the implementation of the Freedom of Information Law by the Dolgeville Central School District. In brief, in your attempts to review and/or copy financial records, some of which were unsuccessful, you learned that the District has no records access officer or appeals officer, that minutes of meetings are incomplete, and that the District does not maintain a "subject matter list".

In this regard, I offer the following comments.

First, 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 aspects of the Freedom of Information Law, as well as the subject matter list. The Committee has done so, and its regulations appear as 21 NYCRR Part 1401 et seq. In turn, section 87(1) of the Law requires the governing body of a public corporation, i.e., a board of education, to adopt procedural rules and regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee.

Relevant to the facts that you described, section 1401.2 of the regulations requires that the Board of Education designate one or more "records access officers", persons who have the duty of coordinating an agency's response to requests for records. Similarly, section 1401.7 requires that the Board designate a

person or body to render determinations on appeal following a denial of a request. The cited provision also specifies that the records access officer and the appeals officer cannot be the same person.

Second, as a general matter, the Freedom of Information Law pertains to existing records. Unless specific direction is provided to the contrary, an agency is not required to create a record in response to a request. However, two areas of your requests involve exceptions to the rule. 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; and
>
> (c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

As such, the Freedom of Information Law requires that a list be prepared that identifies every officer or employee of an agency, including individual salaries. It is noted, too, that the "subject matter list" must refer by category, to all agency records, and not only those considered to be accessible to the public. The regulations contain additional guidance concerning the subject matter list in section 1401.6.

Third, in terms of rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Although it is not completely clear which records you are seeking, records prepared by the School District concerning its financial transactions are, in my view, clearly available. Relevant is one of the grounds for denial which, due ~~to its structure, requires the records in question to be made~~ available. Section 87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Under the circumstances, it appears that the records sought solely involve "statistical or factual tabulations or data" accessible pursuant to section 87(2)(g)(i).

Moreover, there are other provisions of law that may be cited for the purpose of obtaining the type of information that you want. For instance, section 170.2 of the regulations promulgated by the Commissioner of Education sets forth rules regarding financial recordkeeping. One among several provisions that may be relevant to your request indicates that a board of education has the duty:

"To require the treasurer to render a report, at least quarterly (monthly in the event that budget transfers have been made since the last report), for each fund including no less than the revenue and appropriation accounts required in the annual State budget form. This report shall show the status of these accounts in at least the following detail:

(1) Revenue accounts.

(i) Estimated revenues.

(ii) Amounts received to date of report.

(iii) Revenues estimated to be received during balance of the fiscal year.

(2) Appropriation accounts.

(i) Original appropriations.

(ii) Transfers and adjustments.

(iii) Revised appropriations.

(iv) Expenditures to date.

(v) Outstanding encumbrances.

(vi) Unencumbered balances."

In view of the foregoing, it would appear that the District is required to maintain various types of records concerning its finances.

Fourth, I point out that 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 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)].

Lastly, you contended that minutes of meetings are sometimes incomplete. Here I direct your attention to the Open Meetings Law. Subdivision (1) of section 106 pertains to the minimum requirements concerning the contents of 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."

Further, subdivision (3) of section 106 requires that minutes of open meetings be prepared and made available within two weeks. Where minutes are not or cannot be approved within two weeks of a meeting, to comply with the Open Meetings Law,it has been advised that minutes be prepared within the appropriate time, and marked as "draft" or "non-final", for example. By so doing, the public can learn generally of what transpired at a meeting; concurrently, the public is effectively informed that the minutes are subject to change.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, model regulations designed to enable agencies to adopt their own regulations easily, the Open Meetings Law, and "Your Right to Know", which describes both the Freedom of Information and Open Meetings Laws. To enhance compliance, copies of those materials and this opinion will be sent to Mr. Smith, the new Superintendent, and the Board of Education.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Robert Smith, Superintendent
Board of Education

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1302
FOIL-AO-4183

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

July 7, 1986

Mr. Jim Switzer
School District Clerk
Wayne Central School District
6200 Ontario Center Road
Ontario Center, New York 14520

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

Dear Mr. Switzer:

I have received your letter of June 12, 1986 in which you request the assistance of the Committee on Open Government.

Specifically, you ask:

1. "Can a school board limit the persons who may speak at 'Comment Time' at a public meeting to those who are residents of the school district, only?

2. "Are all items presented at a school board meeting (reports, information), some apart from the published agenda, public records accessible under FOIL?

3. "Would this include information provided to the school board by the superintendent in an informational packet separate from the formal board agenda?"

In this regard, I offer the following comments.

First, the Open Meetings Law generally requires that meetings of a public body be open to the public. The Law [section 102(1)] defines "meeting" as "the official convening of a public body for the purpose of conducting public business."

Second, however, the Open Meetings Law is silent with respect to public participation. Thus, it has been advised that a public body may permit the public to speak; however, there is no requirement that the public be given the authority to speak or otherwise participate at meetings. Since the Law does not address the issue of public participation, it does not touch upon the question of limited participation. Thus, the propriety of limitations on public participation are not issues arising under the Open Meerings Law but rather under other provisions of law, as well as the reasonableness of rules that might be adopted by a board. It is noted that the case of Arnold Baum, et al. v. The Board of Education of the Delaware Valley Central School District, Supreme County, State of New York, County of Sullivan, September 28, 1984 and January 15, 1985, dealt, in part, with regulation of the time, place and manner of speech at school board meetings. The September 28, 1984 decision found that a regulation adopted by the Board was unconstitutional for violating the freedom of speech guaranteed by both the Federal and State Constitutions, but noted that "The time, place and manner of speech may be regulated by government provided such regulation is both limited and reasonable." The January 15, 1985 decision held in part that "that portion of (the regulation) which limits comments and questions at regular school board meetings to topics related to education and the board's conduct of the school and comments at special meetings to the purpose for which the special meeting was called, does not violate the Federal and State constitutional provisions protecting the freedom of speech." I point out that neither of these decisions deal with a limitation specifying categories of members of the public who may speak or participate at meetings.

Third, in regard to your last two questions, all items presented at a school board meeting, including "information provided to the school board by the superintendent in an informational packet separate from the formal board agenda" would be subject to the Freedom of Information Law.

As you may know, the Freedom of Information Law is based upon a presumption of 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. Rights of access would be dependent upon the specific contents of the records. For example, records concerning a particular student might be confidential, in whole or in part, pursuant to the federal Family Educational Rights and Privacy Act; a memorandum might be wholly advisory and deniable under section 87(2)(g) of the Freedom of Information Law. Other types of records would be accessible in accordance with the Freedom of Information Law. In short, it could not be advised that the records in question would always be accessible or deniable, for their specific contents would determine rights of access.

As you requested, I am enclosing copies of the 1985 Annual Report of the Committee on Open Government, which includes the most up to date index to advisory opinions, the Freedom of Information Law and 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:ew

Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4184

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

July 7, 1986

Mr. Adrian Kelly
84-B-0669
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 opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kelly:

I have received your letter of June 18. Your inquiry involves civil discovery in the context of a proceeding in federal court.

In all honest, I have neither the expertise nor the jurisdiction to offer assistance relative to discovery. As you are aware, the Committee on Open Government is responsible for advising with respect to the New York Freedom of Information Law. The Freedom of Information Law involves rights of access to government records that may be invoked by any person. Generally, discovery involves access to records by litigants. The only point that I can offer is that, even though you may be a litigant, you may nonetheless seek records under the Freedom of Information Law as a member of the public [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

It is suggested that you confer with an attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4185

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

July 7, 1986

Mr. Ronald L. Morris
83-C-702
Collins Correctional Facility
Helmuth, New York 14079

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

Dear Mr. Morris:

I have received your letter of June 8 concerning court records.

You wrote that you requested copies of a warrant and sentencing minutes under the Freedom of Information Law from the Clerk of the Depew Village Court. As of the date of your letter to this office, you had not received a response.

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 Law to include:

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

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 Freedom of Information Law does not apply to the courts or court records.

Second, however, often court records are available pursuant to other provisions of law, such as section 255 of the Judiciary Law, and section 2019-a of the Uniform Justice Court Act.

Lastly, it is suggested that you confer with an attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1186

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

July 8, 1986

Mr. Sidney B. Glaser
Associate Counsel
State of New York
Insurance Department
160 West Broadway
New York, NY 10013

Dear Mr. Glaser:

I have received your letter of June 20 in which you seek to confirm our telephone conversation, which followed the issuance of an advisory opinion on June 9.

Specifically, it is your understanding that I have no objection to the Department's practice of ascertaining the purpose of a request that involves a list of names and addresses or its equivalent. The practice is based upon 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."

As indicated in the opinion of June 9, the language quoted above in my opinion represents an internal conflict in the Freedom of Information Law. While the status of an applicant and the purpose for which a request is made are generally irrelevant in determining rights of access, the purpose is relevant when a list of names and addresses is requested. Consequently, I am in general concurrence with your practice.

I note that, in your letter, you relied in part upon Krauss v. Nassau Community College, 122 Misc. 2d 218 (1983). While the court alluded to the purpose for a request for a list of names and addresses of students, of greater significance in that case was a provision of the federal Family Educational

Rights and Privacy Act (20 U.S.C. 1232g), which governs the disclosure of student records. More analogous in my opinion is an unreported decision referenced in the June opinion, Golbert v. Suffolk County, a copy of which is enclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4187

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

July 8, 1986

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

I have received your letter, with attachments, of June 20 in which you request the assistance of the Committee on Open Government.

According to your letter, you made a written request to the New York State Department of Correctional Services, Office of Classification and Movement, for information regarding a change in your classification. Specifically, you inquired as to why that office has refused to change your classification and at what date you may become eligible for reclassification. You advise that you have not received a response to your request. In this regard, I offer the following comments.

First, 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.

Second, the Freedom of Information Law pertains to existing records. Therefore, if the requested records do not exist, the Department of Correctional Services would not in my view be required to create such records in response to a request [see Freedom of Information Law, section 89(3)]. It is noted that the Freedom of Information Law does not require an agency to provide information or answer questions, but only to make existing records available upon request where such records do not fall under one or more of the grounds for denial.

Third, assuming that the requested records do exist, based upon the facts that you have presented, it appears that such records or portions thereof could likely be denied under one or more of the grounds for denial under section 87(2) of the Freedom of Information Law.

In particular, 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.

Fourth, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations pertaining to the procedural implementation of the Law. In turn, section 87(1) requires that each agency adopt regulations in conformity with the Law and consistent with the regulations promulgated by the Committee. Please note that the Department of Correctional Services has promulgated the appropriate regulations. One of the components of the regulations involves the designation of one or more "records access officers" who are responsible for receiving and handling requests made under the Freedom of Information Law. The regulations indicate that, with respect to records kept at a facility, the records access officer is the facility superintendent or his designee. With respect to records kept at the Department's central offices, the records access officer is the Deputy Commissioner for Administration, Department of Correctional Services, Building 2, State Campus, Albany, New York 12226. Thus, any additional requests for records of the Department of Correctional Services should be directed to the appropriate records access officer.

Fifth, please note that under the Freedom of Information Law, a request for records must "reasonably describe" the records sought. Therefore, when requesting records, it is suggested that the request be as detailed as possible in order to enable agency officials to locate the records.

Finally, I have enclosed a copy of "Your Right to Know", a pamphlet which describes the Freedom of Information Law and includes a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:ew

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-37
FOIL-AO-4188

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

July 8, 1986

Mr. Leo Carl Halpern
[redacted]

Dear Mr. Halpern:

I have received your letter of July 3 addressed to Secretary of State Shaffer and me.

Your letter consists of a request made under the Freedom of Information and Personal Privacy Protection Laws for:

> "All notes, memoranda, messages of phone calls, and minutes of the Committee on Open Government on the N.Y. State Mental Health Reports, on the Fountain House Foundation Rehabilitation Center at 425 West 47th St in New York County, City and State of New York..."

You added that you "mean all inspection records from Jan. 1978 through June 30, 1986."

Please be advised that the Committee on Open Government is responsible for advising with respect to the Freedom of Information and Personal Privacy Protection Laws. As a general matter, the Committee does not maintain records of other agencies or serve as a repository of records. Further, the Department of State, due to its functions, would not maintain the types of records that you are seeking. The Committee staff has, over the years, prepared advisory opinions regarding the Freedom of Information Law as it relates to the Mental Hygiene Law and mental hygiene records. While those are not the records that you seek, copies are available on request. With respect to the records that you requested, in short, I cannot provide them to you, because this office does not maintain such records.

For future reference, requests should be directed to the "records access officer" at the agency or agencies that you be-

section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought in order to enable agency officials to locate the records.

In addition, in terms of rights of access granted by the Personal Privacy Protection Law, that statute generally involves records sought by an individual pertaining to him or her. As such, it does not appear that the Personal Privacy Protection Law would apply with regard to the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1305
FOIL-AO-4189

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

July 8, 1986

Mr. Charles A. Forma
Counsel-Cable Operations
Cablevision
One Media Crossways
Woodbury, NY 11797

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

Dear Mr. Forma:

I have received your letter of June 23 in which you requested an advisory opinion under the Open Meetings Law.

You have questioned the propriety of an executive session held by the Public Safety Committee of the Suffolk County Legislature. Specifically, according to your letter:

> "On or about May 5, 1986, a federal prisoner who was in the custody of Suffolk County on separate charges was apparently released by the County when local charges were dropped, instead of being returned to a federal penitentiary. The Public Safety Committee of the Suffolk County Legislature held its regular scheduled meeting on May 21, 1986. Representatives from the District Attorney, the Sheriff and the system court were called to testify as to the events leading up to the release of the prisoner. The Committee, on the advise [sic] of counsel, determined to go into executive session on the grounds that the information which could be adduced at the hearing could 'imperil public safety by laying out a blueprint for other people' and on the

> ground that there is 'an ongoing investigation'. Despite the protests of the representatives of the media and, as Legislature Bachety said, the fact that the Committee was 'talking about something that's already done', the Committee voted to go into executive session by a vote of 4 to 2 with 2 members not present."

It is your view that the Committee had no "reasonable basis for assuming that information which could 'imperil the public safety' would be brought out". Nevertheless, a transcript of the meeting, a copy of which you enclosed, provides the view of Mr. Paul Sabatino, Counsel to the Committee. Mr. Sabatino stated that:

> "...we don't want to imperil the public safety by laying out a blueprint for other people who can take advantage of certain information and perhaps effectuate the same result. We also have an ongoing investigation, therefore, it would be the judgment of the Counsel to the Legislature that there is basis to go into executive session."

In this regard, I offer the following comments.

First, the substance of your question pertains to one or perhaps two of the grounds for entry into an executive session. Specifically, a public body may enter into an executive session to discuss:

> "a. matters which will imperil the public safety if disclosed...
>
> c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed..."

~~In fairness, without knowledge of the specific facts re~~lating to the incident that was the subject of the discussion, or the nature of the discussion itself, it is impossible to advise with certainty that the executive session was held legally or otherwise. As a general matter,it is my view that the the Open Meetings Law seeks to require that public business be discussed in public, unless and until a discussion would result in harm to an individual, for example, or a governmental process. From my

perspective, the issue should likely have been discussed in public until the Committee reached the point at which public disclosure would indeed "imperil the public safety" in the manner suggested by Mr. Sabatino -- where the discussion would offer "a blueprint" that would enable prisoners to escape or evade detection. By means of analogy, in a decision rendered by the Court of Appeals relative to the Freedom of Information Law, which excepts from disclosure records "compiled for law enforcement purposes" when disclosure would result in the harmful effects described in section 87(2)(e) of that statute, it was held that "The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" [Fink v. Lefkowitz, 47 NY 2d 567, 573 (1979)].

If indeed public discussion would have offered a "blueprint" for escape or evasion of the law, or if public discussion would have imperiled effective law enforcement in relation "to current or future investigation or prosecution of a criminal offense", to that extent, I would agree that a ground for entry into executive session could have been asserted. However, once again, it is unclear on the basis of the information that you provided whether the topic could properly have been considered during an executive session. The article published by Newsday that is attached to your letter suggests that public discussion would have neither provided a "blueprint" for prisoners to escape, nor would it have interfered with a criminal investigation. It appears that any criminal investigation had been terminated, and that the incident that precipitated the discussion was, in the words of a County legislator, "a comedy of errors". The legislator, according to Newsday, added that: "It would only happen again if everyone was as stupid as they were the first time". In my opinion, that comment suggests that a series of errors, all unusual, occurred. If that is so, it does not appear that the discussion of the incident would have laid out a "blueprint" for escape by other prisoners.

Lastly, whether or not the issue fell within the scope of one or more of the grounds for entry into executive session, it appears that the executive session was improperly held. Section 105(1) of the Open Meetings Law prescribes the procedure to 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:

> "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..."

As indicated in the initial clause of the provision quoted above, a motion to enter into an executive session must be carred by "a majority vote of [the] total membership" of a public body. Based upon your letter, six members of the Public Safety Committee were present at the meeting; two members were absent. The motion to enter into executive session received four affirmative votes. A minimum of five affirmative votes would have been required to carry the motion [see also General Construction Law, section 41]. Since four constitutes less than a majority of the Committee's total membership, the motion in my opinion did not carry. If my interpretation of the facts regarding the membership of the Committee is accurate, I do not believe that the executive session could have been held, whether or not the issue fell within one or more of the grounds for entry into executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul Sabatino
Public Safety Committee

STATE OF NEW
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4190

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

July 8, 1986

Mr. Bryan E. Berard
#83-A-6646
Great Meadow Correctional
Facility
Box 51
Comstock, NY 12821

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

Dear Mr. Berard:

I have received your letter of June 24.

You have asked for the name of the person from whom you may purchase a "master index" pertaining to the Schenectady County Sheriff's Department and jail. In this regard, I offer the following comments and suggestions.

First, to avoid problems in interpreting your request, I point out that the phrase "master index" is used to refer to what is generally known as the "subject matter list". Further, to the best of my knowledge, the term "master index", which appears in the regulations of the Department of Correctional Services, is used only by that Department and its facilities. Therefore, when making a request, it is suggested that you seek the "subject matter list" prepared pursuant to section 87(3)(c) of the Freedom of Information Law.

Second, for purposes of comparison, I would conjecture that the "master index" kept at your facility is more expansive than its equivalent pertaining to records of the County Sheriff or the County Jail, for it is likely that one subject matter list has been prepared with respect to all agencies within Schenectady County government.

Third, having contacted the office of the County Clerk on your behalf, it was suggested that you write directly to the Sheriff, at 320 Veeder Avenue, Schenectady, NY 12307 or, in the alternative, to Robert McAvoy, County Manager, 620 State Street, Schenectady, NY 12307.

Lastly, it is noted that a "master index" or "subject matter list" is not intended to refer to each and every record kept by an agency. Section 87(3)(c) of the Freedom of Information Law requires that each agency maintain:

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

As such, a subject matter list should refer to categories of an agency's records, rather than individual 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1307
FOIL-AO-4191

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

July 9, 1986

Mrs. Judy Freeman
[redacted]

The staff of the Committee on 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. Freeman:

I have received your letter of June 24, in which you requested advice under the Freedom of Information Law.

Specifically, you state that you hand delivered two letters, one dated June 19 and the other June 20 to the Seguin Community Services Office. On June 24, you received a certified letter from Gary McIlvain of that office acknowledging receipt of the letter dated June 19. The June 20 letter, receipt of which was not acknowledged contained your request under the Freedom of Information Law to inspect and copy the tape recording of the open meeting held at the Owasco Town Hall on April 28, 1986. On June 24 you hand delivered a third letter to Mr. McIlvain advising him that he failed to acknowledge your June 20 letter which contained your request to review the tape recording. In this regard, I 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 physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets,

> forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the language quoted above, I believe that a tape recording prepared by or in possession of a unit of local government 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 NY 2d 575 (1980); Washington Post Co. v. New York State Insurance Department, 61 NY 2d 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 of the grounds for denial appearing in section 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].

Fourth, it is noted that both the Freedom of Information Law and the regulations promulgated by the Committee on Open Government pursuant to section 89(1)(b)(iii) of the Law (21 NYCRR Part 1401 et seq.) prescribe time limits within which an agency may 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)].

I am enclosing copies of the Freedom of Information Law, the Open Meetings Law and "Your Right to Know", a pamphlet which describes both laws.

Copies of this letter and the enclosures will also be sent to Mr. McIlvain at the Seguin Community Services 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:ew

Encs.

cc: Mr. McIlvain

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4192

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

July 9, 1986

Captain Edwin F. O'Brien
[redacted]

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

Dear Captain O'Brien:

I have received your letter of June 27 concerning your capacity to review civil service examinations.

You have asked that I determine whether the exams you took are available under the Freedom of Information Law. In this regard, the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. This office has no authority to compel an agency to grant or deny access to records. As such, only the Department of Civil Service can determine whether or to what extent the exam you took would be available or deniable.

As you are aware, section 87(2)(h) of the Freedom of Information Law permits an agency to withhold records that:

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

Therefore, if an examination or portions of an examination are to be given in the future, both the questions and the answers can be withheld. Conversely, if an examination or questions on an examination will not be used again, the questions and the answers become available.

It is suggested that you submit a request for the examination, identifying the exam by number, title, and the date on which it was given, to the records access officer for the Department of Civil Service, Mr. Anthony Costanzo. The address is NYS Department of Civil Service, State Campus, Civil Service Building, Albany, New York 12239. In addition, to obtain addi-

tional information regarding examinations generally or the apparent change in the City's policy on disclosure, you might want to contact either the Bureau of Examinations and Staffing Services [(518) 457-5445] or the Bureau of Municipal Service [(518) 457-9553)] at the Department of Civil Service.

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-4193

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

July 9, 1986

Mr. Steven M. Silverberg
Counsel to the Town
Town of Mamaroneck
740 West Boston Post Road
Mamaroneck, NY 10543-3319

<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. Silverberg:

I have received your letter dated July 8 (which reached this office on July 7) in which you requested in advisory opinion under the Freedom of Information Law.

You wrote that the Town Board of the Town of Mamaroneck is in the process of adopting a "disclosure form" to be completed by Town officials pursuant to a local ethics law. Questions have been raised concerning public rights of access and the capacity to withhold information that may be required to be included in item 2 of the form. That provision reads as follows:

> "I list below the name and address of any partnership, corporation, joint venture, or similar commercial enterprise which I or a member of my immediate family or to my knowledge a close business associate is a partner, officer, senior executive or shareholder, excluding any corporation, partnership or other business venture in which I, such family member or business associate have less than a 5 percent interest..."

In this regard, I offer the following comments.

As you are aware, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Further, section 89(2)(b) lists examples of unwarranted invasions of personal privacy. I point out that 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, even though the forms might identify particular individuals, 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. For example, the fact that an official owns shares in a particular corporation is made known to the public, but the number of shares or their value is excluded on the ground that disclosure would constitute an unwarranted invasion of 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

I point out, too, that at least one aspect of the information to be disclosed would in my view, be available to the public from a different source. In the case of a partnership, records filed with a county clerk identifying partners are available for public inspection and copying (see Partnership Law, section 91).

Another aspect of the information required in the form appears to deal with persons other than Town officials or family members, for reference is made to interests of "a close business associate". If that is so, and portions of a disclosure statement would pertain to persons other than town officials or their families, I believe that, in view of the case law that requires a greater degree of accountability on the part of public employees than others, those "others" might be accorded greater protection of privacy than those having a clear relationship with town government.

In sum, due to the flexibility and, therefore, lack of clarity concerning the privacy provisions of the Freedom of Information Law, clear advice cannot be offered. However, as suggested earlier, if the intent of a disclosure requirement is to enable the public to know of actual or potential conflicts of interest, perhaps the nature or sources of business involvement or income would be available, while information regarding the amounts or percentages of holdings or interests be deniable.

If the Board disagrees with that kind of standard, it might want to revise the requirement in order that lesser or different types of personal information be submitted. I offer that point because, in a judicial proceeding challenging a denial, the burden of proof is on the agency [see Freedom of Information Law, section 89(4)(b)]. Recent judicial determinations indicate that, in the area of privacy, it is often difficult to prove that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Hopkins v. City of Buffalo, 486 NYS 2d 514 (4th Dept., 1985); Capital Newspapers v. Burns, ___ 46 NY 2d ___, Ct. of Appeals, July 3, 1986].

I hope that I 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-4194

162 WASHINGTON AVENUE, ALBANY, NEW YORK 1223[illegible]
(518) 474-2518 27[illegible]

July 9, 1986

Mr. Elijah Nixon
84-C-441
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

<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. Nixon:

I have received your letter of June 30 and the correspondence attached to it.

You wrote that, on three occasions, you sent requests for records to the Rochester police officer who prepared reports concerning a particular incident. The requests were made under the federal Freedom of Information and Privacy Acts. In response to your initial request, the officer indicated that he could not locate the records sought, and that he needed additional details. You provided greater detail in your subsequent requests. However, you have not heard from the officer since his response to you on May 20.

In this regard, I offer the following comments.

First, the statutes that you cited are federal acts that pertain to records maintained by federal agencies. While those acts are not applicable, the New York Freedom of Information Law does apply, for it pertains to records of state and local government in New York.

Second, pursuant to regulations promulgated by the Committee on Open Government that govern the procedural aspects of the Freedom of Information Law (21 NYCRR Part 1401), each agency should have designated one or more "records access officers", persons having the duty of coordinating an agency's response to requests made under the Freedom of Information Law. As a general

matter, a request should be sent to the records access officer for the City of Rochester or its Police Department rather than an individual who prepared the record. Therefore, for future reference, it is suggested that requests be directed to the "records access officer".

Third, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. It has been held that a request "reasonably describes" the records when agency officials are able to locate the records based on the terms of a request [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Lastly, 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)].

Enclosed are copies of the Freedom of Information Law and an explanatory pamphlet that describes the Law in greater detail.

I hope that I 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

FOIGAO-4195

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

July 9, 1986

Mr. Peter LaGrasse
[redacted]

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

Dear Mr. LaGrasse:

I have received your letter of June 27 addressed to Ms. Cheryl Mugno. Please be advised that Ms. Mugno is no longer with this office.

Your inquiry pertains to the implementation of the Freedom of Information Law by the Stony Creek Volunteer Fire Company. It is noted that a similar inquiry was made recently, and I have enclosed a copy of that opinion. According to your letter:

> "The Fire Company has no organizational structure at present for applying the Freedom of Information Law, we have no Public Access Officer, no rules whereby the public gains access to information, etc. Accessible documents are held by different officers, treasurer, secretary, financial secretary, Chief and Squad Captain holding whatever item specifically pertain to his or her duties."

In this regard, both the Freedom of Information Law [section 87(1)] and the regulations promulgated by the Committee (21 NYCRR Part 1401 et seq.), which govern the procedural aspects of the Law, place the responsibility for complying with the Law upon the head or governing body of an agency. Under the circumstances, I believe that the board of a volunteer fire company would bear such a responsibility. More specifically, section 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, each agency is required to adopt similar procedural rules and regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee. One aspect of the regulations involves the designation of one or more "records access officers" who would have the duty of coordinating an agency's response to requests for records. I point out that section 1401.2(a) of the Committee's regulations states in part 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." Therefore, if, for example, the treasurer had been authorized in the past to make records available, it would appear that he or she could continue to do so, unless specific direction to the contrary has been given.

You also referred to an "application procedure". While an agency may require that a request be made in writing {see Freedom of Information Law, section 89(3)], section 1401.5 of the regulations indicates that oral requests may be accepted.

Your remaining questions deal with First Amendment rights and prior restraint. In all honesty, I am not an expert on constitutional law, and those issues fall outside the scope of the Committee's jurisdiction.

Enclosed for your consideration are copies of materials sent to Mr. Strathearn, the Freedom of Information Law, the Committee's regulations and model regulations. The model regulations were designed to enable agencies to adopt appropriate procedures quickly and easily. It is suggested that the Company and its Board adopt regulations as required 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:et

Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4196

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279

July 9, 1986

Mr. Clarence Lennon
84-A-7037
P.O. Box AG
Fallsburg, NY 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 Mr. Lennon:

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

You have asked that this office "represent" you regarding your right to obtain records under the Freedom of Information Law form the New York City Police Department. According to a determination on appeal, certain records were withheld on the grounds that they are:

> "...pre-decisional, intra-agency records [Public Officers Law section 87(2)(g)] and contain information given to the police in confidence [Public Officers Law section 87(2)(e)], disclosure of which would be an invasion of privacy [Public Officers Law section 87(2)(b)]."

The determination also indicates that certain of the records sought, "D.A.'s Investigative Reports" are not records of the Police Department, but rather may be maintained in the office of the District Attorney.

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. The Committee does not have the authority to compel an agency to grant or deny access to records, or to "represent" and individual in a judicial proceeding.

Second, under the circumstances, since you have exhausted your administrative remedies concerning records sought from the New York City Police department, you have the right to initiate a lawsuit under section 89(4)(b) of the Freedom of Information Law. The cited provision states in relevant 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."

Third, with regard to the determination on appeal, without knowledge of the contents of the records in question, I could not conjecture as to the propriety of the denial. For purposes of clarification, section 87(2)(g) of the Freedom of Information Law permits the withholding of intra-agency materials to the extent that they consist of advice, opinion, recommendation and the like. Section 87(2)(e) enables an agency to withhold records "compiled for law enforcement purposes" under certain conditions, i.e., when disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation" [section 87(2)(e)(iii)].

Lastly, as suggested in the determination on appeal, perhaps a separate request should be directed to the records access officer at the office of the district attorney involved in the proceeding. It is also suggested that you confer with an attorney, for it is possible that avenues may be available to you other than 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4197

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 279

July 10, 1986

Mr. Mart i.l.v.e.s. Goldrich-Nowak
[redacted]

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

Dear Mr. Goldrich-Nowak:

As you are aware, I have received your letter of June 7 in which you described a series of problems and successes in your research, which involves the preparation of a biography concerning Adam Berwid, who was convicted of several felonies, including second degree murder, and who is currently incarcerated at the Attica Correctional Facility. I will attempt to deal with the problems to the extent possible.

It is noted at the outset that the Freedom of Information Law pertains to existing records. As a general matter, an agency is not required to create a record in response to a request. I offer that point because, in one of the items of correspondence attached to your letter, you raised questions rather than requesting records. From my perspective, although agency officials may respond to questions, the Freedom of Information Law does not require them to do so. That statute, however, does require that responses be given relative to requests for records.

You indicated that you have unsuccessfully sought the "incorporated records of Frederick J. Harris, Lake Success, N.Y.", the last employer of Ms. Ewa Berwid I have discussed the matter with Mr. Relyea's assistant, who had no knowledge of your request. In any event, the Department of State does not keep detailed records or annual reports concerning corporations. Generally, it would maintain a certificate of incorporation indicating the purpose of the corporation. Further, it is unclear on the basis of your letter whether you identified an employer, as

an individual, or the name of a corporation. On your behalf, I made a search for a corporation under the name that you provided. The only such corporation pertains to a dentist located in Pelham. The papers regarding that corporation were filed on September 26, 1975.

With respect to your request to the Office of Mental Health, as I understand your inquiry, you requested information concerning Mr. Berwid's "treatment teams". I agree with your contention that certain records pertaining to public employees are available, such as the agency payroll record required to be maintained and made available pursuant to section 87(3)(b) of the Freedom of Information Law. That provision requires the creation of "a record setting forth the name, public office address, title and salary" of all agency employees. However, a record identifying public employees who served on a "treatment team" relative to a particular patient would constitute a record separate and distinct from the record maintained pursuant to section 87(3)(b) of the Freedom of Information Law. Moreover, my assumption is that members of the treatment team could be identified only by means of a record or records pertaining to a patient. Such records would likely be included within the scope of "clinical records" subject to section 33.13 of the Mental Hygiene Law. Subdivision (a) of the cited provision states in relevant part that:

> "A clinical record for each patient or client shall be maintained at each facility licensed or operated by the office of mental health or the office of mental retardation and developmental disabilities, hereinafter referred to as the offices. The record shall contain information on all matters relating to the admission, legal status, care, and treatment of the patient or client and shall include all pertinent documents relating to the patient or clients."

Further, as you are aware, ensuing provisions of section 33.13 prohibit disclosure of clinical records, except in those circumstances specified in the statute under which clinical records may be disclosed. In short, it would appear that the provisions of section 33.13 of the Mental Hygiene Law, rather than the Freedom of Information Law, govern rights of access to records identifying members of a treatment team, for those records would, in my view, be part of the "clinical records" maintained by facilities.

You indicated that the Nassau County Tax Assessment Division has "stonewalled" with regard to your request for a record indicating the assessed value of the Berwid's home for a series of years. Assuming that such records exist, I believe that they would be available [see Szikszay v. Buelow, 436 NYS 2d 558, 107 Misc. 2d 886].

I point out that it is unclear whether your requests are directed to agencies' "records access officers". By way of background and general information, pursuant to regulations promulgated by the Committee on Open Government that govern the procedural aspects of the Freedom of Information Law (21 NYCRR Part 1401), each agency should have designated one or more "records access officers", persons having the duty of coordinating an agency's response to requests made under the Freedom of Information Law. Therefore, you may find it useful to direct requests to the records access officer of an agency, rather than an individual who has physical custody of the records. Further, 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)].

Another area of difficulty concerns records of the District Attorney. It is assumed that you have reviewed or obtained court records that may also be maintained by the District Attorney, and that your requests involve other records.

One of the categories of records pertains to Ewa Berwid's letters, which have apparently been denied pursuant to section 87(2)(b), which permits a denial to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". As suggested to you previously, the capacity to deny under that provision with respect to a deceased is questionable, and to the best of my knowledge, has not yet been the subject of judicial determinations rendered under the Freedom of Information Law. However, the contents of letters sent to or received by Ms. Berwid may pertain to others, and there may be privacy considerations present with respect to those others.

You also referred to "witness lists" relating to several proceedings in which the Berwids were involved. Here I point out that 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...
>
> (iii) identify a confidential course or disclose confidential information relating to a criminal investigation..."

The extent to which the language quoted above applies would in my opinion be dependent upon facts and circumstances with which I am not familiar. As such, I could not conjecture as to the propriety of its assertion.

Further, some of the "witness lists" that you identified pertain to such matters as divorce and child custody. It would appear that the source of such records would be the court before which a matrimonial proceeding was heard. Since court records fall outside the scope of the Freedom of Information Law, issues regarding rights of access to those records would likely be governed by section 235 of the Domestic Relations Law.

You referred to a denial of the "sentence suggestion". It appears that you may be referring to a "pre-sentence report". If that is so, I direct your attention to section 390.50 of the Criminal Procedure Law. In brief, that provision generally requires that pre-sentence reports be kept confidential; it permits disclosure only by a court in conjunction with the circumstances described in that statute.

With respect to your request to the Department of Correctional Services, it is noted at the outset that you referred to the record of commitments, which, in your view, must be made available pursuant to section 500-f of the Correction Law. The cited provision states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what and by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper."

Due to its specific reference to counties, its inclusion in Article 20 of the Correction Law, entitled "Jails", and its derivation from provisions of the County Law, I believe that section 500-f is applicable only to county jails; I do not believe that it applies to "correctional facilities" under the aegis of the Department of Correctional Services. It is noted that I contacted Counsel to the Commission of Correction, an agency independent of the Department of Correctional Services, who agreed with my contention.

With respect to other materials sought from the Department of Correctional Services, the correspondence attached to your letter indicates that some information was made available and that the remainder was withheld as an unwarranted invasion of personal privacy. Without knowledge of the contents of the records sought, I cannot offer guidance concerning the propriety of the denial. Further, enclosed is a copy of a recent decision involving a request for records pertaining a particular inmate. Department's denial was upheld on the basis of the privacy provisions of the Freedom of Information Law, as well as the Personal Privacy Protection Law. I have enclosed a copy of the decision for your consideration [Kavanagh v. Department of Correctional Services, Supreme Court, Albany County, April 22, 1986]. Under the circumstances, as suggested by Department officials, you might want to seek a waiver from the subject of the records.

The remaining issues pertain to records maintained by private attorneys and Hempstead Legal Services. Those documents would not in my opinion constitute "agency records" and, as such, the Freedom of Information Law would not be applicable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4198

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

July 10, 1986

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 July 2 concerning requests made under the Freedom of Information Law.

According to your letter, you have received no response to requests directed to the Yonkers Bureau of Community Development and the Yonkers Budget Director. The requests involve records concerning payments received by the City. You have asked whether your requests can be disregarded and what recourse you might have.

In this regard, I offer the following comments.

First, both the Freedom of Information Law [section 87(1)] and the regulations promulgated by the Committee (21 NYCRR Part 1401 et seq.), which govern the procedural aspects of the Law, place the responsibility for complying with the Law upon the head or governing body of an agency. Under the circumstances, I believe that the City Council would bear such a responsibility. More specifically, section 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, each agency is required to adopt similar procedural rules and regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee. One aspect of the regulations involves the designation of one or more "records access officers" who would have the duty of coordinating an agency's response to requests for records. It is suggested that you attempt to determine who the designated records access officer or officers might be.

Second, the Freedom of Information Law and the regulations 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 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, 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 section 87(2)(a) through (i) of the Law. Records involving an agency's payments and receipts are generally available, for none of the grounds for denial would likely apply.

Lastly, I point out that section 89(3) requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, sufficient detail should be included to enable agency officials to locate the records.

Enclosed is "Your Right to Know", a pamphlet that describes the Freedom of Information Law in greater detail.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:et

Enc.

cc: Bureau of Community Development
Nicholas DeSantis, Budget Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4199

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

July 11, 1986

Mr. Karl Ahlers
#82-A-4134
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. Ahlers:

I have received your letter of July 9, which, as I understand it, concerns the handling of mail addressed to you by officials at the Green Haven Correctional Facility.

You wrote that, pursuant to Directive 4422 of the Department of Correctional Services, mail addressed to inmates will be delivered, unless there is a failure to adhere to "the regulations of this directive". In such a case, you wrote that the mail "will be returned to sender with an explanation" and that "the inmate will be notified and given the name of the sender, date and reason for the action." You wrote that the Deputy Superintendent at the Facility denied your request "for a copy of the Superintendent's written authorization for this mail to be read". You added that no reason for the denial was given. You have subsequently appealed to Counsel.

In this regard, I offer the following comments.

First, I have no knowledge or expertise with respect to directives adopted by the Department of Correctional Services generally, nor the particular directive that you cited. Consequently, I cannot provide guidance with respect to the activities that you described regarding compliance with the directive.

Second, however, I agree that when a request is denied a reason for the denial should be offered. The requirement that a reason be given is found in regulations promulgated by the Committee [21 NYCRR section 1401.2(b)] and in the regulations promulgated by the Department of Correctional Services [section 5.35(d)(5)].

Third, under the circumstances, it appears that you have taken the appropriate step by appealing to the Counsel.

Lastly, 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. Without specific knowledge concerning the directive to which you referred or the contents of any statements made by the Superintendent, I cannot offer specific direction or guidance concerning the propriety of the denial.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:et

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4200

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

July 11, 1986

Ms. Carole Rowland
[redacted]

The staff of the Committee on 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. Rowland:

I have received your letter of July 8, as well as the correspondence attached to it.

According to the materials, you requested from the New York Power Authority records concerning "the selection procedures used to fill a position" at the Authority. Mr. Bradley S. Telias, Secretary to the Authority and Records Access Officer, wrote that "there are no records or documents setting forth the selection process applied to determine what applicants were contacted for interviews." You indicated that you were "surprised at this denial", for such procedures are generally available.

In this regard, I offer the following comments.

First, I concur that records containing selection procedures would be available, for they would represent the policy of an agency [see Freedom of Information Law, section 87(2)(g)(iii)]. However, I point out 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. Therefore, in short, if the Authority has not reduced its selection procedures to writing, it would not be obliged to do so in response to a request made pursuant to the Freedom of Information Law.

Second, you referred to the response as a denial. From my perspective, a denial occurring under the Freedom of Information Law pertains to a situation in which existing records are withheld. In this instance, although you did not obtain the information, there was no denial, for, again, the information sought does not exist in the form of a record.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:et

cc: Bradley S. Telias, Secretary

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4201

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

July 18, 1986

Mr. Felix Silva
85-A-2968
P.O. Box 500
Elmira, NY 14902-500

Dear Mr. Silva:

I have received your letter of July 14.

You have requested copies of the Freedom of Information Law and the Committee's annual report, as well "any and all information concerning [you] - such as the accusatory instrument, misdemeanor complaint, felony complaint and warrant of arrest and so forth".

Enclosed as requested are copies of the Freedom of Information Law and the Committee's latest annual report. However, with respect to the remaining materials. I point out that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law, it does not maintain custody or control of records generally, such as those pertaining to you. In short, the Committee does not maintain the records concerning you that you requested.

To seek those records, requests should be directed to the records access officer at the agency or agencies that you believe would maintain the records. It is emphasized, 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, you should include sufficient detail to enable agency officials to locate the records, such as descriptions of events, names, dates, index and docket numbers, and similar details.

Further, some of the records sought may be maintained by a court. While the courts and court records are not subject to the Freedom of Information Law, court records are often available pursuant to different provisions of law. As such, you might want to seek records from the clerk of the courts in which proceedings were conducted.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Encs.

COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4202

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

July 28, 1986

Ms. Elaine Werbell
Freedom of Information Officer
NYC Department of Consumer Affairs
80 Lafayette Street
New York, New York 10013

Dear Ms. Werbell:

Thank you for sending a copy of Mr. FitzPatrick's determination following an appeal by Andrew O. Shapiro of Brownstone Publishers, Inc.

The appeal indicates that Mr. Shapiro requested a list of participants in a monthly heating oil survey conducted by the Department of Consumer Affairs. Mr. FitzPatrick affirmed the initial denial based upon a contention that "The courts have sustained the common-law public interest privilege of public agencies", citing Young v. Town of Huntington, 388 NYS 2d 978, 99 Misc. 2d 632, 388 NYS 2d 978 (1976) and Cirale v. 80 Pine Street Corporation, 35 NY 2d 113, 359 NYS 2d 1, 316 NE 2d 301 (1974).

I disagree with Mr. FitzPatrick's stated basis for the denial. Further, I offer the following comments.

An advisory opinion regarding virtually the same information was prepared on April 23 at the request of Mr. John Striker, Publisher of Brownstone Publishers, Inc. At the time, Mr. Striker indicated that the list had been withheld on the basis of section 87(2)(b) of the Freedom of Information law, which enables an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". In that opinion, it was suggested that the cited provision was not applicable, for the privacy provisions of the Freedom of Information Law pertain to natural persons and not entities, such as the heating oil dealers. It appears that Mr. FitzPatrick has not relied upon the privacy exception to the Freedom of Information Law in the more recent denial, but that he is relying upon the so-called public interest privilege. While early decisions rendered under the Freedom of Information Law appeared to have pre-

served such a privilege where it was appropriately asserted, the Court of Appeals has clearly indicated that the Freedom of Information Law, as amended, effectively precludes agencies from denying access to records based upon the assertion of the privilege. As stated by the Court of Appeals 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 the law requires to be disclosed (cf. Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571, supra). Nothing said in Cirale v. 80 Pine Street Corp. (35 NY 2d 113) was intended to suggest otherwise. No greater weight can be given to the constitutional argument which would foreclose a governmental agency from furnishing any information to anyone except on a cost-accounting basis. Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" (48 NY 2d 341, 347).

Further, more recent decisions rendered by the Court of Appeals confirm that unless there is a statutory basis for withholding, records are subject to rights of access granted by the Freedom of Information Law [see e.g., M. Farbman & Sons v. New York City, 62 NY 2d 75, 78 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979); Capital Newspapers v. Burns, __ NY 2d __ (July 3, 1986), NYLJ (July 15, 1986).

In view of the foregoing, I believe that Mr. FitzPatrick's reliance on the public interest privilege is misplaced, for the decisions that he cited have been effectively overruled by the Court of Appeals.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Christopher G. FitzPatrick
Andrew O. Shapiro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1203

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

July 29, 1986

Mr. Frank Gennuso
85-C-127
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. Gennuso:

I have received your letter of June 17 in which you requested an advisory opinion from the Committee on Open Government.

I apologize for the delay in responding to your inquiry, due in part to our heavy workload and vacation schedule. Since I have not received an update on the status of your request for records, this response is based on the situation and the time frame as set forth in your letter.

Specifically, you state that you made a request for records to the Nassau County Medical Center on June 6 and that you have not received a response to that request. You further state that the records requested are:

> "The names and titles of all present employees and/or personnel of the Nassau County Medical Center.
>
> and:
>
> "The number of abortions during 1985 to present, given or supervised under the authority of Nassau County Medical Center's employee's and/or personnel to women 21 years of age or under."

In this regard, I offer the following comments.

First, in brief, the Freedom of Information Law creates a presumption of 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, in regard to your request for a record of the names and titles of all present employees of the medical center, it does not appear that any of the grounds for denial [section 87(2)(a) through (i)] are applicable. Additionally, section 87(3)(b) requires that each agency maintain a record of "the name, public office address, title and salary of every officer or employee of the agency". Thus, the record you are requesting is in my view clearly available to any person and should be available in the form of a payroll list from the County, from the Medical Center, or perhaps both.

Third, in regard to your second request, it appears that a record of the number of abortions performed would be available, if such a record exists, so long as the records are purely statistical and contain no identifying details.

It is noted that the Freedom of Information Law pertains to existing records. Therefore, if the record you are requesting has not been compiled or does not exist in the form which you have requested, the Medical Center would not in my view be required to create such a records in response to a request [see Freedom of Information Law, section 89(3)].

Fourth, you state that your request was "served on" the Medical Center on June 6 and that as of June 17 you had not received a response. You ask that the Committee on Open Government render an advisory opinion as to the time limits set forth in the Freedom of Information Law for responding to a request for records. Both the Freedom of Information law and the regulations promulgated by the Committee (21 NYCRR Part 1401) prescribe time limits within which an agency may 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 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 regard to your recent request under the Freedom of Information Law, it is difficult to determine at this time whether the Medical Center has responded within the required time limits. It is possible that the agency has responded in a timely fashion and that you have not yet received that response due to mailing time.

Fifth, I point out that under the Freedom of Information Law, a request for records should be directed to the "records access officer" at the agency that maintains the records sought. If you do not receive a response to your request, it is suggested that you determine who is the designated records access officer for the Medical Center and direct a request for the records to that individual.

Finally, I am enclosing a copy of "Your Right to Know", a pamphlet which describes the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4204

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

July 29, 1986

Mr. Orville Edwards
85-A-7085
Ossining Correctional Facility
354 Hunter Street
Ossining, NY 10562

Dear Mr. Edwards:

I received today an Affidavit of Service and what appears to be an appeal made under the Freedom of Information Law and directed to the "Committee on Public Access to Records". The appeal pertains to a denial of access to records made by the Mt. Vernon Police Department.

In this regard, please be advised that the Committee has been redesignated as the Committee on Open Government. Further, if my assumption is accurate, that you have appealed a denial of access to the Committee, I point out that the Committee does not render determinations on appeal. The Committee is authorized to advise with respect to the Freedom of Information law; it does not have the capacity to render a determination concerning access to records or compel an agency to grant or deny access to records.

It is noted that the provision concerning appeals is found in 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 records the reasons for further denial, or provide access to the record sought."

As such, I believe that an appeal following a denial of access to records maintained by a municipal police department should be directed to the head or governing body of the municipality or the person designated to make determinations on appeal.

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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4205

COMMITTEE MEMBERS

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WILLIAM T. DUFFY, JR.
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PRISCILLA A. WOOTEN

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

August 1, 1986

Mr. James Kenyon
News Reporter
WSTM-TV
1030 James Street
Syracuse, NY 13203

<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. Kenyon:

As you are aware, I have received your letter of July 2 in which you requested an advisory opinion under the Freedom of Information Law. I have also received the additional materials that you sent concerning the records sought.

According to the materials, on June 18, you requested from the City of Syracuse records "pertaining to the 1985 study of asbestos in city buildings conducted by Galson Technical Services". On June 30, Dennis S. Lerner, Assistant Corporation Counsel, denied the request on two grounds, that the "report in question was prepared for litigation and was not undertaken in the regular course of business", and that the report "is advisory and deliberative materials prepared by professional consultants".

Background information concerning the issue of asbestos in the City buildings appears in a memorandum of June 13, 1986, prepared by C. Frank Harrigan, Corporation Counsel, and sent to the Common council. Mr. Harrigan wrote that:

> "The City's interest/awareness of asbestos was sparked by the School District's preparation of a claim in the Johns Manville bankruptcy. The City undertook to prepare a claim as well. To support the City's claim, a survey of City buildings was made by Galson & Galson; a firm specializing in asbestos testing. The Galson survey information was submitted with the City's claim against Johns Manville on January 30, 1985."

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 section 87(2)(a) through (i) of the Law.

Second, the initial ground for denial, section 87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". Section 3101(d)(2) of the Civil Practice Law and Rules (CPLR) states in relevant part that:

> "materials...prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Although the Court of Appeals, the state's highest court, has not rendered any determination that deals specifically with the relationship between the Freedom of Information Law and section 3101(d), decisions involving the earlier language of section 3101(d) (which was amended in 1985) indicate that materials prepared for litigation are considered to be exempted from disclosure and, therefore, outside the scope of the Freedom of Information Law [see e.g., Fitzpatrick v. County of Nassau, 372 NYS 2d 905 (1975), 53 AD 2d 628; Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234]. In Westchester Rockland, supra, it was stressed that the exemption would apply only if materials were prepared solely for litigation, and, that if materials were prepared for multiple purposes, one of which would involve litigation, the Freedom of Information Law, rather than the exemption conferred by section 3101(d), would apply.

As such, based upon case law, if the report in question was prepared solely for litigation, it appears that it would be exempted from disclosure pursuant to section 87(2)(a) of the Freedom of Information Law in conjunction with section 3101(d) of the CPLR. On the other hand, if the report was not prepared solely for litigation, I believe that the Freedom of Information Law would govern rights of access.

I point out that Mr. Harrigan's memorandum of June 13 states that the "survey information was submitted with the City's claim". If that statement means that the survey information was served upon a federal bankruptcy court, it is possible that the survey would be available from the court. However, since I am not familiar with federal statutes or rules concerning access to bankruptcy court records, clear direction relative to access to the records held by such a court cannot be offered. Further, assuming that the survey in question is available from a court, there would appear to be no reason for the City to continue to withhold.

Lastly, leaving aside the issue of the applicability of section 3101(d) of the CPLR, it has been held by the state's highest court that records prepared for an agency pursuant to a contract by a consultant may be characterized as "intra-agency materials" [see Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)]. Of relevance in regard to such records is section 87(2)(g) of the Freedom of Information Law, which states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those portions of intra-agency materials consisting of advice, opinion or recommendation, for example, could be withheld. Therefore, if the only basis for denial [and it may not be if section 3101(d) of the CPLR may appropriately be invoked] is section 87(2)(g), portions of the 1985 survey could likely be withheld. However, if the survey included a list of City buildings containing asbestos, that portion of the survey would, in my view, be available on the ground that it consists of "factual" data available under section 87(2)(g)(i) of the Freedom of Information Law [see e.g., Ingram v. Axelrod, App. Div., 90 AD 2d 568 (1982); Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion for leave to appeal denied, (1979)].

In sum, it appears that rights of access would be dependent upon the propriety of the assertion of section 3101(d) of the CPLR. It also appears that the issue may be all but moot if the survey is available from the federal Bankruptcy Court.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: C. Frank Harrigan, Corporation Counsel
Dennis S. Lerner, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4206

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

August 4, 1986

Mr. William Guillermo Ramos
#81 - A - 0722
Auburn Correctional Facility
P.O. Box 618
135 State Street
Auburn, NY 13024

Dear Mr. Ramos:

I have received your letter of July 29 in which you requested from this office information pertaining to the Freedom of Information Law, as well as records relating to an incident that occurred at the Ossining 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. The Committee does not maintain custody or control over records maintained by other agencies. As such, since this office does not possess the records you seek relative to the incident in question, we cannot make them available.

However, I offer the following comments and suggestions.

First, as a general matter, a request should be directed to the agency that maintains the records. According to the regulations promulgated by the Department of Correctional Services, a request for records kept at a correctional facility may be directed to the facility superintendent. For records kept at the Department's Albany offices, a request may be sent to the Deputy Commissioner for Administration.

Second, 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 sufficient detail to enable agency officials to locate the records in which you are interested.

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated under the Law by the Department of Correctional Services, 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:dr

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4207

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

August 5, 1986

Mr. Mart i.l.y.e.s. Goldrich-Nowak
[redacted]

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

Dear Mr. Goldrich-Nowak:

I have received your letter of July 3, in which you requested that the Committee on Open Government address a number of specific issues which you have raised under the Freedom of Information Law.

First, it is noted that the Committee renders advisory opinions under the Freedom of Information Law. It is not within the scope of the authority or expertise of this office to render advice in regard to general legal questions.

Second, the Freedom of Information Law is applicable to records of an "agency". The term "agency" as defined in the Law includes local and state governmental entities, except the courts and the state legislature.

Third, 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.

Fourth, a number of your inquiries do not pertain to access to records and, thus, are not matters within the scope of the authority or expertise of this office. Such inquiries include the following: whether a convicted felon who owns a house jointly with one who is deceased can refuse to sell; whether you can take a photograph of a house from the street; whether you can visit a cemetery and take a photograph of a tombstone; whether you can subpoena a lawyer who withdrew from a case after

being stabbed by his client; whether you have the right to write a book over the objections of a decedent's executor; and what happened to the Berwids' cars and Mrs. Berwid's pistol. As indicated above, these are all matters which do not relate to the Freedom of Information Law and thus are not inquiries to which this office can properly respond.

Fifth, you have made a number of inquiries in regard to obtaining documents which are not records of an "agency" and which are therefore not subject to the Freedom of Information Law. These inquires include requests for personnel records of an employee in the private sector, a petition for annulment of a marriage by the church and baptismal records. Additionally, you have made several inquiries regarding records maintained by the courts, which are not "agencies" under the Freedom of Information Law. These include requests for a Certificate of Disposition of Divorce and a Certificate of Disposition in a child custody matter. You also inquired about court records including trial records of a misdemeanor which were destroyed by fire (it is pointed out that no entity can produce a record which no longer exists), the docket sheet of a surrogate court matter which is sealed, and minutes of a competency hearing. Again, the Freedom of Information Law does not apply to those court records.

Sixth, in regard to the driver's licenses of a deceased and a convict, it is noted that drivers licenses are generally available under the Vehicle and Traffic Law. However, I do not know whether the Department of Motor Vehicles retains records of licenses of deceased individuals or for what length of time the department retains records of inactive drivers' licenses.

Seventh, you have made a number of inquiries which do not provide sufficient facts to indicate whether the records in question may be available. As to writs of habeas corpus maintained by a district attorney's office, such records may be available to the public from a court. If that is the case, the record would likely be available from the district attorney's office. In regard to a confession and a list of attorneys of a convict, if these records contain information which has already been disclosed, the records are likely available. Insofar as these records contain information which has not been disclosed, there may be a ground for withholding those portions of the records, if, for example, disclosure would constitute an unwarranted invasion of personal privacy [section 87(2)(b) of the Freedom of Information Law].

Eighth, you make several inquiries regarding psychological reports on individuals and other records which may be maintained in patients' mental health records, such as the composition of

treatment teams. As this office has explained to you in previous advisory opinions, such records are confidential under the Mental Hygiene Law, section 33.13.

Ninth, you inquire as to the a availability of sign-in sheets or logs for visitors and payroll and personnel information regarding an employee of a psychiatric center. If the psychiatric center is a private entity, it is not subject to the Freedom of Information Law. If the psychiatric center is an agency under the Freedom of Information Law, I believe that payroll records of employees are available in accordance with section 87(3)(b) of the Freedom of Information Law. In regard to sign-in sheets for visitors, and credentials and disciplinary hearings of employees, I believe that there may be bases for withholding portions of such records on privacy grounds. As you know, both the June 3 and the July 16 advisory opinions of this office contained detailed explanations of the "unwarranted invasion of personal privacy" ground for denial under the Freedom of Information Law.

You also make several other inquiries for records which are subject to the Freedom of Information Law which may involve privacy issues. You inquire about letters and photos of a homicide victim; records of information subpoenaed from a lawyer who was stabbed by his client; a witness list containing names and addresses of witnesses at a trial, the records of which have been sealed; and police vouchers of personal property of an arrestee or of a decedent. Without more specific facts in regard to those requests, I cannot render an opinion as to whether such records or portions thereof may be available.

Tenth, you are seeking county, village and school taxes for a certain residence from 1966-1971. Records of county, village and school taxes are generally available. However, I do not know how long records are maintained.

Eleventh, you inquire as to state and federal income taxes. It is my understanding that state income tax records are confidential under section 697(e) of the Tax Law. Regarding access to federal income tax records, agencies of the federal government, including the Internal Revenue Service, are not subject to the Freedom of Information Law. However, I believe that such records are confidential under federal law.

Twelfth, you inquire about access to a "list of employers and application of a deceased person who always worked in the private sector as a mechanical engineer". You do not indicate whether such a list actually exists or where it might be maintained. Assuming that such a list does exist and is maintained by an "agency", there may be privacy considerations in regard to the family of the deceased or the employer.

Thirteenth, you ask about the availability of the names of schools which decedent's children attended. Once again, you do not indicate whether an agency maintains such a record. I am not aware of the existence of any such central index. However, any such records relating to students would be subject to the Family Educational Rights and Privacy Act [20 USC section 1232(g)].

Fourteenth, you are seeking copies of "letters and photos of a deceased victim by her and to her" maintained by a local district attorney's office and police. It is my view that disclosure of such records or portions thereof would likely constitute an unwarranted invasion of personal privacy of others to whom such letters were written, or by whom they were received or who may be included in the photographs. Additionally, there may be a privacy issue in regard to the family of the deceased.

Fifteenth, you seek the identity of the party who currently pays the property taxes on a certain property. It is suggested that you seek such a record from the municipal office that maintains the record.

Finally, you ask whether records of liens on a certain property would be available. It is my understanding that all such records are publicly available and may be found at the county courthouse of the county in which the property is located.

It is pointed out that the pamphlet which you received with the June 3 advisory opinion, entitled "Your Right to Know", clearly outlines the Freedom of Information Law. Additionally, section 87(2) of the Law, discussed in detail on pages 3 and 4 of the pamphlet clearly sets forth the grounds for denial of a request for records. It is suggested that for additional clarification you may find it helpful to refer to the pamphlet.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4208

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

August 19, 1986

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 letters of July 12 and July 22, which deal with a related issue.

You described a series of events and issues relating to a "stipulation" under which you apparently agreed to stop making requests under the Freedom of Information Law, with certain conditions. You also raised other questions concerning the intent and implementation of the Freedom of Information Law.

In this regard, I will not offer commentary concerning the stipulation or its effect, for that is a matter that does not fall within the jurisdiction of this office. Further, the following comments are intended to offer general advice and should not be construed to relate to the stipulation to which you referred.

One of your questions involves a statement allegedly made by a particular official. You wrote that, according to the official, "filing Freedom of Information requests for personnel records contained in his office files constitutes a 'course of action which merely taxes the time and resources of all concerned'." You asked whether I agree with the official's statement, and you requested that I cite "some strong judicial decisions to support [my] view". While it may be true that the use of the Freedom of Information Law might be "taxing" in terms of the time and resources of agency officials, those considerations, without more, would not in my view constitute valid reasons for rejecting a request. In addition to Doolan v.

BOCES, which you cited in your letter [48 NY 2d 341 (1979)], it is suggested that you review United Federation of Teachers v. NYC Health and Hospitals Corp., 428 NYS 2d 823, 824 (1980), Farbman v. NYC Health and Hospitals Corp., 62 NY 2d 75, 79-80 (1984), and Capital Newspapers v. Burns, ___ NY 2d ___, NYLJ, July 15, 1986.

You also wrote that persons charged with the duty of responding to requests, so-called "records access officers", should in your view "respond in good faith" to requests made under the Freedom of Information law. You asked whether I agree with your contention. From my perspective, as a general matter, public officers should always act in good faith, in relation to duties imposed by the Freedom of Information Law or by any law relating to the performance of their official duties.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4209

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

August 19, 1986

Mr. Willis Moore
83-A-7252
Box 750
Wallkill, NY 12589

Dear Mr. Moore:

I have received your letter of August 11, which reached this office on August 15. Your letter is in the form of a request for records.

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. This office does not maintain records generally, such as those that you requested, nor does the Committee have the authority to compel an agency to grant or deny access to records. In short, the records sought cannot be granted or denied by the Committee, for this office does not have possession or control of the records. Nevertheless, I offer the following comments and suggestions.

First, your request involves records of the Kings County District Attorney pertaining to a judicial proceeding in which you were involved. Attached to your letter is a copy of the request, which was directed to the District Attorney. Pursuant to the procedural regulations promulgated by the Committee (21 NYCRR Part 1401), each agency is required to have designated a records access officer, a person having the duty of responding to requests. It is suggested that your request be directed to the records access officer at the office of the District Attorney.

Second, in the event of a denial, you may appeal the denial in accordance with 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 records the reasons for further denial, or provide access to the record sought."

Third, the Freedom of Information Law and the Committee's regulations prescribe 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 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)].

Fourth, the request attached to your letter was made pursuant to the federal Freedom of Information Act. That statute is applicable to records maintained by federal agencies; it does not apply to records of a district attorney. A request may, however, be made under the New York Freedom of Information Law, Public Officers Law, Article 6, sections 84-90.

Lastly, enclosed is "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:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4210

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

August 19, 1986

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:

As you are aware, I have received your letter of July 7. Please accept my apologies for the delay in response.

Attached to your letter is correspondence indicating that you cannot use the Freedom of Information Law to obtain records from the Fairview Fire District on the ground that you are involved in litigation with the District. The records that you requested include:

> "1) Minutes of the Special Meeting of the Board held on June 5, 1986 at Fire Headquarters circa 8:00 P.M.
>
> 2) Letter between a bank and [yourself] referred to by Chairman McGowan at the Special Information Meeting of the Board held on June 5, 1986
>
> 3) Three studies referred to by both Commissioner McGowan and Commissioner Gerardi (at the Special Meeting held on June 5, 1986) which allegedly determined that consolidation was neither cost effective nor firematically advisable
>
> 4) A schedule of the current insurance policies which insure the District against various perils and the cost of each insurance policy..."

In this regard, I offer the following comments.

First, as you indicated in your letter, the Court of Appeals has held that any person, including a litigant, may seek and obtain accessible records under the Freedom of Information Law [Farbman v. NYC Health and Hospitals Corp., 62 NY 2d 75 (1984)].

Second, with respect to the records sought, it appears that minutes of a meeting or letters between you and a bank to which reference was made at a meeting are accessible, for none of the grounds for denial listed in section 87(2) of the Freedom of Information Law would be applicable. Further, the Open Meetings Law, Public Officers Law, section 106, requires that minutes of meetings be prepared and made available, in accordance with the Freedom of Information Law, within two weeks of meetings.

The request refers to three studies concerning consolidation. Without knowledge of the nature of the studies, it is difficult to provide specific guidance. If they were prepared by the District or perhaps by consultants hired by the District, the studies would likely be characterized as "intra-agency" materials [see Freedom of Information Law, section 87(2)(g); also Xerox Corp. v. Town of Webster, 65 NY 2d 131 (1985)]. Assuming that the studies are intra-agency materials, rights of access would be dependent upon their contents. For instance, opinions contained in the studies might be deniable, while statistical or factual information would be available [see e.g., section 87(2)(g)(i)].

The fourth aspect of the request involves a "schedule" of the District's insurance policies and the cost of each policy. Here I point out 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 [see section 89(3)]. Therefore, if no "schedule" exists, the District would not in my view be required to prepare such a record on your behalf. If a schedule does exist, I believe that it would be available, for it would consist of factual information. Further, insurance policies, contractual agreements between the District and insurers, 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: Robert Mauro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-38
FOIL-AO-4211

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

August 19, 1986

Mr. Eric W. Schoen
[redacted]

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

Dear Mr. Schoen:

I have received your letter of July 11 and the materials attached to it. Please accept my apologies for the delay in response.

Your inquiry pertains to a denial of a request for financial disclosure statements filed by elected officials of the City of Yonkers. The basis for the denial is stated in a memorandum sent to David Smith, Assistant City Manager, by Joseph T. Bonanno, Assistant Corporation Counsel, in which Mr. Bonanno advised that:

> "Yonkers City Code Section 7-22[D] proscribes the release of disclosure statements filed pursuant to the City Code of Ethics. This section specifically provides that such statements '...are not to be a public record and they shall be in the sole custody of the Board of Ethics but kept in a sealed file in the office of the Corporation Counsel and subject to examination at any reasonable time by two (2) or more members of the Board of Ethics...(emphasis added)'.
>
> 'Moreover, disclosure of the information which is sought is further proscribed by Public Officers Law Section 89,2-a which prohibits the release of information which constitutes an un-

> warranted invasion of personal privacy, as well as Public Officers Law Section 96(2)(a) which bars the disclosure of any personal information which is prohibited by Law from being disclosed."

As such, Mr. Smith denied the request and advised that you could appeal to the Committee on Open Government.

Without knowledge of the contents of the financial disclosure statements, clear direction cannot be offered. Further, while the following comments should not be construed to suggest that the statements are available, I believe that some of the statements made by City officials are erroneous.

First, Mr. Bonanno referred to section 89(2-a) of the Public Officers Law, which is part of the Freedom of Information Law, and to section 96(2)(a) of the Public Officers Law, which is part of the Personal Privacy Protection Law. Section 89(2-a) states that:

> "Nothing 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."

However, section 96 is applicable only to state agencies; it does not apply to municipalities, such as the City of Yonkers. The requirements of the Personal Privacy Protection Law pertain to records and personal information of an "agency", which is defined for purposes of that statute in section 92(1) to mean:

> "...any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

In view of the foregoing, a state agency subject to the Personal Privacy Protection Law may be prohibited from disclosing personal information due to the provisions of section 89(2-a) when read in conjunction with section 96 of the Personal Privacy Protection

Law. However, those provisions do not apply to personal information maintained by a "unit of local government". Therefore, in my view, neither the Freedom of Information Law, section 89(2-a), nor the Personal Privacy Protection Law would serve to prohibit disclosure of financial disclosure statements.

Second, it appears that the statements are considered to be confidential under the Yonkers City Code. From my perspective, a provision of a municipal code cannot serve as a basis for exempting records from disclosure. 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 City Code in question is not a statute, I do not believe that it can require "confidentiality" [see e.g., Morris v. Martin, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. 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.

Third, the most relevant exception to rights of access is section 87(2)(b) of the Freedom of Information Law, which enables an agency to withhold records or portions thereof to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". It is noted that the Freedom of Information Law, as it pertains to municipalities, such as the City of Yonkers, 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, too, that, despite the confidentiality restriction present in the City Code, 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.), aff'd ___ NY 2d ___, NYLJ, July 15, 1986]. 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 inspecoion 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. Again, however, without knowledge of the contents of the statements, specific guidance cannot be offered.

Lastly, you were informed that you could appeal to this office. In this regard, it is emphasized that 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. Further, with respect to appeals, 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 records the reasons for further denial, or provide access to the record sought."

It is suggested that you attempt to ascertain the identity of the person or body designated to render determinations on appeal. It is likely that such a designation may be found in the City's rules and regulations promulgated 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: David Smith, Assistant City Manager
Joseph T. Bonanno, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-39
FOIL-AO-4212

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

August 19, 1986

Mr. Robert J. Troise
[redacted]

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

Dear Mr. Troise:

As you are aware, I have received your letter in which you raised a series of questions concerning rights of access to records.

In your first area of inquiry, you wrote that you are employed by two state agencies, the courts and SUNY at Stony Brook. You added that you are interested in viewing the contents of your "personnel folder" and asked whether any of the contents may be withheld and to whom you may direct requests.

It appears that both the Freedom of Information and Personal Privacy Protection Laws may be relevant, for the records sought pertain to you, and it is suggested that your request be made under both statutes. Since you referred to the courts, I point out that, as a general matter, neither the Freedom of Information Law nor the Personal Privacy Protection Law is applicable to the courts or court records. However, it is has been held that the Office of Court Administration, which is not a court but rather the administrative arm of the court system, is an "agency" required to comply with the Freedom of Information Law. Agencies subject to the Freedom of Information Law and/or the Personal Privacy Protection law are required to adopt procedural rules which include the designation of individuals to whom requests may be directed. For example, under the Freedom of Information Law, each agency must designate one or more "records access officers", persons having the duty of coordinating an agency's response to requests for records. Further, in most instances, I believe that the persons designated under the Free-

dom of Information Law are usually also responsible for dealing with requests made under the Personal Privacy Protection Law. As such, it is recommended that your requests be directed to the "records access officer" at the agency or agencies that you believe maintain the records sought.

Both the Personal Privacy Protection Law and the Freedom of Information Law require that an applicant "reasonably describe" the records sought. Therefore, when making a request, sufficient detail should be included to enable agency officials to locate the records sought.

The Freedom of Information Law, as a general matter, is based upon a presumption of 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 sections 87(2)(a) through (i) of the Law. Although some aspects of a personnel file might be deniable under the Freedom of Information Law, such as an opinion of a supervisor concerning your performance [see Freedom of Information Law, section 87(2)(g)], the same record might be available to you as a "data subject" pursuant to the Personal Privacy Protection Law, section 95(1). Under the Personal Privacy Protection Law, records pertaining to a data subject are available to him or her. The exceptions to rights of access are found in subdivisions (5) through (7) of section 95. The extent to which they might be applicable is conjectural, for I have no information concerning the contents of the records in question. It is noted, too, that collective bargaining agreements often afford employees significant rights to personnel records pertaining to them. Consequently, if you are a party to such an agreement, it is suggested that you review it, for it may be useful to you.

The second area of inquiry concerns a request directed to the State Insurance Fund which apparently involves records that you supplied to the agency. From my perspective, the issue is similar to that discussed in preceding commentary and, consequently, similar advice need not be restated.

Your third, question involves access to a "NYS Civil Service list". It is assumed that you are referring to an "eligible list" that identifies those who passed a civil service exam. Eligible lists have long been available pursuant to Civil Service Rules and the Freedom of Information Law.

The next area of inquiry pertains to medical records. As a general matter, medical records pertaining to a patient are not directly accessible to the patient. Under section 17 of the Public Health Law, a competent patient may designate a physician to request and obtain on his or her behalf medical records maintained by a physician or hospital, for example. It is noted that

Governor Cuomo recently signed legislation (Chapter 497) that will give patients direct rights of access to most medical records pertaining to them. The legislation becomes effective on January 1, 1987. Therefore, while there may not be direct rights of access to medical records now, such a right will exist within a matter of months.

Another inquiry concerns a complaint that you apparently sent to the Attorney General in regard to a problem you encountered with your car. You were told by General Motors that you could not have its report, and you asked whether you may obtain it from the Attorney General records that it may have prepared relative to your claim. In this regard, 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, General Motors, a private corporation, is not subject to the Freedom of Information Law.

With respect to records prepared by the Attorney General, it is difficult to advise without additional information. However, I point out that attorney work product and material prepared for litigation may be exempt from disclosure pursuant to section 3101 of the Civil Practice Law and Rules. If the records in question are confidential under section 3101, I believe that they could be withheld under section 87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute."

The last area of inquiry concerns reports maintained by SUNY at Stony Brook "made out to students, staff, faculty..." Again, without knowing more of the nature of the reports, clear direction cannot be offered. Further, the records could pertain to a variety of situations and, therefore, a variety of statutes might be relevant. For instance, education records pertaining to a particular student are generally considered confidential under the federal Family Educational Rights and Privacy Act (20 USC section 1232g).

Enclosed are copies of the Freedom of Information Law and the Personal Privacy Protection Laws, as well as explanatory brochures concerns each of these statutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1310
FOIL-AO-4213

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

August 19, 1986

Ms. Frances C. Nugent
Town Clerk
Town of Rye
10 Pearl Street
Port Chester, NY 10573

The staff of the Committee on 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. Nugent:

I have received your letter of July 18 as well as the materials attached to it. Please accept my apologies for the delay in response.

The first issue raised in your letter concerns a meeting of the Town Board of the Town of Rye scheduled to begin at 5 p.m. on July 2. You enclosed a news article containing a notice of the meeting and which also stated that "After the meeting, the board will meet in executive session to discuss personnel". In your capacity as Town Clerk, you were apparently prepared to attend. However, you wrote that "At 5:07, the Supervisor's Secretary gave an oral message from him that a quorum was not expected and that [you] could be excused". As such, you "recorded that no quorum was present and the meeting would not be held and left the building". Nevertheless, on the following morning, you learned that the meeting was held at 5:50, that certain actions were taken, and that minutes were prepared by the Town Attorney. Those minutes were later made "official" by the Board on July 15.

In this regard, I offer the following comments.

First, based upon the facts as you described them, it appears that the meeting as originally scheduled was cancelled, for you, and perhaps others, left the site of the meeting following the receipt of a message from the Supervisor's office. If it was determined later that a quorum would be available for the

purpose of conducting a meeting, it is my view, due to your responsibility as clerk, that you should have been so informed. Further,it appears that a new notice concerning an unscheduled meeting should have been given to the public and the news media in accordance with the requirements of the Open Meetings Law.

I point out that the Open Meetings Law does not preclude a public body from convening a meeting quickly. In terms of notice, section 104(1) of the Open Meetings Law pertains to meetings scheduled at least a week in advance and requires that notice of the time and place of such meetings be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 104(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and by means of posting "to the extent practicable" at a reasonable time prior to such meetings. It is unclear whether efforts were made to provide notice prior to the unscheduled meeting that began at 5:50.

Further, somewhat related is your capacity to carry out your powers and duties as town clerk pursuant to section 30 of the Town Law. Subdivision (1) of the cited provision states in part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep an complete and accurate record of the proceedings of each meeting". Without notice to you, it appears that you were effectively precluded from carrying out your powers and duties imposed by section 30 of the Town Law. In view of the specific direction in the Town Law, it is questionable in my view whether minutes prepared by a person other than the clerk or deputy clerk may be considered as "official".

Second, viewing the matter from a different vantage point, it was noted earlier that a news article concerning the scheduled meeting stated that an executive session would be held after the meeting to discuss personnel.

In a technical sense, an executive session cannot be scheduled prior to a meeting. I point out that the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Therefore, an executive session is not separate and distinct from an open meeting, but rather is a part of an open meeting. Further, section 105(1) of the Law prescribes a procedure that must be accomplished, during an open meeting, before an executive session may be held. Specifically, section 105(1) states in 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..."

As such, again, technically, it cannot be known that an executive session will indeed be held until a motion is made and carried by a majority vote of the total membership of a public body during an open meeting.

In addition, due to the language of the "personnel" exception for executive session and judicial interpretations of the Law, a motion to enter into executive session to discuss "personnel", without greater description, would in my view be inadequate. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

It has been held that a motion to enter into an executive session relative to the provision quoted above should contain reference to two elements. It should include the term "particular" to indicate that the discussion involves a specific person or corporation; and it should refer to one or more of the topics listed in section 105(1)(f) [see Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983 and Doolittle, Matter of v. Board of Education, supra]. As such, a motion to discuss "the employment history of a particular person" or a "matter leading to the appointment of a particular person" would be appropriate; a motion to discuss "personnel" or "personnel matters" without more would not.

The second issue raised in your letter concerns your son, Terry Nugent, who apparently is or had been a tenant of a building owned by the Town. In brief, as I understand the situation, your son was asked to vacate or to pay rent based upon market value. A letter addressed to Mr. Nugent by the Town Attorney on January 30 indicated that "The Town Board of the Town of Rye has

met to discuss the issue of your continued occupancy", and that the Board made decisions relative to the issue. Subsequently, Mr. Nugent requested copies of minutes of the meeting. In response, the Town Attorney in a letter of July 10 wrote that:

> "There was no formal meeting of the Rye Town Board called for the express purpose of discussing your tenancy. Rather, at two announced meetings, the subject of your tenancy was brought up. These meetings were held, to the best of my recollection and after a review of calendars on the morning of January 21, 1986, and on January 29th, 1986 at 5:00 P.M.
>
> "My letter of January 30th, is a consensus I assembled from the Board members. As I recall, each of the Board members reviewed my letter to you, prior to it having been mailed. As such, no minutes of any action exists."

Although an informal "consensus" may have been reached, it is questionable in my opinion whether such a consensus could be considered as valid and binding action. Assuming that the Town Board has the sole authority to render a determination on the matter, I believe that such a determination could only be made at a meeting of the Board pursuant to a motion carried by a majority vote of its total membership. Relevant to the powers and duties of public bodies is the quorum requirement imposed as follows by section 41 of the General Construction Law:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and

> not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

In view of the foregoing, I believe that a public body may carry out its powers and duties only at a duly convened meeting during which action is taken by means of an affirmative vote of a majority of its total membership.

Lastly, I point out that a record of votes indicating the manner in which each member cast a vote must be prepared when final action is taken. Specifically, section 87(3) of the Freedom of Information Law 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."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Aldo V. Vitagliano, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4214

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

August 19, 1986

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:

As you are aware, I have received your letter of July 12. Please accept my apologies for the delay in response.

According to correspondence attached to your letter, you requested records of the Binghamton Police Department relative to a specific incident. In a determination following your appeal, Mayor Crabb upheld an initial denial stating that:

> "Criminal proceedings based on the files you seek are currently pending in Broome County Court. Because criminal proceedings are in progress, the City can not in any possible way do something which could interfere with a judicial proceeding or possibly deprive a person of a fair trial by releasing investigation records."

In your letter to this office, you wrote that you "have to agree that the denial is in order for the investigative material but is it in order for a denial of the complaint or other material that is not of an investigative nature?"

Without knowledge of the nature of the complaint or other materials, I cannot offer specific guidance. However, it appears that several grounds for denial might be applicable.

For instance, section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof of when disclosure would constitute an "unwarranted invasion of personal privacy". It is possible that there may be considerations of privacy, particularly with respect to a complaint.

Further, the provision to which Mayor Crabb alluded, section 87(2)(e), states in its entirety that an agency may withhold records that:

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

Again, without knowledge of the contents of the records in question, I cannot conjecture as to rights of access or the capacity to deny under section 87(2)(e).

A third possible ground for denial is section 87(2)(g), which enables an agency to withhold records that:

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

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

The remaining ground for denial in the Freedom of Information Law of possible significance is section 87(2)(f), which permits an agency to withhold records when disclosure would "endanger the life or safety of any person". The assertion of that provision would be dependent upon specific facts and circumstances which, against, are unknown to me.

In short, without greater knowledge of the incident or the other records to which you alluded, specific advice cannot be offered.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor Crabb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4215

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

August 19, 1986

Ms. Ellen Bernstein
[redacted]

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

Dear Ms. Bernstein:

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

You wrote that you are working on a video documentary about the City University of New York (CUNY) and that you need information from CUNY to complete the project. You enclosed a draft letter of request and asked that I advise you with respect to rights granted by the Freedom of Information Law. According to the draft, you are interested in the following information:

> "1) Members of the original task force on writing, and biographies of the members.
>
> 2) What NETWORKS is, what their function is within CUNY, who the members are and their credentials.
>
> 3) All of the minutes of the meetings of the task forces on Reading, Writing and Math concerned with the standardized test procedures.
>
> 4) The role of the Chief Reader and how the chief readers are selected and evaluated.
>
> 5) How the Assessment Tests historically and currently have been evaluated for cultural and racial bias and by whom. How the test is reviewed and changed yearly.

6) How the Standards for grading have been changed since the tests were implemented.

7) Statistics of passing and failing grades broken down into school."

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

First, the draft is addressed to a named individual, who is apparently associated with the CUNY Instructional Resource Center. While that person might have the authority and ability to respond, I point out that each agency, including CUNY, is required to have designated one or more "records access officers" who have the duty of coordinating responses to requests made under the Freedom of Information Law. By way of background, section 89(1)(b)(iii) of the Freedom of Information Law requires that the Committee on Open Government promulgate general regulations that govern the procedural aspects of the Law. The Committee has done so (21 NYCRR Part 1401 et seq.). In turn, section 87(1) of the Law requires each agency to adopt procedural rules and regulations consistent with the Law and the Committee's regulations. Again, while it is possible that the person you identified might be authorized to respond to a request, it might be worthwhile to attempt to ascertain the identity of the designated records access officer.

Second, as a general matter, the Freedom of Information Law pertains to existing records. Section 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. Several aspects of your draft request are written in the form of questions, and the Freedom of Information Law would not require the agency to prepare answers in response to the questions. It is suggested that, rather than raising questions to elicit information, requests be made for records.

Third, with respect to rights of access to existing records that fall within the scope of your request, 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.

It is noted, too, that 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. The quoted provision in my view evidences a recognition on the part of the Legislature that a single record

might be both available and deniable in part. I believe that it also imposes an obligation on agency officials to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

From my perspective, two of the grounds for denial are likely relevant to the information sought. This is not to suggest that records may be withheld in their entirety, but rather that certain records or portions of records might be denied.

Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Further, section 89(2)(b) lists a series of examples of unwarranted invasions of personal privacy, the first of which includes "disclosure of employment, medical or credit histories or personal references of applicants for employment". The initial area of your request involves members of a task force and their biographies. While members' names, for example, would in my view clearly be available, "biographies" consisting of personal information or employment histories could likely be withheld. I point out here that the Freedom of Information Law is permissive; while an agency may withhold, it is not obliged to do so. Therefore, if, for instance, CUNY desires to disclose the credentials or similar information regarding members of a task force, it may do so.

The other ground for denial, section 87(2)(g), pertains to inter-agency and intra-agency materials. If the records in question were prepared by CUNY officials and staff, I believe that they could be characterized as "intra-agency" materials. More 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. Concur-

rently, to the extent that intra-agency materials are reflective of advice, opinion, recommendations and the like, it is my view that they could be withheld.

It appears that, to the extent that the information in which you are interested exists in the form of a record or records, much of it would be available. Extant statistical or factual information, including factual information in a narrative form, would in my view clearly be available. Standards used for grading and evaluation, for example, would likely be reflective of agency policy and would be accessible on that basis. Similarly, a description of the duties of a particular position (i.e., Chief Reader) would in my view represent policy that is available.

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law in greater detail. It also contains a sample letter of request that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4216

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

August 19, 1986

Ms. Hazel M. Gilbert
[redacted]

The staff of the Committee on 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. Gilbert:

I have received your letter of July 24 addressed to Ms. Kahn of this office. Please accept our apologies for the delay in response.

Your inquiry concerns tape recordings of public hearings conducted by the Zoning Board of Appeals of the City of Oswego. You wrote that, after a tape recording is transcribed, a certification is made by the secretary that "this is a true and accurate transcript..." The first question is: "If a portion or portions of a tape is erased can an accurate and true transcript be transcribed?" You also asked whether tape recordings "kept on file in the Zoning Office, in City Hall..." are "official city records". According to your letter, "The city attorney has recently held that tape recordings are only to refresh your memory and not part of the official record."

In this regard, I offer the following comments.

With respect to your initial question concerning the capacity to prepare an accurate transcript after a portion of a tape has been erased, I do not believe that the issue arises under the Freedom of Information Law. As such, I could not advise with certainty.

With regard to the remaining issue, whether or not a tape recording is considered "official" or otherwise is in my view irrelevant. If the City maintains a tape recording, I believe that it is a "record" subject to rights of access granted by the Freedom of Information Law. It is emphasized that the term "record" is defined expansively in section 86(4) of the Law to include:

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

Based upon the language quoted above, if a tape recording is "kept" or "held" by the City of Oswego, it is a "record" that in my opinion falls within the scope of the Freedom of Information Law. I point out, too, that the Court of Appeals, the State's highest court, has held that the definition should be interpreted as broadly as its language indicates [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); Washington Post v. Insurance Department, 61 NY 2d 557 (1984)].

Further, 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. From my perspective, since a tape recording of a public hearing pertains to an event that was open to the public, none of the grounds for denial would apply, and the tape recording would be accessible under the Freedom of Information Law. It is noted that in a similar situation it was found 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].

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: James McCarthy, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4217

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

August 19, 1986

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:

As you are aware, I have received your letter of July 20. Please accept my apologies for the delay in response.

Your letter and the materials attached to it involve a request for records directed to the Queens County Court Clerk. The request, which apparently comprises of forty-five pages, was granted. However, you believe that the fee of $180 is excessive and that it fails to comply with the Freedom of Information Law.

In this regard, I offer the following comments.

First, it is noted that county clerks perform a variety of functions, some of which involve county records that are likely subject to the Freedom of Information Law, others of which may be held in the capacity of clerk of a court. It is possible that the records in question are considered court records, which, although available, are not subject to the Freedom of Information Law.

Second, in either case, it appears that the fee is legal and appropriate. As you may be aware, under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". In this instance, I believe that a different fee is indeed prescribed by statute. Specifically, pursuant to section 8020 of the Civil Practice Law and Rules, entitled "County clerks as clerks of court", subdivision (f) permits the following fee:

> "For preparing only, or preparing and certifying a copy of an order, record or other paper entered or filed in his office, four dollars."

Similarly, section 8021 of the Civil Practice Law and Rules, entitled "County clerks other than as clerks of courts", in subdivision (c)(9) permits a four dollar fee per copy based upon the same language as that quoted above.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4218

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

August 19, 1986

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 July 18. Please accept my apologies for the delay in response.

Attached to your letter is a copy of a request sent to the Syracuse Police Department for a copy of an accident report pertaining to a particular incident. The response merely states that "A report is $7.00"; it is neither signed nor dated.

It is your view that the response is improper. In this regard, I offer the following comments.

First, I believe that the issue of the amount of the fee assessed by the Syracuse Police Department is the subject of litigation. Since this office as a matter of policy will not advise if it is known that the specific issue is under litigation, I will not comment with respect to the amount of the fee.

Second, I agree that the response should have been dated, if only to enable you to know that the reply was given within statutory time limit.

Third, from my perspective, a response to a request should indicate that the record sought is available or deniable. For instance, if the response had been "The report is $7.00", rather than "A report is $7.00", I believe that there would have been a clear indication that the report would be made available to you upon payment of the 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-4219

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

August 19, 1986

Mr. John V. Hartzell
Deputy Clerk of the Board
Jefferson County Board of Supervisors
175 Arsenal Street
Watertown, New York 13601

Dear Mr. Hartzell:

Thank you for your letter of July 24 and the materials attached to it. The correspondence pertains to a request made by John B. Johnson, Jr. of the Watertown Times.

According to the materials, Mr. Johnson requested from Jefferson County records indicating:

> "Accumulated vacation time for all current Jefferson County employees and all employees who have left the employment of the county since 1970, who are not or were not covered by collective bargaining agreements."

The Acting Records Officer, according to an appeal attached to your letter, "refused to provide any of the records requested showing accumulated vacation time for current employees on the grounds that disclosure of the names of current employees would constitute an unwarranted invasion of personal privacy". It was apparently inferred in the initial response that records pertaining to former employees were no longer maintained by the County. In response to the appeal, it was stated that "such records were provided insofar as they were available in regard to current and former employees". The determination on appeal also affirmed the deletion of names of employees as an unwarranted invasion of personal privacy. He also cited the case of Bahlman v. Brier [462 NYS 2d 381, 119 Misc. 2d 110 (1983)]. In that decision, the Court upheld a denial of identifying details relative to sick leave accumulated by police officers. The Appeals Officer also quoted a portion of the decision which stated that: "No public interest is advanced by publishing a laundry list of names so that the newspaper can 'ask the guy what was his problem'" (id. at 382).

Enclosed is a copy of Capital Newspapers v. Burns, which was decided by the Court of Appeals on July 3. In my opinion, the decision effectively reversed the holding in Bahlman, supra, and indicates that the information sought, including names of employees, to the extent that such records exist, must be made available. The decision granted access to the dates of sick leave used by a particular police officer, which in my view is arguably more "personal" than information regarding the accumulation of vacation leave. Further, in its discussion of the intent and utility of the Freedom of Information law, the Court found that the statute "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of public officers". It is noted, too, that the reason or motive for seeking records is generally irrelevent to rights of access [see Farbman & Sons v. New York City, 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165]. Further, although a reporter might "ask the guy what was his problem", the Freedom of Information Law pertains to existing records; it is not a vehicle that requires public officials to answer questions. As such, that consideration is also, in my view, irrelevant to rights of access.

In view of the Capital Newspapers decision, it is suggested that the County's Appeals Officer might want to reconsider the denial.

Once again, I thank you for forwarding the materials. If I can be of assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: John B. Johnson, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4220

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

August 19, 1986

Mr. Patrick J. King, Jr.
[redacted]

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

Dear Mr. King:

As you are aware, I have received your most recent correspondence. Please accept my apologies for the delay in response.

It is noted at the outset that on receipt of your letter, copies of "Your Right to Know" were sent, as you requested, to the individuals identified in your letter.

Your inquiry concerns either a denial of or a failure to respond to requests made under the Freedom of Information Law. Based upon your letter and the materials attached to it, one request involves minutes of a judicial proceeding in which you were involved that resulted in a mistrial. The request was directed to the District Attorney at the suggestion of the County Clerk and was apparently denied. The other requests were directed to the Villages of Woodsburgh, Hewlett Bay Park and Hewlett Neck. As of the date of your letter, you received no responses to those requests. These requests involve letters sent to you or your attorneys, as well as minutes of meetings.

With respect to minutes of the judicial proceeding to which you referred, if it can be assumed that the minutes pertain to a public proceeding, there would appear to be no basis for withholding the records from you, the subject of the proceeding.

With regard to the unanswered requests, I point out that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, 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 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: Ed Grilli, Office of the District Attorney
W. Shapiro, Trustee, Village of Woodsburgh
J.L. Morris, Mayor, Village of Hewlett Bay Park
Clerk, Village of Hewlett Neck

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4221

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

August 19, 1986

Mr. David Dugatkin
Reporter
Wallkill Valley Times
P.O. Box 446
Walden, New York 12586

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

Dear Mr. Dugatkin:

As you are aware, I have received your letter of July 22. Please accept my apologies for the delay in response.

Your first area of inquiry pertains to police blotters. Specifically, you asked:

> "...are they public information that is open for inspection during regular office hours? And if so, how should they be kept? (index cards, notebooks, etc?) Specifically our village police department says they do not keep a police blotter, but index cards on each incident. Shouldn't the blotter be a bound book where pages cannot be removed?"

In this regard, it is emphasized at the outset that the phrase "police blotter" is not, to the best of my knowledge, defined in any provision of law, nor is there any requirement that a police blotter be kept. As such, there is neither a requirement that there must be a police blotter, nor is there any law that pertains to the manner in which a police blotter must be maintained or preserved. Based upon custom and usage, it was held that a police blotter traditionally consists of a log or diary in which any event reported by or to a police department is recorded. Further, in that decision, it was specified that the

blotter contains merely a summary of events or occurrences, that it generally contains no investigative information, and that, therefore, as described, it is available under the Freedom of Information law [see Sheehan v. City of Binghamton, 59 AD 2d 808 (1977)].

It is possible that the index cards to which you referred may be the equivalent of what traditionally has been characterized as a police blotter. If that is so, I believe that they would be accessible. However, if the index cards contain information above and beyond the contents of a traditional police blotter, rights of access would be dependent upon the contents of the cards. Assuming that the contents of the index cards are more expansive or detailed than the contents of a blotter, it is likely that section 87(2)(e) of the Freedom of Information Law would be of particular relevance. The cited provision states that an agency may withhold records that:

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

The language quoted above, in brief, conditions the ability to deny access to records compiled for law enforcement purposes to the situations described above in which disclosure would result in some type of harm, i.e., interference with an investigation. As such, depending upon the effects of disclosure, individual cards might be available in their entirety, or perhaps in part, or they might be deniable in their entirety. It is possible, too, that other grounds for denial might be relevant. In short, without additionally knowledge of the contents of the index cards, specific advice cannot be offered.

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. Therefore, while an agency, such as a police department, may withhold record,s or portions of records, its policy on disclosure must in my view be consistent with the Freedom of Information Law and other applicable statutes.

The second area of inquiry concerns the times during which you may seek or review records of a part-time police department. By way of background, it is noted that the Committee on Open Government is required to promulgate general regulations governnng the procedural aspects of the Freedom of Information Law [see section 89(1)(b)(iii)]. The Committee has done so (21 NYCRR Part 1401). In turn, section 87(1) of the Law requires the governing body of a public corporation (i.e., a town board or village board of trustees) to adopt rules and regulations consistent with the Freedom of Information Law and the Committee's regulations. The Law requires that the regulations include reference to "the times and places such records are available". The regulations promulgated by the Committee indicate that, when an agency maintains regular business hours, requests may be made during those hours.

To provide you with additional information, enclosed are copies of "Your right to Know", which describes the Freedom of Information Law more fully, the Freedom of Information Law, the regulations promulgated by the Committee and model regulations designed to enable agency officials to easily adopt appropriate procedures in compliance with the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

OML-AO 1314
FOIL-AO 4222

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

August 20, 1986

Mr. C. Bruce Lawrence
Suter, Doyle, Kesselring,
Lawrence & Werner
Attorneys at Law
950 Crossroads Building
2 State Street
Rochester, New York 14614

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

Dear Mr. Lawrence:

I have received your letter of July 25 in which you requested an advisory opinion. Please accept my apologies for the delay in response.

By way of background, you represent The Weller Companies, which unsuccessfully requested from the State Liquor Authority (SLA) the "1985 SLA list of licenses by County" and "Recommendations for approval or disapproval of local ABC Boards". In 1985, Weller obtained the same type of list for an earlier period, which apparently was published. You indicated that "Weller does not solicit the listees, but presumes that the people who buy the publication may contact the listees". The list most recently requested was denied on the basis of section 89(2)(b)(iii), which permits an agency to deny on the ground that disclosure would constitute an unwarranted invasion of personal privacy when a list of names and addresses would be used for "commercial or fund-raising purposes".

It is your view, however, that various requirements of the Alcoholic Beverage Control Law (ABC Law) and regulations promulgated by the SLA essentially negate the authority to deny based upon provisions pertaining to the protection of personal privacy. For example, you cited section 100(7) of the ABC Law which requires that, after filing a new application for a license, the applicant must post a notice "in a conspicuous place at the

entrance to the proposes premises"; you also cited section 107 of the ABC Law, which requires that "Every person procuring a license hereunder must publish a notice thereof..."; similarly section 114 requires that a license be conspicuously displayed in the place of business of the licensee.

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 grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, the provision upon which the denial was premised, section 89(2)(b)(iii), in my view represents something of an aberration or exception relative to the general scheme of the Freedom of Information Law. With the exception of that provision, the purpose for which a request is made and the use of accessible records are irrelevant to rights of access [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 and Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. In the case of section 89(2)(b)(iii), rights of access may be conditioned upon the purpose for which a request is made. According to your letter, Weller does not engage in any direct contact with licensees; however, as I understand the situation, it prints information regarding licensees, and sells or distributes a publication containing the information. In turn, the recipients of the publication may contact licensees. While Weller's activities do not involve any direct contact or solicitation, from my perspective, it nonetheless seeks the list for a "commercial purpose".

Third, in my opinion, the Freedom of Information Law generally does not enable an agency to restrict access because an applicant seeks records for commercial purposes; often records are routinely made available even though they may be requested for commercial purposes (i.e., contracts, successful bids and related records). Further, I do not believe that the authority to deny pursuant to section 89(2)(b)(iii) pertains to all lists. This office has consistently advised that the exception pertains only to those lists that identify natural persons, rather than entities, for example.

If the list in question identified only entities, section 89(2)(b)(iii) would in my view be inapplicable. However, it is possible that it identifies both entities, such as commercial establishments, as well as natural persons. It is questionable in my view whether an entire list could be withheld if it identifies entities and natural persons. Concurrently, however, it may be difficult if not impossible in some cases for the agency to determine whether names appearing on lists identify persons or entities.

Of potential relevance are some of the related provisions of the ABC Law, such as those requiring the posting of notice and publication. I would conjecture that those requirements were imposed by the Legislature due to the public interest that may exist with respect to an activity that is regulated by government.

There are judicial decisions involving requests for lists of names and addresses, or their equivalent, where the courts upheld agency denials. However, I believe that the situations described in those cases might be distinguishable from those present here. In Scott, Sardano & Pomeranz v. Records Access Officer of the City of Syracuse [65 NY 2d 294, 491 NYS 2d 289 (1985)], a law firm requested accident reports for purposes of contacting accident victims by means of direct mail solicitation. While accident reports are generally available under both the Freedom of Information Law and section 66-a of the Public Officers Law, the court determined that the identifying details pertaining to the victims, their names and addresses, could be deleted. Another decision, Goodstein v. Shaw [463 NYS 2d 162 (1983)], dealt with a request by an attorney for complaints filed with the State Division of Human Rights during a particular time period. The request was granted, with the exception of the first names and addresses of complainants. The court determined that the names and addresses were sought for commercial purposes and, accordingly, could be withheld. From my perspective, the contents of the list in question are somewhat less "personal" than those described in the cases cited above. Both involved names of persons and their home addresses; both involved records relating to a "personal" event, i.e., a motor vehicle accident or a claim of discrimination. In this instance, the name on the list might identify an entity, rather than a person. Further, to the extent that the list does identify a natural person, it pertains to that person acting in his or her capacity as seller of alcoholic beverages. The address on the list, as I understand it, is not a home address, but rather the address of the commercial premises where alcoholic beverages may be purchased. Additionally, the posting and publication requirements would appear to be intended to enable the public to know the location where alcoholic beverages may be sold, and the identity of the licensee. While it is questionable that those requirements constitute a waiver of the protection of privacy as envisioned by section 89(2)(c)(ii) of the Freedom of Information Law as you suggest, it is also questionable in my view whether, given those requirements, an agency could justifiably withhold a list containing the equivalent of information that had previously been published in a newspaper and which is currently conspicuously posted in a commercial establishment. I recognize that an individual accident report, like an individual license is publicly available and that the Scott decision, supra, upheld a denial of a broad request for the names and addresses of accident victims. The distinctions in my

opinion involve the fact that the sale of alcoholic beverages is an activity regulated by the state that requires a license, an official approval indicating that specific qualifications have been met, coupled with the requirements of the ABC Law which are apparently intended to give the public the capacity to know, by means of posting and publication, that those requirements have been satisfied.

In short, to the extent that the list identifies licensees as entities rather than natural persons, I do not believe that the privacy provisions of the Freedom of Information Law would apply; to the extent that it does identify natural persons, the notice, posting and publication requirements imposed by the ABC Law likely would effectively negate the application of the provisions that might otherwise permit a denial.

The remaining issue concerns rights of access to recommendations for approval or disapproval of license applicants by local ABC boards. In brief, it is your view that such boards are subject to the requirements of the Open Meetings Law, that their minutes are available and that their recommendations constitute their final determinations, although not the final determinations, which are made by the SLA.

Section 43 of the ABC Law provides that the "Functions, powers and duties of local boards" include the following:

> "1. To recommend to the liquor authority the issuance or the refusal of licenses to sell alcoholic beverages at retail.
>
> 2. To recommend to the liquor authority the revocation of such licenses."

Section 30 of the ABC Law indicates that local boards consist of two members, except in New York City, where the board consists of four members.

Based upon the foregoing, a local ABC board is in my view a "public body" subject to the Open Meetings Law. Section 102(3) of that statutes 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 sub-committee or other similar body of such public body."

A local board is an entity consisting of two members or, in the case of New York City, four members; it is assumed that its powers can be carried out only by means of an affirmative vote of its members (a quorum); and it conducts public business and performs a governmental function for both the state and a public corporation, i.e., a county.

As a general matter, meetings of public bodies must be preceded by notice (see Open Meetings Law, section 104) and conducted open to the public (section 103), except to the extent that a topic may be considered during an executive session. The phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded [section 102(3)], and a procedure must be accomplished during an open meeting prior to entry into an executive session. That procedure is found in section 105(1), which 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..."

When read in conjunction with section 106 concerning minutes, which will be discussed later, I believe that a public body may generally vote during a proper executive session,unless the vote is to appropriate public monies. Whether a vote is taken during an open meeting or an executive session, minutes reflective of the action taken must be prepared as required by section 106.

Among the grounds for entry into an executive session, it appears that section 105(1)(f) may be particularly relevant to a local ABC board in relation to licensing. The cited provision permits a public body to enter into an executive session to discuss:

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

A local board might discuss the "financial or credit history of a particular person or corporation" in its review of an application for a license. To that extent, an executive session could in my view appropriately be withheld. However, the vote to recommend that a license be approved or disapproved likely must be conducted during an open meeting during which the general public may be present. If my assumptions are accurate, the recommendations transmitted by local boards to the SLA are the result of action taken at open meetings during which the public may be present. Further, if that is so, minutes or similar records indicating the nature of the recommendation should likely be available.

With respect to minutes, section 106(1) pertains to minutes of open meetings, section 106(2) concernings minutes of action taken during an executive session, and section 106(3) states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Again, while minutes are available "in accordance with the provisions of the freedom of information law", which contains certain bases for withholding, again, minutes indicating action taken during an open meeting would in my view be available, even though they may indicate a "recommendation".

I agree that a recommendation transmitted from one agency to another may generally be withheld pursuant to section 87(2)(g) of the Freedom of Information Law. However, section 87(2)(g)(iii) requires that inter-agency or intra-agency materials reflective of "final agency policy or determinations" must be made available. In this instance, you contend that the action of the local board, although not the final and binding determination, which may be rendered only by the SLA, is the final agency determination of the local board. While there is controversy over what may be considered "final", there is precedent which in my view indicates that action taken by a local board may be accessible. For example, in Miracle Mile Associates v. Yudelson, it was found that intermediate decisions in a "multilevel administrative process" constitute final agency determinations [68 AD 2d 176, 182 (1979)]. In other contexts, what may be viewed as recommendations made by advisory bodies are available. At the local

government level, a planning board must hold open meetings, and its actions must be memorialized in minutes available to the public, even though its actions constitute recommendations transmitted to a governing body, a final decision-maker. As indicated earlier, the term "public body" includes committees and subcommittees, which generally have only the capacity to advise. Further, in Syracuse United Neighbors v. City of Syracuse [80 AD 2d 984, appeal dismissed, 55 NY 2d 995 (1982)], it was found that minutes of meetings of advisory task forces are available. In sum, due to the requirements of the Open Meetings Law and the judicial decisions cited above, determinations of local boards, although advisory to the SLA, are in my view likely available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gloria Cabiri

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4223

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

August 20, 1986

Mr. Phillip Joe Taylor
81-A-5708
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. Taylor:

I have received your letter of July 28, in which you requested assistance in obtaining records.

Specifically, you wrote that you are interested in obtaining "all records from your trial". In this regard, I offer the following comments and suggestions.

It is noted at the outset that the Committee is authorized to advise with respect to the Freedom of Information Law. That statute pertains 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 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 Freedom of Information Law does not apply to the courts or court records.

However, other statutes often grant rights of access to court records, and it is suggested that you direct your request to the clerk of the court in which the proceeding was conducted. It is also suggested that, when making a request, you include as much detail as possible, such as names, dates, indictment, docket and identification numbers, as well as similar information that might enable court officials to locate the records.

Lastly, it is recommended that you confer with an attorney or seek the assistance of Prisoners' Legal Services or a legal aid group, 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-4224

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

August 20, 1986

Mr. Steven C. Martin
68-B-58
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. Martin:

I have received your letter of July 28. Please accept my apologies for the delay in response.

Your inquiry concerns the relationship between the Freedom of Information Law and section 255 of the Judiciary Law. You alluded to decisions indicating that agencies that administer the court system, such as the Office of Court Administration, are subject to the requirements of the Freedom of Information Law. Your question is as follows: "Would a court clerk in a court of law be held as administering the judicial branch, and subject to the Freedom of Information Law?"

In my view, based upon section 255 of the Judiciary Law and other statutes, a court clerk is generally the custodian of court records. Since the Freedom of Information Law specifically excludes the "judiciary", the courts, from its scope, a clerk acting as custodian of court records would not, in my opinion, be considered as "administering the judicial branch". Further, from my perspective, if records held by a court clerk were considered to be subject to the Freedom of Information Law, the exception from the Freedom of Information Law concerning the judiciary would be all but meaningless.

In short, it is my opinion that rights of access to records maintained by a court clerk are not subject to the Freedom of Information Law, but rather to the requirements of other statutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4225

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

August 20, 1986

Mr. Raymond Watson
80-B-310
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. Watson:

I have received your letter of July 27. Please accept my apologies for the delay in response.

According to your letter, in 1978 you were charged in connection with a shooting incident. It is your contention that, although a different person was implicated and identified in a line-up, that person was released after he alleged that you engaged in the assault. Following an attempt to obtain allegedly "exculpatory evidence", you were apparently informed that photographs, police officers' "memobooks" and related police reports were lost.

You have requested assistance in the matter and, in this regard, I offer the following comments and suggestions.

First, as a general matter, the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law states that the Freedom of Information Law does not require an agency to create or prepare a record in response to a request. As such, if the purported records no longer exist, the Freedom of Information Law does not apply.

Second, in many instances, records pertaining to a single incident might be maintained by several agencies. It appears that you believe that the New York City Housing Authority Police Department maintains the records, for you attached to your letter a request to that agency. In addition, however, it is possible

that duplicate or related records might be maintained by the New York City Police Department or perhaps the office of the District Attorney. As such, it is suggested that requests be directed to the records access officer at any of the agencies that might maintain the records sought.

Lastly, enclosed is a pamphlet entitled "Your Right to Know", which describes the Freedom of Information Law in detail 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:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4226

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

August 20, 1986

Mr. Walter Speller
83-A-7958
Clinton Correctional Facility
Box B
Dannemora, New York 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. Speller:

I have received your letter of July 13, in which you requested the advice of the Committee on Open Government under the Freedom of Information Law.

Specifically, you refer to a passage in an advisory opinion dated June 5, in which you were advised that the records you sought might be maintained by the office that handled the prosecution of your case, as well as by a court. You were further advised that if you were prosecuted under New York State Law, the matter would have been handled by the district attorney's office in the county in which the charges were brought. Finally, you were advised that if the prosecuting office is an agency subject to the Freedom of Information Law, such as a district attorney's office, you might make a request for the records under the Freedom of Information Law, to the records access officer of that agency. You now ask the Committee on Open Government to "advise [you] of example requests that could possibly be made and obtained by [your] directing a request to the records access officer of the district attorney's office". In this regard, I offer the following comments.

First, you indicated in your May 21 letter that the records you were seeking were "your 1983 preliminary proceeding records...in particular, certain formal 'motions' that [you] had submitted..." These are the types of items to which I referred when I suggested that "the records in question might also be maintained by the office that handled [your] prosecution...".

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. Thus, you may make a request under the Freedom of Information Law to the district attorney's office for any additional records you seek which are maintained by that agency. Since I do not know what additional records you seek or the content of the records you seek, I cannot conjecture as to the extent to which records should be made available to you.

Third, it is emphasized that section 89(3) of the Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, you should include sufficient detail to enable agency officials to locate the records sought.

Finally, for your information and use, I am enclosing another copy of "Your Right to Know", the pamphlet which describes the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4227

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

August 21, 1986

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

I have received your letter of July 28.

Included in your letter is a series of statements describing certain medical records kept by a correctional facility and outlining the procedures under which the facility prepares, transfers and divulges medical records pertaining to inmates. At the end of your letter, you asked that:

> "When [I] write back, [you] would like for [me] to write down [your] original statements listed above, and write the word 'response' below each statement, and give a comment on each statement in relation to the Freedom of Information Act, as to the illegality, breach of privacy, and whether its wrong for [you] to be denied access to [your] records when other inmates have access to them freely."

The statements in my view are somewhat repetitive, for they deal with relatively few issues. Further, several merely describe facts rather than raising issues. Consequently, I do not feel that any purpose will be served by reiterating the statements individually as you presented them.

It appears that your letter was precipitated by a request made under the Freedom of Information Law that was granted in part, and denied in part. As you described the Department's response, I believe that it would have been consistent with the Freedom of Information Law. The medical records prepared by the facility and its staff would constitute "intra-agency" materials that fall within the scope of 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 portions of intra-agency materials reflective of advice, recommendation, opinion and the like may be denied. "Suggestions for treatment" or "evaluative materials" are likely advisory in nature and therefore, in my view, fall within the exception to rights of access.

Your main objection appears to deal with the fact that inmates who work in facility medical units or who transport medical records within the facility might often have the capacity or opportunity to see or read medical records pertaining to you. In some cases, they may see medical records that you unsuccessfully request. Further, you contend that their opportunity to see the records represents a "breach of privacy".

While I am not familiar with the specific practices or procedures that have been implemented at your facility, I would conjecture that inmate workers see the records in question only in conjunction with the performance of their duties. If that is so, the records are not being made available to them pursuant to a request for the records in conjunction with a statute, such as the Freedom of Information Law; they are viewed, transported or completed only as the result of their duties as workers at a facility. I would conjecture that the use of inmate workers to perform those duties represents an effort to be efficient, to lower costs, and to provide meaningful work.

In short, it does not appear that the viewing, transportation or preparation of medical records by inmate workers, or consultation among facility staff that involve a review of medical records would constitute the type of "disclosure" that is made under the Freedom of Information Law or that may be prohibited in conjunction with a physician-patient relationship. By means of analogy, in a large hospital, a variety of staff, physicians, nurses, aides, clerks, records managers and perhaps others may view, transport or complete medical records. Again, as in the case of the facility, those kinds of exchange do not in my view violate the physician-patient privilege; they merely reflect the manner in which the duties of the hospital are carried out.

As such, if I have interpreted the facts correctly, it does not appear that the facts represent any violation of law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4228

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

August 21, 1986

Mr. Kevin Alleyne
84-A-1539
Attica Correctional Facility
Attica, New York 14014

<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. Alleyne:

As you are aware, I have received your letter of July 18, which reached this office on August 1.

Your letter, insofar as it involves access to records, concerns unsuccessful attempts to obtain medical records from the Erie County Medical Center. 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, if the hospital records in question are maintained by a private facility, the Freedom of Information Law is not applicable; if it is a county government facility, the Freedom of Information Law does apply.

Second, assuming that the Freedom of Information Law is applicable, a request should be directed to the appropriate "records access officer", a person designated by Erie County to respond to requests made under the Freedom of Information Law. Further, it is noted that section 89(3) of the Law 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 sought.

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

With respect to medical records kept by a county hospital, for example, of possible relevance is section 87(2)(g). That provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. 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 advice, opinion, recommendation and the like may in my view be withheld. In the case of intra-agency medical records, factual data, i.e., laboratory tests, would likely be available; a diagnostic opinion could likely be withheld.

Fourth, I direct your attention to section 17 of the Public Health Law. That statute does not confer upon a patient a right to gain direct access to medical records pertaining to him; however, a competent patient may designate the physician of his choice, who may in turn request and obtain medical records pertaining to the patient from a hospital. Therefore, it is possible that a physician at the facility might request medical records on your behalf.

Lastly, it is suggested that you confer with an attorney from Prisoners' Legal Services or a legal aid group, 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

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4229

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

August 21, 1986

Mr. Samuel J. Smolen, Jr.
85-A-4082
P.O. Box 149
Attica, New York 14011

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

Dear Mr. Smolen:

I have received your letter of July 28 concerning your unsuccessful attempts to gain access to records.

Specifically, you sought to obtain copies of an arrest warrant, a felony complaint and a stenographic transcript of a hearing from the Justice Court of the Village of Tuckahoe. The clerk responded that the court does not have the records in question. 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 neither the resources nor the power to "investigate", nor does it have the authority to compel an agency to grant or deny access to records.

Second, the Freedom of Information Law pertains to 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 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 Freedom of Information Law does not in my view apply to the courts or court records.

Third, however, as you are aware, other provisions of law often grant significant rights of access to court records, such as the provision you cited, section 2019-a of the Uniform Justice Court Act. While a justice court must generally make its records available, it is possible that the records you seek were transferred. For example, depending upon circumstances, the records might have been transferred to the village clerk or to a district court. Therefore, it is suggested that requests be directed to those other offices that might maintain the records. In addition, it is possible that the office of District Attorney might have duplicates of some of the records sought, and it might be worthwhile to forward a request to that office as well.

Lastly, it is suggested that you confer with an attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4230

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

August 21, 1986

Ms. Patricia C. Arthur
[redacted]

The staff of the Committee on 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. Arthur:

I have received both of your letters of July 30, in which you requested advice under the Freedom of Information Law.

The question raised in the first letter is:

> "what the legal interpretation of 'ten business days' is as it relates to a municipality where the Town Clerk is the designated Records Access Clerk and said clerk has formal office hours only part of four days a week."

Although there is nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government that specifically defines the phrase "business day", I believe that a business day is generally construed to mean any day other than Saturday, Sunday or a legal holiday (see e.g., General Construction Law, section 60). From my perspective, if, for example, a municipal office in a small community had "business hours" only two days a week, it would be unreasonable to contend that a response required to be made within ten business days could be delayed for a period of five weeks. Therefore, once again, "ten business days" should in my view be accorded its common meaning, days other than Saturday, Sunday or legal holidays.

With respect to the second letter, the correspondence attached to it indicates that you submitted a request to inspect the "NY State Fire Prevention and Building Code" to the records access officer of the Town of Gorham on July 9. In an undated response, you were informed that the Town has one copy of the code and that it is used "as a field book" and, therefore, is not always available in the Town office. It was also stated that "If you would like to look at the manual, you may contact me [Bob Gage] for a suitable time." In addition, you were informed that you could purchase the manual for $30.00 from the Division of Housing and Community Renewal. Following the response, you appealed on July 16. As of the date of your letter to this office, you had not received a response to the appeal.

If I understand the facts accurately, there was no denial, for an offer was made to enable you to inspect the code. It is suggested that you contact Mr. Gage in order to arrange a time for inspection.

With regard to appeals generally, section 89(4) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

Lastly, as service to you, I contacted the Division of Fire Prevention and Control at the Department of State to learn more about the Code. I was informed that the volume maintained at the Division of Housing and Community Renewal is outdated, and that an up-to-date version is published by Lenz and Reicker in New York City. It is available for $48.00 and consists of approximately 600 pages.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Clyde S. Beebe, Supervisor
Bob Gage

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4231

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

August 21, 1986

Mr. Max Lambert
82-A-906
Great Meadow Correctional Facility
Box 51
Comstock, New York 12821

Dear Mr. Lambert:

I have received copies of your appeals made under the Freedom of Information Law.

One of the appeals pertains to records requested from the New York Times. Please be advised that the Freedom of Information Law does not apply to the New York Times or its records. The Freedom of Information Law pertains to records of an "agency", a term defined in section 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In view of the foregoing, as a general matter, the Freedom of Information Law applies to entities of state and local government in New York; it does not apply to a private corporation or a newspaper, for example.

I hope that my comments have helped to clarify the scope of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4232

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

August 21, 1986

Mr. Vernon Ward
84-A-6619
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. Ward:

I have received your letter of July 20, in which you made several inquiries pertaining to the Freedom of Information Law.

Specifically, you ask about an inmates rights of access to his or her own medical, psychological and psychiatric reports, as well as records regarding one's "P.K. draft status" and minutes of Parole Board Hearings. You also ask whether the Law provides for the waiver of copying fees when an individual requests copies of records but cannot afford to pay the statutory fee. In this regard, I offer the following comments.

First, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in 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. 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 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, regarding access to medical records by inmates, it is my understanding that as a general rule, 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, psychological or psychiatric opinions , 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, if any of the psychiatric or psychological reports you are seeking were prepared by a mental hygiene facility and are maintained by such a facility or have been forwarded to the correctional facility, section 33.13 of the Mental Hygiene Law would in my view serve to exempt those records from disclosure. In brief, section 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 section 33.13 states in part that "Information so disclosed shall be kept confidential by the party receiving such information and the limitation on disclosure in this section shall apply to such party."

Fifth, 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)].

Sixth, you inquire about the availability of your "P.K. draft status". It is my understanding that "P.K. draft status" is the term used some years ago for information indicating that an inmate was going to be transferred from one correctional facility to another. A record containing such information would, in my view, likely be available to the person to whom that records pertains. However, disclosure of the transfer status of an inmate other than the requester would likely constitute an unwarranted invasion of personal privacy relative to that other inmate. Thus, insofar as the record requested exists and contains information pertaining to other inmates, such portions of the record could likely be deleted.

Additionally, I have contacted the Department of Correctional Services' Legal Department in regard to the matter of transfer status. I have been advised that although such a record would likely be available to the person to whom the record pertains, such records are generally prepared within several days of the date on which the transfers are to take place. Thus, it appears unlikely that an inmate would obtain a requested record of transfer status until after the transfer had taken place.

Seventh, you inquire about rights of access to Parole Board hearing minutes. It is my understanding that minutes are not taken at these hearings but that transcripts are prepared. You may obtain a transcript of a hearing pertaining to yourself by writing to:

Minutes Room Supervisor
Albany Area Parole Office
1092 Madison Avenue
Albany, New York 12208

Additionally, I believe that following a final parole hearing, the subject of the hearing will, as a matter of course, receive records indicating findings of fact, the hearing officer's recommendations and the decision of the Board of Parole.

Eighth, 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, section 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, rather than obtaining copies.

Ninth, it is noted that when requesting records maintained by an agency other than the Department of Correctional Services, generally your request should be directed to the records access officer of the agency that maintains the records sought.

Finally, I am enclosing a copy of "Your Right to Know", a pamphlet which describes the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:jm

Encs.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO- 41
FOIL-AO- 4233

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

August 21, 1986

Mr. Constantine Nicolau
[redacted]

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

Dear Mr. Nicolau:

I have received your letter of July 30, which pertains to an unanswered request sent to the Yonkers Police Department pursuant to the Personal Privacy Protection Law. The records sought pertain to an arrest that occurred in October of 1985.

In this regard, it is emphasized that the Personal Privacy Protection Law does not apply to the City of Yonkers or its Police Department. The Personal Privacy Protection Law is applicable to personal information maintained by an "agency", which for the purposes of that statute, is defined 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 pertains only to state agencies and excludes from its scope "any unit of local government", including the City of Yonkers.

Relevant, however, is the Freedom of Information Law, which contains a different definition of "agency" for purposes of that statute, and which is applicable to units of both state and local government. Therefore, it is suggested that a request be directed to the appropriate records access officer in the City of Yonkers and/or its Police Department.

Since you indicated that twenty days had passed without having received a response, I point out that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) prescribe 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 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4234

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

August 22, 1986

Mr. Lawal Mohammed
86-C-0301
Great Meadow Correctional Facility
Box 51
Comstock, New York 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. Mohammed:

I have received your letter of August 4 in which you requested advice regarding access to records.

Specifically, you wrote that you want information from the Onondaga County Jail indicating the dates of visits to you, the identities of visitors, dates that you were "transported to court" and the reasons for court appearances. You also asked how you may obtain records from your trial attorney.

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

First, by way of background, the Freedom of Information Law requires the Committee to promulgate general regulations concerning the procedural implementation of the Law (21 NYCRR Part 1401). In turn, section 87(1) of the Law requires the governing body of a public corporation, i.e., the Onondaga County Legislature, to adopt procedural regulations consistent with the Law and the Committee's regulations. The County's regulations must include the designation of one or more "records access officers", a person or persons who have the duty of responding to requests for records. Therefore, it is suggested that you send your request to the records access officer at the office of the Sheriff and state that, if that is not the proper address for making a request, the request be forwarded to the appropriate person.

Second, the Law [section 89(3)] requires that an applicant "reasonably describe" the records sought. As such, your request should include sufficient detail to enable agency officials to locate the records sought.

Third, the Freedom of Information Law pertains to existing records of an agency. Therefore, as a general rule, an agency is not required to create or prepare a record in response to a request.

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

Assuming that logs or similar records exist that identify visitors to inmates, the dates of their visits, or references to court appearances, those records or perhaps those portions of the records pertaining to you would in my view likely be available to you.

With respect to records kept by your attorney, it is noted that the Freedom of Information Law applies to records of agencies, entities of state and local government; it does not apply to records maintained by a private attorney, for example. As such, issues regarding your right to obtain records from your attorney fall outside the scope of the jurisdiction or expertise of this office.

Lastly, enclosed is "Your Right to Know" which describes the Freedom of Information Law more fully and contains a sample letter of request that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4235

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

August 22, 1986

Mr. Alan J. Azzara
Azzara & Baram
210 Old Country Road
Mineola, New York 11501

<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. Azzara:

I have received your letter of July 30, as well as the correspondence attached to it.

According to the materials, you represent an individual who has been the subject of complaints made against him and his business that have been directed to the Building Department of the Town of Huntington. You indicated that you are interested not in learning the names of complainants, but rather in ascertaining the nature of the complaints and their dispositions. Both your request and appeal were denied under the Freedom of Information Law on the basis of section 87(2)(e)(iii) of the Law. The Assistant Town Attorney added that records reflective of "the nature of the complaints" would be available "either upon commencement of an enforcement proceeding, or upon discontinuance of the investigation."

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. It is emphasized that the introductory language of section 87(2) specifies that "records or portions thereof" may be withheld pursuant to the grounds for denial that follow. From my perspective, the quoted language evidences a recognition on the

part of the Legislature that single record might 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 justifiably be withheld.

Second, in my opinion, reliance by the Town upon section 87(2)(e)(iii) is inappropriate. The cited provision states that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

In my opinion, a complaint made by a member of the public could not be characterized as a record "compiled for law enforcement purposes". If that is so, section 87(2)(e) would not be applicable. It is noted, too, that one of the first decisions rendered under the Freedom of Information Law as originally enacted involved records of the Building Department of the Town of Huntington. In that decision, the Town's denial, which was based upon a contention that the records of the Department constituted "investigatory files compiled for law enforcement purposes" [see original Law, section 88(7)(d], was overturned by the Court [Young v. Town of Huntington, 388 NYS 2d 978 (1976)]. Further, neither of the two judicial determinations cited by the Town in my view supports a contention that complaints may be withheld in their entirety. In Hawkins v. Kurlander [98 AD 2d 14 (1983)], the request involved the names and addresses of witnesses, which were found in records prepared by investigators employed by the district attorney, records that were indeed compiled for law enforcement purposes. In Church of Scientology v. State [403 NYS 2d 224, 61 AD 2d 942, aff'd 46 NY 2d 906 (1979)], names and addresses of persons corresponding with the agency were deleted, but the remainder of that correspondence, i.e., the substance or nature of a letter of complaint, were accessible.

For the reasons described above, I do not believe that section 87(2)(e) is applicable. However, in the case of complaints sent to an agency by a member of the public, 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, section 87(2)(b), section 89(2)(b)]. I point out that section 89(2)(b) states that "agency may delete identifying details when it makes records available". Further, the same provision 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 should be made available for copying, upon payment of the appropriate fees for photocopying, after identifying details have been deleted.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey A. Hartman, P.E.
Director of Engineering, Building & Housing
Gregory M. Hensas
Assistant Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4236

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

August 22, 1986

Mr. Stefan Kotsonis
[redacted]

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

Dear Mr. Kotsonis:

I have received your letter of August 4, as well as the correspondence attached to it.

In brief, in early April, you made a series of requests for records of the New York City Human Resources Administration (HRA). The requests deal with various aspects of the HRA's administration of the federal surplus cheese program in order "to substantiate or refute allegations of wrongdoing and/or mismanagement" of the program. Although you indicated that the HRA staff charged with the duty of responding to requests "have been pleasant and have tried to be helpful", you also stressed that you "have not received a single written response to [your] request, no document, nor any refusal to release documents".

You requested an advisory opinion concerning the matter and, in this regard, I offer the following comments.

First, 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 pertaining to the procedural implementation of the Law. The Committee has adopted regulations, which appear in 21 NYCRR Part 1401. In turn, section 87(1) of the Law requires each agency to adopt procedural rules and regulations consistent with the Law and the regulations promulgated by the Committee.

Second, the Freedom of Information Law and the Committee's regulations prescribe time limits within which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law and section 1401.5 of the Committee's regula-

tions 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)].

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 section 87(2)(a) through (i) of the Law. Further, of potential relevance to the nature of your requests to HRA is a recent decision rendered by the Court of Appeals, the state's highest court. In its discussion of the intent and utility of the Freedom of Information Law, the Court stated that:

> "The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with re-

> spect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" [Capital Newspapers v. Burns, __ NY 2d __; NYLJ, July 15, 1986].

The attachments to your letter consist of thirteen requests. Rather than dealing with each separately, the following general review may be useful for purposes of guidance.

It is noted initially that the Freedom of Information Law pertains to existing records. Unless specific direction is given to the contrary, an agency is not obliged to create or prepare a record in response to a request. For instance, one of your requests involves a "list" of the organizations that receives surplus food from HRA. If no list exists, the Freedom of Information Law would not require HRA to create such a list on your behalf.

I point out further that 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 the ensuing grounds for denial. In my view, the quoted phrase evidences a recognition on the part of the State Legislature that a single record or report might be available or deniable in part. I believe, too, that it imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

It appears that three of the grounds for denial might be relevant to the records sought. Their assertion would in my opinion be dependent upon the specific nature and contents of the records.

Of relevance in several contexts is section 87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". The Freedom of Information Law and various decisions interpreting the Law indicate that personally identifiable information may be withheld in some circumstances, but that, in others, disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. For example, one of your requests involves payroll information identifiable to particular employees of the HRA. That kind of information in my view is clearly available under the Freedom of Information Law [see e.g., section 87(3)(b)]. In addition, 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 to a higher standard of accountability than others.

In general, 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, aff'd __ NY 2d __, NYLJ, July 15, 1986]. 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 the case of the issuance of a reprimand of a public employee or a determination to take disciplinary action against a public employee, I believe that those kinds of records are available, for they are relevant to the performance of one's official duties [see Farrell, Geneva Printing, supra].

Another request involving privacy considerations pertains to complaints. In brief, it has been advised that the substance of a complaint is generally available, but that the name or other identifying details pertaining to the complainant might be deleted when disclosure would result in an unwarranted invasion of personal privacy. Often the name of a complainant is irrelevant to the work of an agency; what is relevant to the agency is the substance of the complaint and whether or not it has merit.

A second ground for denial of particular relevance is section 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, 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, recommendations and the like could in my view be withheld.

Many of the records sought could be characterized as "intra-agency materials" and rights of access, as well as the authority to deny access, are dependent upon the contents of the records. As suggested earlier, the fact that a report contains opinions and statistical or factual information would not render the report deniable in its entirety [see Ingram v. Axelrod, App. Div., 90 AD 2d 568 (1982)]. Those portions accessible pursuant to subparagraphs (i), (ii) or (iii) of section 87(2)(g) would be available (unless a different ground for denial applies), while the remainder might be redacted.

The remaining ground for denial of possible significance is section 87(2)(e). That provision states that an agency may withhold records that:

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

Several of your requests pertain to reports prepared by or records relating to investigations made by the office of Inspector General. Since I am not familiar with the specific powers and duties of the Inspector General, it is unclear whether the records in question might be characterized as records "compiled for law enforcement purposes". Some might fall within that classification, while others might have been compiled in the ordinary course of business or for administrative purposes. Further, assuming that section 87(2)(e) is applicable, the capa-

city to deny is restricted to those situations described in subparagraphs (i) through (iv) in which disclosure would result in harm. I would conjecture, too, that there may be names and other personal information contained in records prepared by the Inspector General which might be deniable as an unwarranted invasion of personal privacy.

As you requested, copies of this opinion will be sent to the officials identified in your letter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Doris Robinson
Robert Jorgen
Edward Gallagher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1315
FOIL-AO-4237

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

August 25, 1986

Ms. Alice Waser
[redacted]

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

Dear Ms. Waser:

As you are aware, your letter that was apparently sent to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information Law.

In brief, having attended meetings of the Bohemia Fire District, you requested copies of minutes of meetings and offered to pay for photocopying and postage. However, you wrote that the Chairman of the District stated that he could not supply the minutes "because of law".

It is unclear on the basis of your letter whether the records pertain to meetings of a fire district's board of fire commissioners, or to the board of a volunteer fire company. In either case, I believe that minutes of meetings must be prepared and made available to public.

The Open Meetings Law applies to meetings of all public bodies. In this regard, 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."

If your inquiry pertains to a board of fire commissioners, its meetings are in my view clearly subject to the Open Meetings Law, for a fire district is a "political subdivision of the state" according to section 174(6) of the Town Law, and the board is its governing body. Further, I believe that each of the conditions necessary to a finding that the board of a volunteer fire company is a public body can also be met.

The board of a volunteer fire company is an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the conditions precedent can be met, a volunteer fire company is in my view a "public body" subject to the Open Meetings Law.

I would also like to point out that the status of volunteer fire companies had long been unclear. Such companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not such bodies conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, in a landmark decision, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland Newspapers v. Kimball, it is in my view clear that a volunteer fire company also falls within the definition of "public body" and is required to comply with the Open Meetings Law.

I would like to point out, too, that both the Open Meetings and Freedom of Information Laws are based upon presumptions of openness. In the case of the Open Meetings Law, all meetings must be conducted open to the public, except to the extent that an executive session may be held in accordance with section 105(1) of the Law. Similarly, under the Freedom of Information Law, all records of a volunteer fire company are available, except to the extent that they fall within one or more of the grounds for denial of access appearing in section 87(2) of the Law.

With respect to minutes, section 106(3) of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks, and that minutes of action taken during an executive session must be prepared and made available in accordance with the Freedom of Information Law within one week.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bohemia Fire District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4238

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

August 25, 1986

Mr. John Malowsky
83-C-424
135 State Street
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 July 27 in which you requested an advisory opinion from the Committee on Open Government.

According to your letter, you made a request under the Freedom of Information Law to the Nassau County Department of Social Services for records pertaining to yourself and your mother. Mr. Edward J. Schenk, Attorney for the Department, responded by advising you that the requested records had been lost in a fire. Upon your appeal, Mr. Schenk again informed you that the requested records had been destroyed by fire. Shortly thereafter, you obtained a document which you believe indicates that the records in question were in existence subsequent to the time of the fire. You then commenced an Article 78 proceeding in regard to this matter. The decision of the court was not favorable to you and you now intend to appeal. You ask for an advisory opinion concerning a number of related issues. In this regard, I offer the following comments.

First, the Committee is authorized to render advisory opinions under the Freedom of Information Law. Many of the questions you have presented do not arise under the Freedom of Information Law but under other areas of law which are outside the scope of the authority and expertise of this office. Thus, I cannot advise as to those matters.

Second, it is the policy of the Committee to decline to render an opinion when it is known that litigation has been commenced pertinent to the substance of the requested opinion. Since many of the questions you have raised relate directly to matters under litigation, it is not, in my opinion, proper for this office to respond to those questions.

Third, however, several of your questions appear to be general in nature and can be answered simply by references to the Freedom of Information Law or the regulations (21 NYCRR Part 1401) promulgated by the Committee pursuant to section 89(1)(b)(iii) of the Law.

You ask whether it is permissible under the Freedom of Information Law for one individual to act in the dual capacity of records access officer and appeals officer. Section 1401.7(b) of the regulations states, in relevant part, "The records access officer shall not be the appeals officer". I am enclosing a copy of the regulations for your use and information.

You ask if the Freedom of Information Law requires agencies to "maintain an index on its agency records". In the context of your letter, it appears that you are referring to cross-indices whereby a single record could be located by the use of a variety of identifiers. The only requirement for an index under the Freedom of Information Law involves a "subject matter" index. Section 87(3)(c) of the Law states that each 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." There is not, in my view, any further requirement under the Freedom of Information Law that agencies index their files in a particular manner.

The provision of the Freedom of Information Law relating to burden of proof in an Article 78 proceeding brought for the review of a denial of access is section 89(4)(b) which states in relevant part that:

> "In the event of 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 regard to the legal issues you have raised which relate to areas of law other than the Freedom of Information Law and those which relate to the litigation you have brought, it is suggested that you discuss these matters with your attorney.

Finally, I am also enclosing copies of the Freedom of Information Law and "Your Right to Know", a pamphlet which describes the Law.

I regret that I am unable to be of greater assistance. Should any further questions arise which are within the scope of the jurisdiction of the Committee, please do not hesitate to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4239

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

August 25, 1986

Mrs. Judy Freeman
[redacted]

The staff of the Committee on 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. Freeman:

As you are aware, I have received a variety of correspondence from you concerning the selection of a community residence by the Office of Mental Retardation and Developmental Disabilities (OMRDD). I have tried to reach you by phone several times without success to discuss the status of your requests. As such, I would like to offer the following suggestions.

First, having reviewed your correspondence, several requests made under the Freedom of Information Law were apparently directed to the officials who maintain or prepare records in which you are interested. Although the results of those and similar requests may be fruitful, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force of law, require each agency 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. In the future, it is possible that you may have better success by directing your requests to an agency's records access officer than to the individual who physically maintains the records sought.

Second, several of your inquiries were prepared in the form of questions. It is suggested that, rather than raising questions, requests be made for records. In a related vein, it is noted that the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Freedom of Information Law provides that, as a general rule, an agency need not create or prepare a record in response to a request. Similarly, the Law does not require that "questions" be answered.

Please keep me abreast of your progress.

I hope that I 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 GOVER.

FOIL-AO-4240

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 25, 1986

Gerald A. Scotti, President
Mohawk Valley Community College
Professional Association
1101 Sherman Drive
Utica, New York 13501

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

Dear Mr. Scotti:

I have received your letter of August 6, as well as the materials attached to it.

Your inquiry concerns your recent unsuccessful efforts to obtain "Copies of the CPA Audits for the Mohawk Valley Community College Foundation, Inc." The same question arose some two years ago, when I prepared an advisory opinion at your request. It was advised that, in my view, the audits should be made available, and the opinion was apparently persuasive, for they were made available to you.

Most recently, however, you were informed that the Foundation is a "private not-for-profit corporation" and not a governmental entity. As such, Mr. J.M. Alvermann, Vice P{resident of Mohawk Valley Community College, wrote that your request should be directed to the Foundation, and it would be "inappropriate" for him to release the materials. You pointed out that the records question "are in the physical possession of the College". In addition, you wrote that the Foundation is directed by an employee of the College, and that the College "provides space, utilities, furniture and fixtures, maintenance, misc. supplies and services, travel and printing all at no cost to the Foundation."

You have asked for an "additional advisory opinion" on the matter.

Having reviewed my earlier opinion, which was prepared on April 11, 1984, I do not believe that I can offer any additional or significant new points. Despite its status as a not-for-profit corporation, I continue to believe that the Foundation itself is an "agency" subject to the Freedom of Information Law, for, as you indicated, it functions within and as an arm of the College. Further,if as you suggest, the documents are in the "physical possession of the College", they constitute "records" of the College that are subject to rights of access. It is reiterated that the term "record" is defined expansively in section 86(4) of the Freedom of Information Law to include:

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

Due to the breadth of the language quoted above, if the documents are kept, held or filed by the College, they are, in my view, "records" that fall within the scope 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: J.M. Alvermann, Vice President
for Administration Services
Dr. Michael I. Shafer, President,
Mohawk Valley Community College

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4241

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

November 6, 1986

Mr. Thomas H. Jones
85 C 193
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. Jones:

I have received your letter of October 20 and the correspondence attached to it.

The materials indicate that you sent a request to the Erie County District Attorney on September 20. As of the date of your letter to this office, you had not received a response. You asked whether your request was proper and suggested that you "cannot appeal what has not been denied".

In this regard, I offer the following comments.

First I have contacted the Office of the District Attorney on your behalf in an effort to learn the identity of the person to whom a request may be directed. It is suggested that you renew your request and send it to:

John DeFranks, Assistant District Attorney
Chief, Appeals Bureau
Erie County District Attorney's Office
25 Delaware Avenue
Buffalo, New York 14202

Second, for future reference, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1402), which govern the procedural aspects of the Law, prescribe time limits for responding to requests. I point out that a failure to respond may be considered a denial that may be appealed.

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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4242

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

August 26, 1986

Mr. Felix Romero
82-A-4753
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

Dear Mr. Romero:

I have received your letter of August 7 concerning an unanswered request for records.

You indicated that on July 6 you directed a request under the Freedom of Information Law to the Records Access Officer for the New York City Office of the District Attorney. As of the date of your letter to this office, you had received no response. You asked that I attempt to "speed up this matter".

In this regard, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) prescribe 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 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 an effort to enhance compliance, a copy of this letter will be sent to the Records Access Officer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4243

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12[illegible]
(518) 474-2518, 2791

August 26, 1986

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 August 8 and the materials attached to it.

Your question is whether, in my view, a response to a request dated August 4 by Joseph Gubbay, Records Access Officer for the Department of Investigation, constitutes a denial on appeal that would enable you to initiate an Article 78 proceeding. You also sought my comments "on the dishonesty and charade being played by the DOI and its Freedom of Information Office".

In this regard, Mr. Gubbay's response to you specifies that he was treating your letters as an "initial" request. On that basis, I do not believe that his response could be characterized as a determination on appeal or an indication that you have exhausted your administrative remedies.

With respect to your allegations concerning the implementation of the Freedom of Information Law by the Department of Investigation, I will not comment concerning your claims of dishonesty because I have not found that to be so. As you are aware, I contacted the Department in an effort to respond fully to you in my letter of June 12. It is my view that Department officials have dealt with your inquiries in good faith. Further, it is reemphasized that the Freedom of Information Law pertains to existing records and that, as a general matter, the Law does not require an agency to create a record in response to a request. Therefore, if, for example, a report or transcript do not exist, the Department would not be obliged to create those records on your behalf in response to a request made under the

Law. Moreover, if records sought do not exist, a response to that effect would not in my opinion constitute a denial. Stated differently, I believe that a denial, which may be appealed and eventually challenged in court, occurs when an existing record is withheld, not when an applicant is informed that information sought does not exist in the form of a record.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Gubbay, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1244

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

August 26, 1986

Mr. Ronald L. Morris
83-C-702
Auburn Correctional Facility
135 State Street
Auburn, NY 13024-9000

Dear Mr. Morris:

I have received your letter of August 21 in which you "appealed" a denial of a request to this office. In brief, you were denied access to the "complete arrest record" of your co-defendant by the Division of Criminal Justice Services.

In this regard, it is noted that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. This office does not have the authority to compel an agency to grant or deny access to records.

Further, an appeal should be directed to the head of the agency that rendered a denial. The provision in the Freedom of Information Law pertaining to appeals is section 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 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 records the reasons for further denial, or provide access to the record sought."

Lastly, as a general matter, records indicating arrests (rather than convictions) may often be sealed of considered confidential [see e.g., Criminal Procedure Law, section 160.50]. Since you wrote that the information in question is relevant to an appeal of your conviction, it is suggested that you discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4245

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

August 27, 1986

Mr. Maurice P. Riley
83-B-1335
Box B
Dannemora, NY 12929

Dear Mr. Riley:

I have received your letter of August 22, which reached this office today. You have requested from the Committee on Open Government copies of an "employees manual" and an "employees rule book" pertaining to correction officers.

The Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. As such, as a general matter, the Committee does not maintain records of other agencies. In short, I cannot provide the materials that you requested because the Committee does not have those materials. However, I offer the following suggestions.

First, according to the regulations promulgated under the Freedom of Information law by the Department of Correctional Services, a request for records kept at a facility may be directed to the facility superintendent; requests for records maintained at the Department's Albany offices may be directed to the Deputy Commissioner for Administration.

Second, section 89(3) of the Law requires that an applicant "reasonably describe" the record sought. Therefore, when making a request, sufficient detail should be included to enable agency officials to locate the record.

Third, assuming that the records in question are kept at the facility and that they are accessible under the Freedom of Information Law, I point out that there is no fee for inspection of records. A fee may, however, be charged for copies of accessible records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 4246

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

August 27, 1986

Mr. Merrill E. Trefzer
[redacted]

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

Dear Mr. Trefzer:

I have received your letter of August 8 and the materials attached to it.

You have raised the following question:

> "Is there any provision of the Freedom of Information Law which would prevent an organization from receiving a copy of the 'JOB NETWORK SERVICE ADMINISTRATIVE JOB OPENINGS' (See enclosures) if a formal request is presented to a School District's Records Access Officer?"

Attached to your letter are copies of a memorandum sent to superintendents by an Education Department Assistant Commissioner that describes the Job Network Information Service and a listing of administrative job openings that includes details regarding specific openings. It is noted that the memorandum suggests that superintendents "post this announcement in your school district and disseminate this information to staff members".

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records of an agency, such as a school district. Further, section 86(4) of the Law defines the term "record" expansively to include:

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

In view of the breadth of the language quoted above, the materials attached to your letter in my view clearly constitute "records" subject to rights granted by the Law.

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

Of relevance 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. Under the circumstances, I believe that the list of administrative job openings could be characterized as "inter-agency" material. However, it consists of factual information that identifies positions that are open, salaries of the positions, locations of the openings and closing dates for the submission of applications. Therefore, I believe that the listing of job openings would be accessible from an agency pursuant to section 87(2)(g)(i) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4247

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

August 27, 1986

Mr. Mark R. Kahle
84-A-0408
P.O. Box 975
Coxsackie, NY 12051-0975

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

Dear Mr. Kahle:

I have received your letter of August 6 in which you requested the assistance of the Committee on Open Government.

According to your letter, it appears that you made requests for certain records under the federal Freedom of Information and Privacy Acts. It further appears that upon the denial of your requests, you commenced two actions in federal court for a review of the denials. You ask that the Committee send you literature on the use of the courts in appealing Freedom of Information Act decisions. Additionally, you request information pertaining to the disclosure of "police reports or investigative compilations" maintained by a police department. In this regard, I offer the following comments.

First,it is noted that the Freedom of Information and Privacy Acts, which you refer to as "FOIA/PA", are federal statutes which pertain to disclosure of records maintained by federal agencies. The Freedom of Information Law is a New York State statute which pertains to records maintained by state and local governmental entities within New York State.

Second, the Committee is authorized to render advisory opinions under the Freedom of Information Law. Therefore,it is not within the jurisdiction of the Committee to render advice regarding the issue you have raised under the federal acts.

Third, it is the policy of the Committee to decline from commenting on a question under the Freedom of Information Law which is in litigation. However, it appears that your litigation involves issues only under the federal Law. Assuming that your inquiry regarding disclosure of "police reports or investigative compilations stored at the police department" relates to police departments within New York State, the Freedom of Information Law is applicable to requests for such records.

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

Fifth, it is emphasized that the introductory language of section 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.

Sixth, you have not presented sufficient facts regarding the nature of the records you seek to provide specific direction. However, assuming that you are seeking police reports and investigative materials pertaining to yourself, there are, in my view, four grounds for denial which might be relevant to your request.

Section 87(2)(b) of the Law provides for withholding of records or portions thereof where disclosure "would constitute an unwarranted invasion of personal privacy..." Thus, portions of the requested records which identify individuals other than yourself, may, depending upon the attendant facts, be withheld on the basis of section 87(2)(b).

Section 87(2)(e) of the Law states that an agency may withhold records that:

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

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

Without knowing the content of the records you seek, I cannot conjecture to what extent or in what manner section 87(2)(e) might be applicable.

Section 87(2)(f) provides for the withholding of records where "disclosure would endanger the life or safety of any person". Again, I do not have sufficient facts to comment on the applicability of this provision.

Subdivision (g) of section 87(2) provides for denial of access to records which:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

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

Seventh, it is noted that a request for records under the Freedom of Information Law should be directed to the records access officer of the agency that maintains the records sought. Further, the Law requires that an applicant request records "reasonably described". Thus, your request should be as detailed and specific as possible to enable agency officials to locate the records sought.

Finally, for your use and information, I am enclosing a copy of "Your Right to Know" which describes the Freedom of Information Law and contains a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4248

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

August 27, 1986

Mr. Steven C. Martin
68-B-58
Box 51
Comstock, NY 12821-0051

<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. Martin:

I have received your recent letter and the materials attached to it.

Your inquiry concerns a request made under the Freedom of Information Law and directed to the Clerk of Bronx County Supreme Court. The request involves briefs and related materials submitted to the court regarding a particular proceeding, and you specified that you would be "willing to pay the cost of copying, mailing, etc." In response to the request, you apparently received a copy of a memorandum, which is attached to your letter, and which states:

> "The Freedom of Information Law exempts all court records; in the absense [sic] of a court order, the clerk's office will not provide free copies of court papers."

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

First, I agree with the statement that the Freedom of Information Law does not apply to court records. That statute pertains to records of an "agency", a term 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 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 in my view apply to the records sought.

Second, however,other statutes often grant significant rights of access to court records, such as section 255 of the Judiciary Law (see attached). Therefore, it is suggested that a request be directed to the clerk pursuant to a statute that may be applicable.

Lastly, it might be worthwhile to discuss the matter with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4289

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

August 27, 1986

Mr. Richard Wiedeman
86-A-0311 H-2/34
Clinton Correctional Facility
Box B
Dannemora, New York 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. Wiedeman:

I have received your letter of August 8.

You requested the address that may be used to request a copy of "The Freedom of Information Guide", which you indicated is published by "Want Publishing Company, Washington, DC." I am neither familiar with the guide nor the publisher and, therefore, I am unable to supply that information. However, enclosed is a copy of "Your Right to Federal Records", a publication of the U.S. Justice Department which describes both the federal Freedom of Information and Privacy Acts.

You also asked how you may obtain records from the office of a district attorney. In this regard, I direct your attention to the New York Freedom of Information Law, which is applicable to those records.

To seek records, an applicant should direct a request to the "records access officer" at the agency that maintains the records sought. It is emphasized that section 89(3) of the Freedom of Information Law requires that the request "reasonably describe" the records. Therefore, when making a request, it is suggested that you include sufficient detail to enable agency officials to locate the records sought.

Lastly, 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.

I hope that I 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
DEPA
COMMITT

OVERNMENT FOIL-AO-4250

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

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August 27, 1986

Ms. Dorothy Fuerst
[redacted]

The staff of the Committee on 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. Fuerst:

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

Your inquiry concerns a denial of access by the New York City Department of Personnel to a "work-up sheet", which you described as "a factual listing of the individuals on the Principal Planner's list #8612, indicating the procedure by which the individuals were either considered appointed or passed over". Mr. Michael S. Rabin, the Department's Acting Counsel, and who upheld a denial following your appeal, described the document as "the work-up sheet of the 1 in 3 rule". Mr. Rabin cited section 87(2)(g)(iii) of the Freedom of Information Law as the basis for denial, stating that the document "clearly falls within the exception cited since it is not a document that is a final agency policy or determination".

In this regard, I offer the following comments.

First, I am not familiar with the specific contents of the "work-up sheet". Therefore, I cannot advise with certainty that it is accessible or deniable in whole or in part.

Second, however, as I understand Mr. Rabin's statement, while it may be true that the work-up sheet is not a "final agency policy or determination", the work-up sheet nonetheless appears to contain accessible information.

Specifically, 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 reflective of recommendations, opinions, advice and the like could in my view justifiably be withheld.

Under the circumstances, it appears that a work-up sheet could be characterized as "intra-agency" material. Assuming that it includes a listing of individuals, apparently derived from an eligible list, that portion of the document would likely consist of "factual data" available under section 87(2)(g)(i). Stated differently, to the extent that intra-agency material consists of any of the categories of available information described in sub-paragraphs (i), (ii) or (iii) of section 87(2)(g), those portions of the record would be available under section 87(2)(g). Often statistical or factual data is available, even if the record or the remainder of the record does not constitute a final agency determination [see e.g., Xerox Corp. v. Town of Webster, 65 NY 2d 131 (1985); Niagara Environmental Action v. City of Niagara Falls, 473 NYS 2d 653, 100 AD 2d 742 (1984); Steele v. NYS Department of Health, 464 NYS 2d 925 (1983); Ingram v. Axelrod, App. Div., 90 AD 2d 568 (1982)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Michael S. Rabin, Acting Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4251

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

August 28, 1986

Mr. Michael W. Friedman
Deputy Inspector General
and Counsel
NYS Office of Inspector General
State Capitol
Albany, New York 12224

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

Dear Mr. Friedman:

I have received your letter of August 14 in which you requested an advisory opinion concerning the Freedom of Information Law. Please accept my apologies for the delay in response.

By way of background, the Office of the State Inspector General, which was created by Executive Order, is charged with the responsibility of investigating allegations of fraud corruption, waste and abuse within "covered agencies" designated in the Executive Order. You wrote that "In order to properly conduct such investigations, it is necessary to rely on information supplied to [you] by witnesses and sources who wish to do so in confidence and to remain anonymous." It is your intent to redact from your reports names and other identifying details concerning sources and witnesses. Your question involves the capacity to do so 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. 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 appears that several grounds for denial might be relevant to the ability to withhold the information in question.

Perhaps of greatest significance is section 87(2)(e), which states in part 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...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

In Hawkins v. Kurlander [98 AD 2d 14 (1983)], while the facts were somewhat different from the situation you presented, the Appellate Division referred to and "adopted" the view of federal courts under the federal Freedom of Information Act. For example, the Court cited Pape v. United States (599 F.2d 1383, 1387), which held that a major purpose of the "law enforcement" exception "is to encourage private citizens to furnish controversial information to government agencies by assuring confidentiality under certain circumstances" (Hawkins, supra, at 16). Similarly, the Appellate Division in Gannett v. James cited section 87(2)(e)(i) and (iii) in upholding a denial of complaints made to law enforcement agencies, stating that:

> "the confidentiality afforded to those wishing it in reporting abuses is an important element in encouraging reports of possible misconduct which might not otherwise be made. Thus, these complaints are exempt from disclosure which might interfere with law enforcement investigations and identify a confidential source or disclose confidential information" [86 AD 2d 744, 745 (1982)].

In Church of Scientology v. State [61 AD 2d 942, 46 NY 2d 906 (1979)], a lower court determination requiring disclosure of letters of complaint after having deleted the names and addresses of complainants was affirmed based upon a finding that the deletions "adequately protect against the inappropriate identification of 'a confidential source'" (61 AD 2d 943).

Also relevant, as you inferred in your letter, are sections 87(2)(b) and 89(2)(b) of the Freedom of Information Law, which permit an agency to withhold records or portions thereof which if disclosed would constitute "an unwarranted invasion of personal privacy". It is noted that section 89(2)(a) indicates that, to protect against unwarranted invasions of personal privacy, "an agency may delete identifying details when it makes records available".

In the case of complaints and similar records, it has consistently been advised that the substance of a complaint may be available, but that identifying details pertaining to the complainant may be deleted when disclosure of those details would constitute an unwarranted invasion of personal privacy. Two of the examples of unwarranted invasions of personal privacy listed in section 89(2)(b) [see 89(2)(b)(iv) and (v)] refer to "information of a personal nature" that is "not relevant" to the work of the agency. In the case of complaint, or by analogy, reports identifying witnesses or sources, the identity of a complainant, witness or source might not be relevant to the work of the agency; what is relevant is the nature or substance of a complaint, and whether or not it has merit.

A third potential ground for denial 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, those portions of inter-agency or intra-agency materials reflective of advice, opinion, recommendation and the like may in my view justifiably be withheld. As such, internal memoranda or memoranda transmitted by agency employees that express opinions, for example, would fall within the scope of the exception.

The final ground for denial of possible significance, but which is rarely invoked, is section 87(2)(f). The cited provision permits an agency to withhold records the disclosure of which "would endanger the life or safety of any person". Although it is applicable only in unusual circumstances, it is conceivable that section 87(2)(f) might, in the course of your work, be pertinent.

I hope that I 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

PPPL-AO-43
FOIL-AO-4252

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

August 29, 1986

Mr. Robert J. Hill
[redacted]

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

Dear Mr. Hill:

I have received your letter of July 30 and enclosures in which you requested an advisory opinion.

Specifically, you asked that your request for records under the Freedom of Information Law for certain records maintained by the Metro North Commuter Railroad be reviewed. Your request includes the following records pertaining to yourself: personnel file, medical reports, copies of forms you completed, reports or results of interviews, reports or results of tests (i.e. reading and mechanical ability). Further, you ask that we forward our opinion to the records access officer at Metro North. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to access to records of an "agency". The term "agency" is defined in section 86(3) of the Law to include units of state and local government except the judiciary and the state legislature. Metro North is an arm of the Metropolitan Transportation Authority, which is a public benefit corporation subject to the Public Authorities Law. Section 1263(5) of the Public Authorities Law states that the Metropolitan Transportation Authority "shall be a 'state agency' for the purposes of sections 73 and 74 of the public officers law". Thus, in my view, Metro North is a "state agency" and, as such, is an "agency" subject to the Freedom of Information Law.

Second, as a "state agency", I believe that Metro North is also subject to the Personal Privacy Protection Law. The Privacy Law generally grants rights of access to records maintained by state agencies containing personal information identifiable to the individuals to whom the records pertain.

Third, it would, in my view, be appropriate for Metro North to respond to your request in accordance with the Personal Privacy Protection Law even though the request does not specifically refer to that law. Under the Personal Privacy Protection Law, there are two provisions which might permit a denial of certain records or portions of records that you requested.

Section 95(6) of the Privacy Law states that state agencies shall not be required to disclose to a data subject, the person to whom the record pertains, "patient records concerning mental disability or medical records where such access is not otherwise required by law". Thus, the Privacy Law would not likely, in my view, grant access to your medical records maintained by Metro North or by the Grand Central Terminal Medical Department.

However, under section 17 of the Public Health Law, "upon the written request of any competent patient...an examining... physician or hospital must release...medical records and test records...regarding that patient to any other designated physician...". Stated differently, a family doctor or any other physician may request and obtain copies of medical records on your behalf from another physician or hospital. It is also noted that as of January 1, 1987, an amendment to section 17 of the Public Health Law will become effective, which, to a great extent, enlarges patients rights of access to medical records pertaining to them.

The second provision of the Personal Privacy Protection Law which might constitute a basis for withholding certain records or portions of records is section 96(1)(c), which provides for the denial of records which contain information the disclosure of which would constitute an unwarranted invasion of the personal privacy of an individual other than the person requesting the records. For instance, if the "Background Investigation Results" you request contain personal references, recommendations or complaints pertaining to you, details which might identify the sources of such information could likely be deleted.

Thus, under the Personal Privacy Protection Law, the records you requested which do not fall under either of these grounds for withholding likely should, in my view, be made available to you.

Fourth, if there is some basis of which I am not aware for a determination that the Personal Privacy Protection Law is inapplicable to your request, 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. There are three grounds for denial which might, in my view, be relevant to your requests.

Section 87(2)(b) states that records or portions of records may be withheld where disclosure would constitute an unwarranted invasion of personal privacy. As indicated above, records or portions of records which identify other individuals may be withheld where disclosure would result in an unwarranted invasion of privacy of those individuals.

The third possible ground 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 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).

Fifth, it is suggested that when requesting records pertaining to you that are maintained by a state agency, you indicate that your request is made under both the Freedom of Information and the Personal Privacy Protection Laws and that you direct your request to both the records access officer and the privacy compliance officer.

Sixth, for your use and information, I am enclosing copies of "Your Right to Know" and "You Should Know", two pamphlets, the first of which outlines the Freedom of Information Law and the second of which outlines the Personal Privacy Protection Law.

Finally, in accordance with your request, I am sending a copy of this letter to Mr. W. Zullig, General Counsel and records access officer for Metro North.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Encs.

cc: Mr. W. Zullig

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4253

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

August 29, 1986

Mrs. Jane Falk
[redacted]

The staff of the Committee on 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. Falk:

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

Specifically, you state that your son underwent surgery at the North Shore Hospital of Manhasset and that you have been denied access to the "Operative Report" pertaining to that procedure. You want to know what law provides a right of access to the report and what the procedure is for you to obtain a copy. In the regard, I offer the following comments.

First, the Committee on Open Government is authorized to render advisory opinions under the Freedom of Information Law. Generally, the Law pertains to rights of access to records maintained by state and local governmental entities in New York.

Second, it is my understanding that the North Shore Hospital of Manhasset is a private hospital and not a governmental entity. As such, the hospital is not, in my view, subject to the Freedom of Information Law.

Third, however, section 17 of the Public Health Law pertains to rights of access to medical records maintained by all hospitals and physicians in New York State.
Section 17 states that:

> "Upon the written request of any competent patient...an examining, consulting or treating physician or hospital must release and de-

> liver, 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..."

Thus, in my opinion, upon your request your family doctor or any other physician may obtain a copy of the "Operative report" on your behalf, except to the extent that the report contains personal notes or other records not expressly made available under Public Health Law, section 17.

It is noted that as of January 1, 1987, an amendment to Public Health Law, will become effective. It is my understanding that the amendment will, to a great extent, enlarge patients' rights of access to medical records pertaining to them.

Finally, there is not, to my knowledge, a law currently in effect which provides patients with a direct right of access to medical records pertaining to them.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1318
FOIL-AO-4254

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

August 29, 1986

Mr. Renato J. Sanges
The Rainbow Alliance
P.O. Box 1253
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.

Dear Mr. Sanges:

I have received your letter of August 18, which pertains to the implementation of the Open Meetings and Freedom of Information Laws by officials of the City of Johnstown.

Your first area of inquiry concerns executive sessions held by the Common Council. For example, on July 21, the Mayor "requested an executive session between the Council and representative of a private business, to discuss the proposed purchase of another privately owned business in Johnstown". When questioned about the basis for entry into executive session, the Mayor apparently said "negotiations". On August 11, an executive session was held despite objections raised. After the session, "the Mayor told a reporter nothing important was discussed".

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that topics under consideration fall within the scope of one or more of the grounds for entry into executive session listed in section 105(1)(a) through (h).

Second, the Law requires that a public body accomplish certain procedural requirements, during an open meeting, before it may enter into an executive session. Specifically, the introductory language of section 105(1) states that:

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

Third, with respect to a discussion of "negotiations", the only reference to that term in the grounds for entry into executive session appears in section 105(1)(e), which permits a public body to enter into an executive session to discuss collective bargaining negotiations under the Taylor Law, negotiations between a public employer and a public employee union.

Moreover, it has been advised, based upon judicial determinations, that a motion identifying the subject matter to be discussed as "negotiations", or, for example, "personnel" or "litigation", without more, is inadequate. Those descriptions do not enable the public, or even members of a public body, to know whether an intended executive session is appropriate [see Daily Gazette v. Town Board, Town of Cobleskill, 444 NYS 2d 44 (1981); Becker v. Town of Roxbury, Sup. Ct., Chemung Cty., April 1, 1983; Doolittle, Matter of v. Board of Education, Sup., Ct., Chemung Cty., July 21, 1981].

In my view, a more detailed description of the reason for entry into executive session might serve to enhance public confidence in government and its compliance with law. By means of an analogy related to the situation described in your letter, it is clear that "negotiations", as that term is used in the Open Meetings Law, would not have constituted a proper basis for entry into an executive session. However, a different ground might have been applicable. Section 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 or a particular person or corporation..."

It is possible that the executive session of July 21 pertained, perhaps in part, to a discussion of the "financial or credit history" of a "particular corporation". To that extent, I believe that an executive session would have been proper. Assuming that was so, the motion to enter into executive session, to be adequate, might have referred to a discussion of "the financial history of a particular corporation."

To provide additional information regarding the adequacy of motions for entry into executive session, enclosed is a copy of the Doolittle decision, supra, the most expansive case involving that issue.

The remaining area of inquiry pertains to a request for copies of city maps under the Freedom of Information Law. According to your letter, the City Attorney, Robert Subik, verbally denied your request, stating that the City is not a "copying service" and that "he did not have time to send a written denial [of your] request."

It is noted initially that the Freedom of Information Law is applicable to all records of an agency, such as the City of Johnstown. Further, section 86(4) of the Law defines the term "record" expansively to include:

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

Due to the breadth of the language quoted above, which makes specific reference to maps, I believe that the records sought clearly fall within the scope of the Freedom of Information Law.

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

Under the circumstances, the maps would in my opinion be available, for none of the grounds for denial could appropriately be asserted.

In addition, while the City might not be a "copying service", the Freedom of Information Law requires that, upon payment of the appropriate fee, an agency must prepare copies of accessible records [see Freedom of Information Law, section 89(3)].

Lastly, I point out that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force and effect of law, impose certain procedural requirements upon agencies. Among them is a requirement that a denial be in writing and explain the reasons for the denial. Moreover, section 87(1) of the Freedom of Information Law requires the Common Council to adopt rules and regulations concerning the procedural aspects of the Law that are consistent with the Law and the Committee's regulations. Enclosed for your consideration are the Committee's regulations. Copies of the regulations and model regulations designed to enable agencies to easily adopt their own regulations will also be sent to the Mayor.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Mayor Donald Murphy
Robert Subik, City Attorney
R.J. Deluke, Schenectady Gazette
City Editor, The Leader Herald
Peter Henner, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AL - FOIL-AO-4255

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

September 2, 1986

Mr. Robert D. Stone
Counsel
NYS Education Department
Albany, New York 12230

Dear Mr. Stone:

Thank you for transmitting a copy of a determination rendered by Acting Commissioner Maurer in response to an appeal made under the Freedom of Information Law by William H. Zimmerli.

According to the determination, the request involved the:

> "'County, BOCES, School District building, grade level, # of assignments/classes, # of pupils per assignment/class, area of certification, type of certification and other such data collected by the Bureau', relating to all persons assigned to teach health education at the junior or high school level in all of the public schools in New York State".

Both the initial denial and the denial on appeal are based on sections 87(2)(b) and 89(2)(b) of the Freedom of Information Law, which permit an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy".

The determination on appeal indicates that the information sought is part of the "Basic Educational Data System" (BEDS) and is required to be provided by certified teachers pursuant to section 80.2(p) of the Commissioner's Regulations. The determination also states that:

> "The information is obtained on the basis of an express assurance that 'it is the Education Department's policy not to release the social security number or professional characteristics of individuals without prior permission from the individ-

> uals involved.' The operating policies of the Department with respect to information contained in the system, a copy of which is annexed hereto, provides that demographic information and professional characteristics associated with individuals will be released only with the prior permission of the individual."

In addition, attached to the determination is a statement of Department policy concerning BEDS, which states in part that:

> "2. Statistical summary data, involving no problems of confidentiality, will be made available to users within and outside of government upon request, and subject to the limitations of time and manpower.
>
> 3. The social security number of an individual will not be used outside the Department's file and will not be released for use by any other agency, public or private.
>
> 4. Names of individuals will be released to bona fide professional organizations and for purposes of serious, educationally related research.
>
> 5. Demographic information and professional characteristics associated with names of individuals will be released only for purposes of serious, educationally related research and only after the person or persons requesting it has obtained prior permission, from each individual, for its use. In addition, information so supplied must be treated confidentially, and may not be released to any other person or agency, public or private."

For the following reasons, I believe that the determination, as well as the statement of policy, may be inconsistent with the Freedom of Information Law.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency 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 authority to withhold "records or portions thereof" that fall within one or more of the ensuing grounds for denial. The quoted language in my view indicates that a single record or report may be both accessible or deniable in part. I believe that it also imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In the context of the facts that are present, I agree that social security numbers identifiable to individuals and perhaps other types of personal information might justifiably be denied. However, those aspects of the records sought might be redacted, while the remainder might be available.

Third, the policy statement refers to conditions, which, in my opinion, are inconsistent with judicial interpretations of the Freedom of Information Law. For instance, reference is made to statistical information being made available "subject to the limitations of time and manpower". Both the Freedom of Information Law [section 89(3)] and the general regulations promulgated by the Committee (21 NYCRR Part 1401.5), which have the force of law, prescribe time limits within which requests must be granted or denied. Further, it has been held that a shortage of manpower to comply with a request is indefensible, for a denial on that basis would "thwart the very purpose of the Freedom of Information Law" [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS 2d 823, 824 (1980)]. Other aspects of the statement of policy indicate that disclosure may be conditioned upon the status of an applicant (i.e., a "bona fide professional organization") or upon the purpose for which a request is made (i.e., "serious, educationally related research"). Nevertheless, it has been held that accessible information is available to any person, without regard to status or interest [M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165].

The only instance in the Freedom of Information Law in which the purpose of a request might affect rights of access involves lists of names and addresses. Section 89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses is such list would be used for commercial or fund-raising purposes". Nothing in the materials indicates that the information sought would be used for a commercial or fund-raising purpose. Further, any

names or addresses that fall within the scope of the request would be available from the employing agencies in conjunction with section 87(3)(b) of the Freedom of Information Law. The cited provision requires each agency to maintain a list setting forth the name, public office address, title and salary of every officer or employee of the agency.

In a related area, the determination and the statement of policy refer to an "assurance" of confidentiality, unless prior permission to disclose is obtained from the individuals identified in the records. From my perspective, an assurance of confidentiality may be meaningless, unless a statute specifically exempts records from disclosure [see Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405; and Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. Based on the decisions cited above, neither a policy nor a regulation can serve to require confidentiality. Where confidentiality is permitted or required, section 87(2)(a) of the Freedom of Information Law, which pertains to the authority to withhold records that are "specifically exempted from disclosure by state or federal statute", is applicable. Even in the case of a statute that apparently confers confidentiality, the Court of Appeals recently held that a statute must clearly require confidentiality to constitute an exemption from the Freedom of Information Law. Specifically, it was stated that:

> "Although we have never held that a state statute must state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection" [Capital Newspapers v. Burns, __ NY 2d __, NYLJ, July 15, 1986; see also Matter of John P. v. Whalen, 54 NY 2d 29, 96-97 (1981)].

Fourth, with respect to the substance of the request, the grounds for denial deal with a claim that disclosure would constitute an unwarranted invasion of personal privacy. The standard in the Law is in my view flexible and subject to a variety of interpretations. Often it is difficult to draw a line of demarcation between what might be considered a permissible as opposed to an unwarranted invasion of personal privacy. However, based on case law and other factors, the specific items sought as described in the determination are, in my opinion, likely available.

All of the personal information sought pertains to public employees. It is noted in this regard that the courts have held in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. Further, with respect to the Freedom of Information Law,it has generally been determined that records pertaining to public employees that are relevant to the performance of their duties are available, for disclosure in those instances would result in a permissible rather than an warranted 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, supra]. From my perspective, each of the specific items to which reference is made in the determination is relevant to the performance of the duties of the employees identified. In addition to the specific items, the determination refers to "other such data collected by the Bureau". I have no knowledge as to what the "other data" might be, or whether it is accessible or deniable. If, for example, the "other data" includes social security numbers or home addresses, presumably those items could be redacted. As suggested earlier, even though portions of a record might justifiably be withheld, the remainder may nonetheless be available.

With respect to portions of the BEDS data concerning certification, as I understand it, a certification is the equivalent of a license, and the issuance of a certification is based upon findings by the State Education Department that an individual has met the qualifications necessary to engage in a particular area or areas of teaching. If my understanding is accurate, a certification may be most appropriate source of determining a teacher's qualifications. Moreover, I believe that it is clearly relevant to the performance of a teacher's duties. It is noted that it has been advised that a license is available, for it is generally intended to enable the public to know that an individual is qualified to engage in a particular profession or aspect of a profession. Therefore, it is my view that records indicating certification status as well as the area of certification are accessible under the Freedom of Information Law.

Lastly, the determination cites the Personal Privacy Protection Law and states that the provisions of that statute "severely restrict the release of information of a personal nature without the consent of the person to whom such information relates". I agree that section 96 of the Personal Privacy Protection Law and section 89(2-a) of the Freedom of Information Law prohibit state agencies subject to the Personal Privacy Protection Law from disclosing records to the extent that disclosure would constitute an unwarranted invasion of personal privacy.

However, the Personal Privacy Protection Law preserves rights of access to records available under the Freedom of Information Law [see section 96(1)(c)]. Stated differently, if my contention is accurate, that the specific items in question would, if disclosed, result in a permissible rather than an unwarranted invasion of personal privacy, to that extent, the Personal Privacy Protection Law is inapplicable.

In view of the foregoing, it is respectfully requested that the determination be reconsidered.

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: Robert J. Maurer, Acting Commissioner
William H. Zimmerli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4256

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

September 3, 1986

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 August 14 and the materials attached to it.

As I understand the situation, your inquiry pertains to a letter dated June 1 addressed to three Suffolk County officials in which you described a variety of concerns and raised several questions. At the bottom of the first page of that letter, you asked that some of your questions be considered as "a formal F of I request". It appears that you did not receive a response and that, therefore, you appealed on the ground that the County constructively denied the request. In response to your "appeal", you received a response from Theodore D. Sklar, Assistant County Attorney, a copy of which was sent to this office and received on July 22. Although Mr. Sklar directed you to the source of some of the information sought and sent a copy of the County Code of Ethics, he also wrote that he was "unable to discern whether you ever requested access to public documents from a County agency, and whether you were denied access to such records". Further, you interpret Mr. Sklar's response to mean that you are required to submit a form. In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to existing records, and section 89(3) of the Law states that, as a general rule, an agency is not required to create a record in response to your request. Although you enclosed only the first page of what was a longer letter, that page contains comments, raises questions, and as you indicate in other correspondence, your "F of I request may not have been absolutely clear".

Second, with respect to the use of a form, Mr. Sklar pointed out that you did not use the form created by Suffolk County. It is unclear whether his remarks indicate the view that a particular form must be used. In any case, while an agency may develop a form, there is nothing in the Freedom of Information Law that pertains to the use of a form prescribed by an agency. As such, it has consistently been advised that any request made in writing that "reasonably describes" the records sought should be sufficient and acceptable. Often a form is devised for purposes of administrative convenience and efficiency. Nevertheless, I do not believe that a failure to use a form prescribed by an agency can constitute a basis for denying or delaying a response to a request.

In the future, it is suggested that requests made under the Freedom of Information Law be clearly designated as such, and that the request be directed to an agency's records access officer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Theodore D. Sklar, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4257

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

September 3, 1986

Mr. Harvey M. Elentuck
139-15 83 Avenue
[redacted]

The staff of the Committee on Open 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 not of August 18 and the materials appended to it. In brief, you asked whether I agree with your contention "that there have been numerous procedural violations" related to denials of records of a community school district.

Your first area of inquiry concerns an alleged "conflict of interest" on the part of Robert H. Terte. According to your letter, Mr. Terte is the Records Access Officer for the New York City Board of Education. He also serves as the Records Appeals Officer for Community School Districts, having been so designated be Chancellor Quinones. It is your view that Mr. Terte cannot serve in both capacities based upon the regulations promulgated by the Committee, 21 NYCRR 1401.7(b), which states in part that the records access officer and the appeals officer cannot be the same person.

Having contacted the Board on your behalf, I believe that you are misinformed, for I was told that Mr. Terte is not the records access officer.

Your second area of inquiry involves a contention that certain aspects of your appeal were ignored. While Mr. Terte referred only to observation reports, you apparently also requested "policies, standards or guidelines" used by District Supervisors in rating teachers as "satisfactory" or "unsatisfactory". If that is so, I would agree that the response was not as complete as it should have been.

You also complained that Mr. Terte cited a different provision as a basis for denial than the records access officer. In my view, an appeals officer is not bound to the rationale offered in an original denial. A determination might cite the same or different bases for denial than those referenced in a denial by a records access officer.

Also related to Mr. Terte's response is your contention that section 87(2)(g) of the Freedom of Information Law does not justify a denial due to the existence of other provisions when read in conjunction with the Freedom of Information Law. You cited section 89(6) of the Freedom of Information Law, which preserves rights of access to records granted by other provisions of law. One of those other provisions to which you referred is section 2116 of the Education Law, which was enacted in 1947 and states that:

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

Based upon a recent decision rendered by the Court of Appeals, I do not believe that section 2116 of the Education Law could be construed as broadly as you suggest. A similar argument was made concerning the scope of section 51 of the General Municipal Law, which states, in brief, that all records of a municipality are available. The contention was that rights granted by that statute exist notwithstanding the exceptions found in the Freedom of Information Law. The Court, however, found that:

> "Such a result would nullify the FOIL exemptions, which the Legislature - presumably aware of General Municipal Law [section] 51 at the time it enacted FOIL - could not have intended. To give effect to both statutes, the FOIL exemptions must be read as having engrafted, as a matter of public policy, certain limitations on the disclosure of otherwise accessible records" [Xerox Corporation v. Town of Webster, 65 NY 131, 490 NYS 2d 488, 489 (1985)].

The remaining issues deal with appeals. The provision of the Freedom of Information Law of relevance is section 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 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 records the reasons for further denial, or provide access to the record sought."

As suggested earlier, if indeed a determination on appeal did not deal with all of the records sought, I agree that the response was deficient.

I hope that I have 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. Terte

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4285

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

September 4, 1986

Mr. Joseph Medford
[redacted]

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

Dear Mr. Medford:

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

Specifically, you want to inspect certain records of the West Hempstead-Hempstead Gardens Water District containing the names of all district customers, their water usage and the amounts they were billed for the preceding year. You indicate that the water district is a municipal entity. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to access to records maintained by agencies. The term "agency" is defined in section 86(3) of the Law to include state and local governmental entities except the judiciary and the State Legislature. Thus, I believe that the West Hempstead-Hempstead Gardens Water District, a municipal entity, is subject to the Freedom of Information Law.

Second, the Law is based upon a presumption of access. Stated differently, all records 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 the records, to the extent that they exist, you are seeking fall within any of the specified grounds for denial. Thus, they should, in my view, be made available to you.

Finally, for your use and information, I am enclosing copies of the Freedom of Information Law and "Your Right to Know", a pamphlet which outlines the Law and contains a sample letter of request.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Encs.

cc: West Hempstead-Hempstead Gardens Water District

FOIL-AO-4259

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

September 5, 1986

Mr. Nelson Eddie Carty
[redacted]

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

Dear Mr. Carty:

Your letter of September 2 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government, a unit of the Department of State upon which the Secretary serves as a member.

First, in accordance with your request, enclosed are copies of two brochures, "You Should Know" and "Your Right to Know".

Second, you asked for information concerning the address of the agency from which you might obtain a copy of a pistol license application that was submitted to and approved by the New York City Police Department in 1979. In this regard, based upon a decision rendered by the Court of Appeals, the state's highest court, approved pistol license applications are available to the public [see Kwitny v. McGuire, 53 NY 2d 968 (1981)]. Since your application was approved by the New York City Police Department, a request should be sent directly to the Department. The address is as follows:

Records Access Officer
New York City Police Department
1 Police Plaza
New York, New York 10038

When making the request, it is suggested that you include as much detail as possible in order that Department personnel can locate the record.

Your remaining question involves where you can write to obtain the names, addresses and your dates of attendance at public schools since you arrived in this county. It is unlikely in my view that there is any single source or agency that maintains the information in question. However, it is suggested that you contact the last public school that you attended, for it is possible that records from other schools may have been forwarded to that school. I point out, too, that the records in question would, in my opinion, be available to you pursuant to a federal law, the Family Educational Rights and Privacy Act (20 U.S.C. 1232g).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4260

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 1791

September 5, 1986

Mr. Joseph C. Dwyer
Dwyer & Dwyer, P.C.
Weststar Professional Building
1616 West State Street
P.O. Box 648
Olean, New York 14760

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

Dear Mr. Dwyer:

I have received your letter of August 22 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter:

> "[You] have a client who received the emergency services of a private, non-profit ambulance company in Allegany County. The company receives some State funding and is required to file reports of services with the Western Regional Emergency Medical System, Department of Surgery, SUNY, at Buffalo. [Your] client has been unable to obtain the report regarding care he received by the ambulance company. Since the ambulance company itself will not release the report, [you] wonder if [your] client may obtain the report from the Western Emergency Medical System under the Freedom of Information Law."

The question is whether you may obtain the report from the Western Regional Emergency Medical System under the Freedom of Information Law.

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 Law to include:

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

From my perspective, the State University of New York (SUNY) is clearly an "agency" subject to the Freedom of Information Law [see also State University of New York v. Syracuse University, 206 Misc. 1003, aff'd 285 AD 59 (1954)]. Assuming that, as you indicate, the Western Regional Emergency Medical System is part of SUNY [see Education Law, section 355(1)(d)], I believe that the report in question would constitute an "agency" record that falls within the scope of the Freedom of Information Law.

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

Third, with respect to medical and related records, of greatest significance is section 87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Further, section 89(2)(b) lists examples of unwarranted invasions of personal privacy, the first two of which pertain to:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

However, section 89(2)(c) provides 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:

i. when identifying details are deleted;

ii. when the person to whom a record pertains consents in writing to disclosure;

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

Therefore, if the subject of the record or a person acting on his behalf seeks records pertaining to himself, I believe that the records must be made available, unless a different ground for denial may appropriately be asserted. Based upon the facts described in your letter, it does not appear that any of the remaining grounds for denial may be asserted.

An alternative method of obtaining the record in question unrelated to the Freedom of Information Law involves section 17 of the Public Health Law. Although that statute does not confer rights of access upon a patient to medical records pertaining to him, a physician may, acting on behalf of a competent patient, obtain from another physician or hospital medical records pertaining to the patient. It is noted, too, that a new section 18 of the Public Health Law, effective January 1, 1987, will generally grant patients direct rights of access to medical records pertaining to them (Chapter 497, Laws of 1986).

In addition, for the reasons described in the attached opinion rendered in 1984, the records of the ambulance company may arguably be subject to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-426/

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 9, 1986

Mr. Christopher J. Kotary
Town Attorney
Town of Webster
1000 Ridge Road East
Webster, NY 14580

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

Dear Mr. Kotary:

I have received your letter of August 22 in which you requested an advisory opinion concerning the Freedom of Information Law.

Your initial area of inquiry pertains to a request directed to the Town Assessor by a private organization for a "computer tape copy" of the Town's "DMT file". The private organization, which, according to your letter, might have a "profit motive", has offered to supply "all necessary blank computer tapes and to pay for all copying costs". You have asked whether, in my view, any portion of the data may be withheld, particularly in consideration of section 87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute an "unwarranted invasion of personal privacy". You also questioned the propriety of releasing information pertaining to individual parcels to a private organization.

In this regard, I offer the following comments.

First, you indicated that you are familiar with the holding in Szikszay v. Buelow [107 Misc. 2d 886, 436 NYS 2d 558 (1981)], which dealt in part with rights of access to the equivalent of an assessment that was produced in computer tape format. The court referred to section 87(2)(b), as well as section 89(2)(b)(iii) [id. at 558), which states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes". Notwithstanding those provisions, the court granted access to the computer tapes and held that:

> "In view of the history of public access to assessment records and the continual availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.L.R.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted'" (id.).

The Court also found that:

> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner's purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy. It is therefore improper for respondent to deny petitioner's request for copies of the County assessment rolls in computer tape format" (id.).

I point out, too, that the same conclusion was reached by another court in an unreported decision (Real Estate Data v. Nassau County and Abe Seldin, Chairman, Board of Assessors, Sup. Ct., Nassau Cty., September 18, 1981).

In view of the foregoing, I believe that assessment information that is now stored on a computer tape is available to anyone, including a private organization.

Second, with respect to more specific information pertaining to particular parcels, I believe that similar records were found to be accessible prior to the enactment of the Freedom of Information Law. As early as 1951, it was held that the contents of a so-called "Kardex" system used by city assessors were available. The records determined to be available were described as follows:

> "Each card, approximately nine by seven inches (comprising the Kardex System), contains many printed items for insertion of the name of the owner, selling price of the property, mortgage, if any, frontage, unit price, front foot value, details as to the main building, including type, construction, exterior, floors, heating, foundation, basement, roofing, interior finish, lighting, in all, some eighty subdivisions, date when

> built or when remodeled, as well as details as to any minor buildings" [Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756, 758; see also, Sanchez v. Papontas, 32 AD 2d 948 (1969)].

Your remaining questions involve whether "the Town may 'sell' its interest in such data" to a corporation and what fees may be imposed. As you intimated, this office does not deal with the issue of a "sale" of its interest. However, with respect to fees that may be imposed under the Freedom of Information Law, section 87(1)(b)(iii) of the Law indicates that an agency may charge up to twenty-five cents per photocopies for records up to nine by fourteen inches, or the "actual cost of reproduction" for other records, i.e., those records that cannot be photocopied, such as computer tapes. Further, the regulations promulgated by the Committee, which have the force of law, state in relevant part that the fee for records that cannot be photocopied:

> "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 Part 1401.8(c)(3)].

In the situation that you described, where a firm is willing to provide blank computer tapes, assuming that the tapes are compatible with the Town's computer, it appears that the fee representing the actual cost of reproduction would involve the use of computer time. For instance, if, by means of contract or otherwise, it costs the Town $100 an hour for computer time, and reproduction of a tape takes a half hour, the fee would be $50. Where no blank tape is supplied, the "actual cost" would likely include the cost of a blank tape to the Town, plus computer time.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4262

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

September 9, 1986

Mr. Thomas H. Jones
85-C-193
Cell 17-32
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. Jones:

I have received your letter of August 25 concerning access to records.

Specifically, you asked how you "can get the statements made by the witnesses in [your] case". You also asked whether there are forms that must be completed when making a request.

In this regard, I offer the following comments.

First, it is unclear on the basis of your letter where the statements might be located. It is possible that the statements are maintained by a court. If that is so, the Freedom of Information Law is not applicable, for it specifically excludes the courts and court records from its coverage. While the Freedom of Information Law does not apply to court records, other provisions of law often grant substantial rights of access to court records. Assuming that the records in question are kept by a court, it is suggested that you submit a request to the clerk of the court. Your request should include sufficient detail to enable court officials to locate the records, such as names, dates, index, docket numbers and similar information.

Second, if the statements are kept by a law enforcement agency or the office of a district attorney, for example, the Freedom of Information Law is applicable.

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

Without additional information concerning the statements or the event to which they relate, it is unclear whether they are available. Of particular relevance may be section 87(2)(e)(iii), which states that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

If, for example, there was no trial and the identities of witnesses were not divulged, it is possible that the exception quoted above might apply.

In terms of making a request under the Freedom of Information Law, no specific forms have to be used. A request should be directed to the "records access officer" of the agency that maintains the records. Further, section 89(3) of the Law requires that an applicant "reasonably describe" the records sought. Therefore, again, you should include sufficient detail to enable agency officials to locate the records.

Enclosed is "Your Right to Know", which describes the Freedom of Information Law more fully and which contains a sample letter of request that may be useful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-44
FOIL-AO-4263

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

September 9, 1986

Mr. Samuel Petty
[redacted]

Dear Mr. Petty:

As you are aware, your letter of August 26 addressed to the Attorney General has been forwarded to the Committee on Open Government, a unit of the Department of State.

In response to your questions, New York State has enacted both a Freedom of Information Law and a Personal Privacy Protection Law.

As a general matter, the Freedom of Information Law is applicable to records maintained by units of state and local government in New York. 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 Personal Privacy Protection Law is applicable only to records of state agencies; it does not apply to local government. Moreover, since you referred to records of law enforcement agencies, I point out that section 95(7) indicates that rights of access granted by the Personal Privacy Protection law do not pertain to "public safety agency" records [see section 92(8)]. As such, the Personal Privacy Protection Law may be of minimal utility to you.

To seek records under the Freedom of Information law, a request should be directed to the "records access officer" of the agency or agencies that you believe maintain records in which you are interested. Section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought." Therefore, when making a request, sufficient detail should be included to enable agency officials to locate the records.

Enclosed are copies of the Freedom of Information and Personal Privacy Protection Laws, as well as two brochures, "Your Right to Know" and "You Should Know", which describe those statutes 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:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1322
FOIL-AO- 4264

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

September 11, 1986

Mr. Robert C. Johnston
[redacted]

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

Dear Mr. Johnston:

I have received your letter of August 24 and the materials attached to it.

Your inquiry concerns a denial of access to records relating to planned changes in the Village of West Carthage water system. The records sought were denied on the basis of section 87(2)(g) of the Freedom of Information Law. However, you indicated that the information sought has been provided to the State Health Department. In addition, it is your view that the information might have been withheld from you and your organization because of a "prior legal action" that you initiated after having examined an earlier proposal concerning the water system. You also referred to a statement by the Village Attorney, who indicated "that it was proper to hold a closed meeting for just that reason". More specifically, according to a news article that you enclosed, it is the Mayor's opinion that a meeting to discuss proposed water system renovations:

> "...can be held in executive session, he said, because of litigation instituted last fall by the Pleasant Lake Land and Cottage Owners Association, which opposes the project because it fears the proposed changes would substantially lower the lake level.
>
> "In an out-of-court accord, the village agreed to the association's request that a full environmental impact study be done before the project construction begins."

The Village Attorney was quoted in the article as stating that "We have a temporary order, but the lawsuit is still pending". The attorney suggested that the meeting could be closed because "any move we might make that the landowners don't like might put us back in court".

In the regard, I offer the following comments.

First, with respect to your request for records, 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.

It is emphasized that the introductory language of section 87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. Based upon the quoted language, I believe that the State Legislature envisioned situations in which a record or report might be both accessible and deniable in part. In my opinion, 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.

Second, under the circumstances, the records sought appear to consist of communications with village engineers and that, therefore, they could be characterized as "intra-agency" materials. 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 portions of the inter-agency or intra-agency materials consisting of advice, opinion, recommendation and the like could in my view justifiably be withheld.

The disclosure of the information to the State Health Department is, in my opinion, likely irrelevant to your rights. It is assumed that the records in question were transmitted to the Department not in conjunction with a request made under the Freedom of Information Law, but rather because the Department officials need the records in the performance of their official duties.

Third, since you referred to a delay in response to your request, I point out that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force of Law, prescribe time limits for responding 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 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)].

With regard to the authority to enter into an executive session to discuss the proposal, based upon the facts as I understand them, I disagree with the opinion of the Mayor and the Village Attorney. The news articles indicate that the lawsuit initiated some time ago resulted in "an out-of-court settlement". Further, the suit apparently dealt with the preparation of environmental impact study.

It appears that Village officials intend to rely upon section 105(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In a situation similar to that described in the materials that you supplied, the Appellate Division unanimously held that the "litigation" exception for executive session could not be asserted. In Weatherwax v. Town of Stony Point, it was held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v Town Bd., 83 AD2d 612, 613). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply by expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [97 AD 2d 840, 841 (1983)].

The materials do not indicate that the discussions will involve a discussion of "strategy" relative to litigation. Further, as specified by the court, the fear of litigation alone does not justify the holding of an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Donald Getman, Mayor
Lawrence D. Hasseler, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4265

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

September 11, 1986

[redacted]
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 [redacted]:

I have received your letter of August 27 concerning access to records.

Specifically, you wrote that you are interested in obtaining a copy of your "discharge summary from M.H.U. in Elmira". It is your view that you have a right to the record under the Freedom of Information Law. 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, the initial ground for denial pertains to records that are "specifically exempted from disclosure by state or federal statute". If I interpret your letter correctly, "M.H.U." stands for "Mental Health Unit". If that is so, it appears that the record in question would be exempted from disclosure by statute, section 33.13 of the Mental Hygiene Law. In brief, the cited provision requires that records identifying clients or patients at a mental hygiene facility, including a mental health unit of a correctional facility, be kept confidential, unless otherwise specified. As such, assuming that my understanding of the situation is accurate, I do not believe that the Freedom of Information Law or any other provision grants you a right to the record in question.

I also received today your letter of September 10, which appears to deal with medical and psychiatric treatment. All that I can suggest is that you confer with your counselor or perhaps a representative of Prisoners' Legal Services or similar group.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4266

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

September 11, 1986

Mr. William J. Kolman
[redacted]

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

Dear Mr. Kolman:

I have received your letter of August 26 and the materials attached to it.

As I understand the situation, you requested to inspect documents maintained by the Croton-Harmon School district. It appears that, although some of the records sought were made available, others were either effectively denied or are not maintained by the District. Further, an affidavit attached to your letter indicates that Mr. Berkow, the District's Business Manager, told you that you "were not allowed to consult the records" and that you "could request specific information..." (emphasis contained in the affidavit).

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law states that, as a general matter, an agency is not required to create or prepare a record in response to a request. Therefore, to the extent that the information sought might not exist in the form of a record or records, the District would not, in my opinion, be obliged to create a record on your behalf in order to respond to a request.

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. As I interpret your request, to the extent that the records sought exist, they are accessible, for none of the grounds for denial could be asserted.

Third, an applicant for records need not identify with specificity the records in which he or she is interested. By way of background, section 88(6) of the Freedom of Information Law as originally enacted in 1974 required an applicant to request "identifiable" records. The current provision, section 89(3), which became effective in 1978, requires that an applicant "reasonably describe" the records sought. Further, it has been held by the state's highest court that a request "reasonably describes" the records if the agency, based upon the terms of the request, can locate the records [M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Lastly, in the event of a denial, an applicant may appeal in accordance with section 89(4)(a) of the 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 records the reasons for further denial, or provide access to the record sought."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alan Berkow, Business Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4267

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

September 12, 1986

Mr. Daniel Danilczyk
[redacted]

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

Dear Mr. Danilczyk:

I have received your letter of August 27 and the correspondence attached to it.

In brief, you apparently requested records under the Freedom of Information Law from the New York Racing Association, Inc. You were informed by the Association that it is not subject to the Freedom of Information Law. You have asked for "a detailed explanation of why they are above the Law". You also asked whether any agency is responsible for regulating the Association. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an "agency". Section 86(3) defines "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 pertains to "governmental" entities. It does not apply to a private corporation, such as the New York Racing Association.

Second, while I am not familiar with its relationship with or specific duties concerning the Association, the Racing and Wagering Board is responsible for supervising all horse racing and pari-mutuel betting activities in New York. The Racing and Wagering Board is clearly an "agency" and its records are subject to rights of access granted by the Freedom of Information Law. The address of the Board is 400 Broome Street, 3rd Floor, New York, NY 10013.

Lastly, should you request records from the Board, I point out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency officials to locate records.

Enclosed is "Your Right to Know", which describes the Freedom of Information Law in greater detail.

I hope that I 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-4268

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

September 12, 1986

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 August 25 and the materials attached to it.

You have, once again, raised a series of issues and suggestions. It is noted at the outset that, over the course of time, I have prepared more than a dozen advisory opinions in response to your inquiries. Most have dealt with the same or related subject matter. In the interest of efficiency and an effort to avoid redundancy, I choose not to reiterate advice that has previously been rendered.

One issue that you raised, in my opinion, involves a misinterpretation of fairly recent decisions rendered by the Court of Appeals. You rely particularly upon M. Farbman & Sons v. New York City, [62 NY 2d 75 (1984)] and express the proposition that the decision represents a reversal of McAulay v. Board of Education, City of New York, [61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion)], for Farbman indicates that records are subject to rights of access, even if they are not used in the decision making process. You also suggested that the Committee recommend that section 87(2)(g) be deleted from the Law.

In my opinion, Farbman stands for the principle that anyone may make a request and assert rights granted by the Freedom of Information Law. As stated in the first sentence of the Court's decision, "Access to records of a government agency under the Freedom of Information Law...is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" (Farbman, supra, 78). While the Court alluded to section 87(2)(g) [id. at 83], there was no

substantive interpretation of that provision that would, in my opinion, negate or alter earlier decisions of the Court of Appeals pertaining to that provision. It is noted, too, that this office has consistently advised that "statistical or factual tabulations or data" are accessible pursuant to section 87(2)(g)(i), whether or not those aspects of inter-agency or intra-agency materials are used in or relate to the decision-making process.

Lastly, I do not believe that section 87(2)(g) should, as you suggest, be deleted from the Law. That provision, in my opinion, grants significant rights of access, and concurrently permits a denial of certain aspects of inter-agency or intra-agency materials based upon strong public policy considerations. Notwithstanding what might be your view of section 87(2)(g), I believe that it continues to permit a denial of those portions of inter-agency or intra-agency materials consisting of opinion, advice, recommendation and the like.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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

September 15, 1986

Ms. Ellen M. Darrow
[redacted]

The staff of the Committee on 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. Darrow:

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

According to your letter, a group of citizens of the Village of Canisteo is questioning the conduct of two village police officers in carrying out their official duties. In order to obtain background information, you made a request under the Freedom of Information Law for the following records:

> "1. Weekly or monthly reports including total number of arrests made with a breakdown of speeding, penal law violations and alcohol-related violations issued January 1, 1985 through December 31, 1985, and January 1, 1986 through June 30, 1986.
>
> 2. Disposition of alcohol-related arrests.
>
> 3. Breakdown of tickets by individual officer.
>
> 4. Average number of D.W.I. arrests per week.
>
> 5. Number of alcohol-related offenses during 1984.

6. Qualifications required for police officer position by Village of Canisteo.

7. Name and qualification of each officer presently employed by Village."

8. Village of Canisteo Police Department subject matter list.

You noted that in regard to your requests for records of arrests and dispositions, you are not seeking the names of the arrestees to whom the records pertain.

You received a response from Mr. James P. Burd, Esq. in which requests numbered "2", "3", "6" and "7" were denied, ostensibly on the basis of grounds for denial set forth in section 87(2) of the Freedom of Information Law. Your request for a copy of the Department's subject matter list was not addressed at all. You corresponded in writing to Mr. Burd, advising him of your objections to the denials. 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 section 87(2)(a) through (i) of the Law.

Second, requests numbered "2" and "3" were denied on the basis of sections 87(2)(a) and 87(2)(e) of the Freedom of Information Law.

Section 87(2)(e) provides that an agency may deny access to 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..."

Since request number "2" pertains to records [illegible] the "disposition" of alcohol related arrests, it [illegible] matters which have been fully investigated and adjudicated. As such, it does not appear that subdivisions (i) or (ii) of section 87(2)(e) would apply to the request. Nor in my view would subdivisions (iii) or (iv) be activated by the disclosure of such dispositions. Thus, I do not believe that section 87(2)(e) would be applicable to this request.

Request number "3" pertains to the breakdown of tickets by individual officer. Assuming that such statistical compilations exist, section 87(2)(e) would not, in my view, be relevant to disclosure of such records. It is noted that the Freedom of Information Law pertains to existing records. Stated differently, if a requested record does not exist, an agency is not required to create a record in response to a request.

Section 87(2)(a) states that an agency may deny access to records or portions of records that "are specifically exempted from disclosure by state or federal statute". However, Mr. Burd does not state what statute provides the pertinent exemption. He incorrectly refers to section 160.50 of the Criminal Procedure Law (CPL) as providing for "the sealing of certain records relative to juveniles or youthful offenders".

Section 720.35 of the CPL provides for confidentiality of certain records involving a youthful offender. Section 725.15 provides for confidentiality of records of proceedings against a juvenile.

Section 160.50 of the CPL provides for the sealing of records when a criminal action or proceeding against a person is terminated in favor of such person.

Although each of the statutes cited above exempts specific records from disclosure, none provides an exemption for conviction records of adults. Thus, these statutes do not, in my view, constitute a basis for a blanket denial of request number "2".

Regarding request number "3", disclosure of a record containing the number of tickets given out by each police officer on the force, would not, in my view, violate any of the above described confidentiality statutes. Once again, however, if no such record exists, the agency would not be obliged to prepare the record on your behalf.

In sum, your request for the disposition of alcohol related arrests should, in my view, be granted except to the extent that CPL sections 720.50, 725.17 or 160.50 are applicable. Your request for a breakdown of tickets by individual officer should, in my opinion, be granted, assuming that the record exists.

Third, request numbers "6" and "7" were denied on the ground that disclosure would "constitute an unwarranted invasion of personal privacy" [section 87(2)(b) of the Freedom of Information Law]. In particular, Mr. Burd cites section 89(2)(b)(i) of the Law, which states that "An unwarranted invasion of personal privacy includes...disclosure of employment, medical or credit histories or personal references of applicants for employment".

With respect to request number "6", a record consisting of general qualifications required of any person who might seek or obtain a position as a public employee (i.e., civil service statement of minimum qualifications for eligibility) would, in my view, clearly be available. Disclosure of such a record would not likely involve an unwarranted invasion of anyone's personal privacy.

In request number "7", you are seeking the name and qualifications of police officers currently employed by the Village. The names of the officers are available. It has consistently been held by the courts that the names, job titles and salary levels of public employees are available under the Freedom of Information Law [see Freedom of Information Law, section 87(3)(c); also Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); and Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765 (1976)]. However, records consisting of the officers' qualifications would likely be unavailable in view of sections 87(2)(b) and 89(2)(b)(i) of the Freedom of Information Law.

Fourth, you ask about the procedure for appealing a denial of a request made under the Freedom of Information Law. Under section 89(4)(a) of the Law "...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..." It is my understanding that the thirty day time limit would commence from the date of the letter denying the request fully or in part.

It is noted that, although Mr. Burd did not identify himself as such, it appears that he is acting as records access officer for the Village of Canisteo. I point out that section 1401.7(b) of the regulations promulgated by the Committee on Open Government, which have the force of law (21 NYCRR Part 1401) states in part that "The records access officer shall not be the appeals officer".

It is suggested that you contact the Village Clerk to determine the identity of the appeals officer or body, for that person or body should be identified in the Village rules adopted under the Freedom of Information Law.

Fifth, it appears that you have received no response from Mr. Burd concerning your request for a copy of the subject matter list of the Village Police Department. Section 87(3)(c) of the Law requires that each agency maintain "a reasonably detailed subject matter list of all records in the possession of the agency...". I am unaware of any basis for withholding such a record. Thus, in my view, upon your request, the subject matter list maintained by the Village concerning all Village records should be made available to you.

Sixth, for your use and information, I am enclosing copies of the Freedom of Information Law and "Your Right to Know", a pamphlet which outlines the Law and provides sample letters of request and appeal.

Finally, a copy of this opinion is being sent to Mr. Burd for his review and that of the appeals officer.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Encs.

cc: James P. Burd, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4270

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

September 15, 1986

Mr. Herbert Roberson, Jr.
76-B-693
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. Roberson:

I have received your letter of August 22 in which you requested assistance.

Specifically, you wrote that you want to obtain copies of psychiatric reports and probation reports pertaining to you which were prepared in 1972 and 1976. Further, it appears from your letter that an appeal may be imminent or currently pending relating to the criminal matter in connection with which the reports were prepared. You ask this office to provide you with copies of the reports or, in the alternative, to review the reports and "verify what is stated therein". In this regard, I offer the following comments.

First, I am assuming, for purposes of this opinion, that by the term "probation reports" you are referring to your pre-sentence reports and that the psychiatric reports you seek are those submitted to the court in connection with sentencing.

Second, the Committee on Open Government is authorized to render advisory opinions under the Freedom of Information Law. We do not have the authority to compel an agency to grant or deny access to records or to enforce compliance with the Law. Nor is it within the jurisdiction of this office to obtain records from other agencies or to verify the information contained in records maintained by other agencies. In short, since this office has neither custody nor control of the records, we cannot provide them to you.

Third, the Freedom of Information Law pertains generally to records maintained by units of state and local of government in New York State. 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.

Fourth, section 87(2)(a) is in my view applicable to the records you are seeking. It states that an agency may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute".

Section 390.50 of the Criminal Procedure Law (CPL) is, I believe, a relevant exempting statute. It is my understanding that generally under section 390.50, pre-sentence reports and psychiatric reports submitted to the courts in connection with sentencing are confidential. However, I believe that section 390.50 also contains several exceptions to that rule which permit disclosure pursuant to court order under certain specified circumstances. As such, it is suggested that you might want to discuss the issue further with your attorney.

It is also noted that, as I understand it, if you were represented by an attorney at the time of your sentencing, it is possible that the attorney retains the pre-sentence report in his/her files. If so, you may be able to obtain the report from that attorney.

Finally, for your information, I am enclosing a copy of section 390.50 of the Criminal Procedure Law.

I regret that I cannot be of greater assistance to you in this matter. Should any further questions arise which are within the jurisdiction of this office, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1324
FOIL-AO-4271

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

September 15, 1986

Mr. Lawrence A. Hendrix
Superintendent of Schools
Putnam Central School District No. 1
Putnam Station, New York 12861

The staff of the Committee 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. Hendrix:

As you are aware, I have received your letter of August 29.

Your inquiry pertains to a series of events that led to the preparation and disclosure of a "Report on Corporal Punishment". The report includes names of students and teachers and has been forwarded to the Commissioner of Education. Your questions involve the application of Buckley Amendment to the report, whether the report should have been forwarded to the Education Department, which individuals who should be able to inspect the report, and whether the report "violate[s] any...state or federal law".

In this regard, I 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 and Open Meetings Laws. While this office has no jurisdiction regarding the Buckley Amendment, a federal law, it is often necessary to review that law in conjunction with the Freedom of Information Law, or the Open Meetings Law, in order to appropriately advise concerning those statutes. For more specific guidance relative to the Buckley Amendment, it is suggested that you review the regulations promulgated under that statute, a copy of which has been sent to you, or that you contact Ms. Pat Ballinger, FERPA Office, Room 3017, U.S. Department of Education, 400 Maryland Ave., S.W., Washington, D.C. 20202. Ms. Ballinger can be reached at (202)732-2058.

Second, the "Buckley Amendment" is the commonly used name for the Family Educational Rights and Privacy Act, which is a federal act (20 U.S.C. 1232g). In brief, the Buckley Amendment is applicable to educational agencies or institutions that participate in the funding programs administered by the U.S. Department of Education. As such, it applies to virtually all public educational institutions, as well as many private colleges and universities. With regard to records, as a general matter, "education records" identifiable to a particular student or students are considered confidential, unless the parents of the students consent to disclosure. Concurrently, the parents enjoy rights of access to education records pertaining to their children. I point out that the term "education records" is defined broadly in the federal regulations to mean:

> "those records which: (1) are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution" (regulations promulgated by U.S. Department of Education, section 99.3, Federal Register, Vol. 41, No. 118 --- Thursday, June 17, 1976).

As indicated earlier, education records identifiable to a particular student can be disclosed only after having received consent from the parents of the student. However, section 99.31 of the regulations describes certain situations in which prior parental consent is not required, including disclosure to authorized representatives of state educational authorities, "Subject to the conditions set forth in [section] 99.35" [section 99.31(a)(3)(iv)]. The "conditions" pertain to disclosures to federal and state officials for "federal program purposes". Specifically, section 99.35 states in relevant part that nothing in the Buckley Amendment or the regulations:

> "(a)...shall preclude authorized representatives of officials listed in section 99.31(a)(3) from having access to student and other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of or compliance with the Federal legal requirements which relate to these programs.

> (b) Except when the consent of the parent of a student or an eligible student has been obtained under section 99.30, or when the collection of personally identifiable information is specifically authorized by Federal law, any data collected by officials listed in section 99.31(a)(3) shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, or enforcement of or compliance with Federal legal requirements."

In addition, section 99.31(a)(5) states that prior consent is not needed in a case in which disclosure is made:

> "To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974".

I have no knowledge of whether the conditions described above may be present, or whether there is any specific reporting requirement. It is suggested that you might contact the State Education Department to determine whether a state statute requires that the report in question must be forwarded to the Department.

Third, during our conversation, you indicated that the Board of Education discussed issues relative to corporal punishment during open meetings, and that both teachers and students were identified during those open meetings.

For future reference, I point out that a public body, such as a board of education, may conduct closed or "executive sessions" to discuss certain topics. Of particular relevance is section 105(1)(f) of the Open Meetings Law (see attached), which permits a public body to enter into an executive session to discuss:

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

Therefore, if a discussion involves, for example, matters leading to the discipline of a particular teacher or student, I believe that an executive session may be held. Further, pursuant to section 105(2), the school board may authorize the parents of a student to join the Board in an executive session.

In addition, section 108 of the Open Meetings Law describes "exemptions". If a matter falls within the scope of an exemption, the Open Meetings Law does not apply. Section 108(3) exempts from the Open Meetings law "any matter made confidential by federal or state law." If, for instance, the Board is reviewing a student's records that are confidential under the Buckley Amendment, the discussion may be exempt from the Open Meetings Law, for it deals with a matter made confidential by federal law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STAT
DEP
COM...

...ENT FOIL-AO-4272

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

September 15, 1986

Ms. Marilyn R. Wessels
Director of Advocacy Services
New York State Association for
Retarded Children, Inc.
393 Delaware Avenue
Delmar, New York 12054

The staff of the Committee on 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. Wessels:

I have received your letter of September 5, which pertains to your unsuccessful efforts to obtain information from the Orange County BOCES.

As I understand the situation, in March, in your capacity as Director of Advocacy Services for the New York State Association for Retarded Children, Inc., you requested that numerous agencies across the state complete a survey. The questions on the survey appear to involve statistical and factual data regarding students with handicapping conditions. None of the information sought would be identifiable to a particular student or students. Having made several inquiries to Orange County BOCES, you received a response on July 2 in which the Assistant Superintendent denied your request, indicating "that the Freedom of Information Act does not require the completion of survey forms." Subsequently, in letters dated August 1 and August 21, you submitted request letters, citing the Freedom of Information Law as the basis for your requests. As of the date of your letter to this office, you received no further response from the BOCES.

In this regard, I offer the following comments, which, as requested, will be shared with the Executive Officer and the Assistant Superintendent of Orange-Ulster BOCES.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that, as a general matter, an agency is not required to create or prepare a record in response to a request. Therefore, notwithstanding your anticipation of cooperation, an agency is not, in my opinion, required to complete a survey in which information is sought. Similarly, having reviewed your correspondence, for future reference, rather than seeking information by asking questions, it is suggested that you request records. For instance, the first question in your request of August 1 is: "How many classes for students with handicapping conditions does your BOCES presently serve?" I believe that, technically, it would be more appropriate to request a record or records indicating the number of classes BOCES has for students with handicapping conditions. Enclosed is "Your Right to Know", which describes the Freedom of Information Law in detail and contains a sample letter of request that may be useful to you.

Second, to the extent that records exist that contain the information sought, they would in my opinion be accessible under the Freedom of Information Law. The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Relevant is one of the grounds for denial which, due to its structure, grants access to the records or portions of records that you seek. 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. Under the circumstances, the information sought, to the extent that it exists in the form of a record or records, could be characterized as "intra-agency" material; however, it would appear to consist solely of "statistical or factual tabulations or data" accessible under section 87(2)(g)(i).

Third, in terms of procedural compliance, section 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. The Committee has done so (21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation, i.e., the BOCES Board, to adopt similar rules and regulations consistent with the Law and the Committee's regulations.

One facet of the regulations involves the designation of a so-called "records access officer". The records access officer, according to the Committee's regulations, is responsible for coordinating an agency's response to requests for records. As such, requests should generally be directed to and answered by the designated records access officer.

Lastly, the Freedom of Information Law and the regulations 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 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: Dr. Emanuel Axelrod, Executive Officer
Robert A. Thabet, Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4273

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

September 15, 1986

Mr. Maurice P. Riley
83-B-1335
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. Riley:

Your letter of September 3 addressed to Secretary of State Shaffer has been forwarded to the Committee on Open Government, a unit of the Department of State responsible for advising with respect to the Freedom of Information and Personal Privacy Protection Laws.

In conjunction with your request, enclosed are copies of "Your Right to Know", and "You Should Know". I have transmitted your letter to the Department's Division of Information Services with respect to the other publications that you requested.

You also asked how you may "go about obtaining a copy of the Employees Manual and the Employees Rule Book". It is assumed that you are referring to a manual and rule book pertaining to employees of the Department of Correctional Services and, in this regard, I offer the following comments and suggestions.

First, the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services indicated that a request for records kept at a correctional facility may be directed to the facility superintendent. If records are kept at the Department's central offices, a request may be sent to the Assistant Commissioner for Administration.

Second, with respect to rights of access, 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.

Third, while administrative staff manuals and rules are often available, it is possible that a ground for denial might be asserted, perhaps with respect to portions of the records sought. Specifically, section 87(2)(e)(iv) states in relevant part that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would...
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

It is noted that a determination rendered by the Court of Appeals, the State's highest court, upheld a denial of certain portions of State Police rules and regulations on the ground that certain investigative procedures were not routine [DeZimm v. Connelie, 64 NY 2d 860 (1985); see also Fink v. Lefkowitz, 47 NY 2d 567 (1979)]. In short, without knowledge of the contents of records sought, the extent to which they may be available is unclear.

I hope that I 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.

TE OF NEW YORK
ARTMENT OF STATE
OMMITTEE ON OPEN GOVERNMENT

OML-AO- 1326
FOIL-AO- 4274

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 122
(518) 474-2518, 279

September 15, 1986

Charles H. Maier, Supervisor
Town of Hamlin
1658 Lake Road
Hamlin, New York 14464

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

Dear Supervisor Maier:

I have received your letter of August 29 and the materials attached to it.

Those materials consist of a letter addressed to the Town Zoning Board of Appeals, a copy of which was sent to you, and a letter placed in your mailbox, that was not specifically addressed to you, by a member of the Town Board. It is apparently the Board member's contention that the correspondence addressed to the Zoning Board of Appeals should have been distributed to all the members of the Board.

In this regard, neither of the statutes within the Committee's jurisdiction, the Freedom of Information Law and the Open Meetings Law, deal specifically with the distribution of records. Certainly, if a request for a record is made under the Freedom of Information Law, the appropriate agency official must respond in accordance with the requirements of the Freedom of Information Law. However, I know of no provision of law that requires a town supervisor or similar official to routinely or automatically distribute copies of materials to all board members. Similarly, questions often arise concerning the disclosure of correspondence received by a municipality at meetings of its governing body. In short, the Open Meetings Law does not require that communications received by a municipality be read, disclosed or identified during meetings. While such a practice might exist in some units of government, I do not believe that there is any such requirement imposed by 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-4275

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

September 16, 1986

Mr. Earl C. Knight
Negotiation Consultants & Co.
Executive Offices
Anthony Estates
Liebler Road
Boston, New York 14025

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

Dear Mr. Knight:

I have received your letter of August 25, which reached this office on September 8.

You enclosed a copy of the East Aurora Union Free School District's policy regarding the Freedom of Information law. It is your view that the policy is, in some respects, inconsistent with the Freedom of Information law and may represent an attempt "to handicap the availability of the Public to gain access to their public records".

Having reviewed the policy, I offer the following comments.

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 aspects of the Law (21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation, i.e., a board of education, to adopt similar rules and regulations consistent with the Law and the Committee's regulations.

Further, I agree that there are certain inconsistencies between the District policy and the Freedom of Information Law and the regulations of the Committee. You referred to those aspects of the policy statement concerning the time of response, a delay in providing material by mail until a fee is paid, the fee for a copy of a legal size paper, and a "service charge" for handling requests made by mail.

In this regard, I offer the following comments.

First, the policy statement does not indicate the time limits for responding to requests or appeals. Here I point out that the Freedom of Information Law and the Committee's regulations prescribe time limits within which responses must be given. 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)].

Second, the policy statement indicates that requests by mail will not be honored until the fee for copying is paid. Further, it also provides that "Requests completed by mail shall carry an additional $2.50 handling fee plus any postage costs in excess of the cost of mailing a standard business envelope". Two provisions are relevant. Section 89(3) of the Law indicates that copies of records must be made available upon payment of or offer to pay the requisite fees. Therefore, I believe that an agency may seek and obtain the fee for photocopying prior to making the photocopies available. With respect to the "handling fee", I believe that it is inappropriate. Section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to

twenty-five cents per photocopy or the actual cost of reproducing any other record (i.e., a record that cannot be photocopied, such as a computer tape), unless a different fee is prescribed by statute. No fee could, in my view, be assessed for personnel costs or "handling", for example. While there is nothing in the Law pertaining to postage, and many agencies do not include the cost of postage, I do not believe that an agency is precluded from passing on to an applicant whatever its cost of postage might be.

Third, with regard to "legal size paper", the provision cited earlier dealing with fees for photocopying refers to a maximum fee of twenty-five cents per photocopy "not in excess of nine inches by fourteen inches". Therefore, again, unless a statute indicates that different fee may be assessed, the fee for photocopying "legal size paper" is limited to a maximum of twenty-five cents per photocopy.

Lastly, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee, and model regulations. The model regulations enable an agency to easily adopt complete procedural regulations pursuant to the Freedom of Information Law by filling in the appropriate blanks. Copies of the same materials will be sent to the Superintendent of Schools.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent, East Aurora Union
Free School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4276

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

September 16, 1986

Mr. Peter Kehoskie
[redacted]

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

Dear Mr. Kehoskie:

I have received your letter of September 3. You requested assistance in obtaining records from the Department of Correctional Services.

According to your letter, you unsuccessfully applied for a "civil service position" at the Auburn Correctional Facility. You requested records that would indicate that you were "given an equal opportunity under the N.Y.S. Civil Service Law". In response to your initial request, although some information was provided, it was stated that the Freedom of Information Law requires that existing records be made available, and that an agency is not required to answer questions.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that, as a general rule, an agency is not required to create or prepare a record in response to a request. Stated differently, the Freedom of Information Law is not a vehicle under which the public can ask questions; rather it is a statute that enables the public to request existing records and requires agencies to respond to such requests.

Second, I have contacted the Office of Counsel on your behalf in order to learn more of your unanswered appeal. I was informed that, at the time or your initial request, no "eligible list" or similar list had yet been prepared. Therefore, your request for such a list, in a technical sense, was not denied, for it did not yet exist. I was also informed that the list in question has since been prepared and that a copy will be sent to you.

Lastly, for future reference, when a civil service examination is given, often a so-called "eligible list" is prepared. That list does not identify all candidates who took an exam; it does, however, identify those who passed the exam, usually by rank.

I hope that I 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-4277

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518 279

September 16, 1986

Ms. Janice M. Norris
[redacted]

The staff of the Committee on 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. Norris:

I have received your letter of September 3 and the correspondence attached to it.

According to your letter, you requested a copy of a letter written by Robert Strom, a member of the City Council, and sent to Karl Amylon, City Manager. The letter, which was denied, apparently pertained to you, your husband, and his role relative to the Development Authority of North Country. Although you appealed to Peter Blodgett, Corporation Counsel, the denial was affirmed, on the ground that the letter in question is "advisory in nature". It is your view that Councilman Strom's letter "was not 'advisory' in nature but accusatory". You also suggest that Mr. Strom was "instructing" the City Manager and that "a final agency policy was determined at the executive session of the Watertown City Council". The correspondence indicates that an executive session was held, but that no action was taken. Further, Mr. Blodgett wrote that the executive session to which you referred "was not held to make a decision upon information contained in that letter".

You have "appealed" to the Committee for a copy of Councilman Strom's letter and, 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 does not have the capacity to compel an agency to grant or deny access to records. Further, since the determination of your appeal by Mr. Blodgett upheld the initial denial, it appears

that the only remaining challenge to the denial would involve the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules [see Freedom of Information Law, section 89(4)(b)].

Second, under the circumstances, a written communication between a member of the City Council and the City Manager could, in my opinion, be characterized as "intra-agency material" that falls within the scope of 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, 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 could in my view justifiably be withheld under section 87(2)(g).

I point out that both the language of section 87(2)(g) as well as its judicial interpretation indicate that a single record might, depending on its contents, be both accessible and deniable in part [see e.g., Ingram v. Axelrod, App. Div., 90 AD 2d 568 (1982) and Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)]. For instance, an intra-agency agency report might contain opinion that may be withheld, as well as factual information that is accessible under section 87(2)(g)(i). However, without knowledge of the contents of the letter, more specific advice cannot be offered.

With regard to your contention that the Councilman "instructed" the City Manager, it appears that you are alluding to section 87(2)(g)(ii), which, as noted earlier, requires disclosure of "instructions to staff that affect the public". It is unclear whether an instruction that may have been given "affects the public". Further, since I am not familiar with the powers of the City Manager or a member of the Common Council, it is not clear whether a Councilman may unilaterally "instruct" the City Manager to engage in a particular course of action.

Lastly, if no action was taken during the executive session to which reference was made in the correspondence, it does not appear that a "final agency policy" was adopted. Further, even if a policy was adopted, while I believe that a statement of policy would be available under section 87(2)(g)(iii), it does not necessarily follow that an opinion leading to the adoption of policy must be made available [see e.g., McAulay v. Board of Education, City of New York, 61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karl R. Amylon, City Manager
Peter S. Blodgett, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4277

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

September 16, 1986

Ms. Janice M. Norris
[redacted]

The staff of the Committee on 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. Norris:

I have received your letter of September 3 and the correspondence attached to it.

According to your letter, you requested a copy of a letter written by Robert Strom, a member of the City Council, and sent to Karl Amylon, City Manager. The letter, which was denied, apparently pertained to you, your husband, and his role relative to the Development Authority of North Country. Although you appealed to Peter Blodgett, Corporation Counsel, the denial was affirmed, on the ground that the letter in question is "advisory in nature". It is your view that Councilman Strom's letter "was not 'advisory' in nature but accusatory". You also suggest that Mr. Strom was "instructing" the City Manager and that "a final agency policy was determined at the executive session of the Watertown City Council". The correspondence indicates that an executive session was held, but that no action was taken. Further, Mr. Blodgett wrote that the executive session to which you referred "was not held to make a decision upon information contained in that letter".

You have "appealed" to the Committee for a copy of Councilman Strom's letter and, in this regard, I offer the following comments.

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that the only remaining challenge to the denial would involve the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules [see Freedom of Information Law, section 89(4)(b)].

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> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
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> iii. final agency policy or determinations..."

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I point out that both the language of section 87(2)(g) as well as its judicial interpretation indicate that a single record might, depending on its contents, be both accessible and deniable in part [see e.g., Ingram v. Axelrod, App. Div., 90 AD 2d 568 (1982) and Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)]. For instance, an intra-agency agency report might contain opinion that may be withheld, as well as factual information that is accessible under section 87(2)(g)(i). However, without knowledge of the contents of the letter, more specific advice cannot be offered.

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Lastly, if no action was taken during the executive session to which reference was made in the correspondence, it does not appear that a "final agency policy" was adopted. Further, even if a policy was adopted, while I believe that a statement of policy would be available under section 87(2)(g)(iii), it does not necessarily follow that an opinion leading to the adoption of policy must be made available [see e.g., McAulay v. Board of Education, City of New York, 61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karl R. Amylon, City Manager
Peter S. Blodgett, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4278

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

September 16, 1986

Mr. Douglas Dietz
[redacted]

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

Dear Mr. Dietz:

I have received your letter of September 4 in which you raised questions concerning the Freedom of Information Law.

According to your letter, on August 7, you requested from the Records Access Officer of the Herkimer County BOCES "All items of adverse or positive evaluations relating to [your] performance as an employee". The Records Access Officer indicated that your "personnel folder" was available to you. However, he added that a particular evaluation was in your supervisor's desk and that you could obtain it only if the supervisor placed it in your personnel folder. On August 15 you appealed the denial to the Executive Officer of the BOCES, Mr. William Busacker. As of the date of your letter, you had not received a response to the appeal.

In this regard, I offer the following comments.

First, as you wrote in your appeal, a copy of which is attached to your letter, the location of records within an agency does not affect rights of access. The Freedom of Information Law pertains to agency records, and section 86(4) of the Law defines "record" to include:

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

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

Based upon the language quoted above, whether or not an evaluation is placed in a personnel folder is, in my opinion, irrelevant. If it is kept, held or produced by an agency, I believe that it is a "record" subject to rights of access granted by the Law.

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.

Of potential relevance is section 87(2)(g), which states that an agency may withhold records that:

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

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

From my perspective, an evaluation could likely constitute "intra-agency" material that is accessible or deniable, in whole or in part, depending upon its contents. Therefore, while the location of the evaluation within the agency is of no

significance, it cannot be advised that it is clearly available, for again, its contents and other factors (i.e., whether or not it could be characterized as a final agency determination) are relevant to rights of access.

In a related vein, you did not indicate whether you are a member of a public employee union. That factor may be signficant, for in some instances, a collective bargaining agreement contains terms that grant employees rights of access to records in excess of rights granted by the Freedom of Information Law. Therefore, if you are subject to a collective bargaining agreement, it is suggested that you review the agreement.

Lastly, you asked whether Mr. Busacker is "obligated" to respond to your appeal. Here I direct your attention to section 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 records the reasons for further denial, or provide access to the record sought."

Therefore, if Mr. Busacker has been designated to make determinations on appeal, I believe that he was obliged to respond within ten business days of the receipt of the appeal.

As you requested, copies of this opinion will be sent to Mr. Osterhoudt, the Records Access Officer, and Mr. Busacker.

I hope that I have 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 Busacker
Alan Osterhoudt

NEW YORK
NT OF STATE
EE ON OPEN GOVERNMENT

FOIL-AO-4279

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

September 16, 1986

Mr. John R. Hamilton
[redacted]

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

Dear Mr. Hamilton:

I have received your letter of September 5 and attachments in which you again requested advice under the Freedom of Information Law.

Specifically, by letter dated June 3, you initially requested advice under the Freedom of Information Law regarding numerous unsuccessful attempts to obtain certain records from the New York City Sanitation Department. You indicated that your requests for the records pertaining to "sanitation violations" which may have occurred on certain lots, began on April 17, 1985. As you were advised in an opinion of June 24, I contacted Mr. Francis Valentino, General Counsel to the Department of Sanitation, in regard to this matter. Mr. Valentino indicated that a search of department files would be made for the requested records and that any such records located would likely be made available to you. According to your September 5 letter, it appears that none of the records you are seeking have yet been made available. Instead, by letters dated June 23 and July 25, Mr. Valentino has again advised you to make your requests more specific so that he can determine what records you wish to obtain. You responded to Mr. Valentino by letters dated June 27 and July 28. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records of an agency. The Law does not require an agency to create a record in response to a request. Thus, for instance, an agency is required to respond to a request for existing records; however, the Law does not require that an agency answer questions. It appears that in several of your correspondences with the Department of Sanitation, you are requesting information rather than records.

Second, however, pursuant to your April 17, 1985 request "to review the records of enforcement violations in re: debris on ones property", Mr. Valentino advised you, by letter of the same date, "We consider your request as one made under the Freedom of Information Law. However, at this time we cannot comply as your statement...is too vague to determine what records about which you wish to inquire".

Third, as noted in my June 24 letter, under the Freedom of Information Law, a request for records must "reasonably describe" the records sought. Therefore, in my view, a request for records should be as detailed as possible in order to enable agency officials to locate the records sought. Further, it has been held by the state's highest court that a request "reasonably describes" the records if the agency can lcoate the records based on the terms of the request [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Fourth, it is also noted that the regulations promulgated by the Committee on Open Government pursuant to the Law (21 NYCRR Part 1401) state that "The records access officer is responsible for assuring that agency personnel...Assist the requester in identifying requested records, if necessary" [section 1401.2(b)(2)]. According to your letter of June 3, you met with Mr. J. Fernandez on December 26, 1985 and with Mr. Marino on December 27, 1985, both of the Department of Sanitation, in regard to your request. If the matter remains unresolved and the nature of the records sought remains unclear, it is suggested that you confer with the records access officer.

Fifth, 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 government body...". Pursuant to section 1401.7(b) of the regulations, a failure on the part of an agency to respond to a request under the Freedom of Information Law within the appropriate time limits may be considered a constructive denial and, as such, may be appealed.

Sixth, since your recent correspondences to the Department written in response to requests for clarification do not specify the records that you seek, it is suggested that you submit another request to Mr. Valentino, being as specific and detailed as possible in regard to the records you seek.

Finally, it is suggested that if you continue to have difficulty in pursuing this matter, it may be helpful to consult an attorney.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: Francis J. Valentino, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4280

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

September 17, 1986

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 correspondence of September 3 in which you raised a question concerning the Freedom of Information Law.

Specifically, having submitted a written request to Albany County, you were given a request form and were told that "This form is to be used for all requests for information of Albany County". You have asked whether you are required to use that form when making a request for County records.

In this regard, I offer the following comments.

First, the Freedom of Information Law, section 89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5) require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate 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)]. As such, both the Law and the regulations are silent concerning the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

Second, it has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed from might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writ-

ing 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, particularly if a form is sent by mail and returned to the agency by mail. 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, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

Third, although the content and format of the County's form is appropriate, as suggested earlier, I do not believe that it can be used to delay a response to a written request for records reasonably described beyond the statutory 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

RJF:jm

cc: Guy D. Paquin, County Clerk

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

OML-AO-1527
FOIL-AO-4281

September 17, 1986

Mr. James Bacallis
[redacted]

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

Dear Mr. Bacallis:

As you are aware, I have received your note of September 10.

According to your letter, in electing its chairman, the Steuben County Legislature engages in "a series of secret ballots until a vote of ten affirmative votes is received. Then a formal resolution is entertained at which usually the vote is unanimous".

You have asked whether the secret ballot or series of secret ballots might violate either the Freedom of Information Law or the Open Meetings Law. In this regard, I offer the following comments.

First, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open meetings" requirement. Although the Freedom of Information Law pertains to existing records and generally does not require that a record be created or prepared [see attached, Freedom of Information Law, section 89(3)], an exception to the rule involves votes taken by public bodies. Specifically, relevant part, section 87(3) of the Freedom of Information Law has long required that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Stated differently, when a final vote is taken by an "agency", which is defined to include a municipal board [see section 86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

Second, in terms of the factual situation that you presented, it does not appear that the preliminary votes, i.e., those votes that do not result in a majority, must be recorded, for they are not "final". However, the vote resulting in an affirmative total of a majority of the membership of the County Legislature would, in my opinion, be required to be recorded and indicated how each member voted. Some have suggested that, in a series of secret ballots, there may be no way of recording the vote in the manner required by the Freedom of Information Law. A possible solution would involve each member marking his or her ballot, i.e., by means of a name or initials. While preliminary votes not resulting in a majority need not be recorded, the marked ballots resulting in a majority vote could be tabulated and identified by each voting member.

Third, in terms of the rationale of section 87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its elected representatives may have voted individually with respect to particular issues.

Further, although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of section 87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listing to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

I hope that I 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

162 AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

OML-AO-1527
FOIL-AO-4281

September 17, 1986

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[redacted]

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Dear Mr. Bacallis:

As you are aware, I have received your note of September 10.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4282

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

September 17, 1986

Mr. Herbert Thomas
79-A-1632
Greenhaven Correctional Facility
Drawer B
Stormville, New York 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 September 7 and the correspondence attached to it.

According to the materials, you requested copies of water test results concerning the Greenhaven Correctional Facility from the Dutchess County Health Department. The Records Access Officer for the Department indicated that the Department does not have jurisdiction, and he suggested that a request be sent to the facility. Subsequently, you appealed to Dr. John R. Scott, Commissioner of Health. Dr. Scott wrote that the Facility "is not inspected, monitored or permitted by the Dutchess County Health Department..." He also suggested that you submit a request directly to the Greenhaven Correctional Facility.

You wrote that you consider the responses described above to be denials of your request, and you seek my opinion on the matter. In this regard, I offer the following comments.

First, as I understand the situation, the Dutchess County Health Department simply does not maintain the records in which you are interested. From my perspective, the responses to your request could not be characterized as denials, for the agency does not have the records sought. Stated differently, the agency cannot withhold records that it does not possess.

Second, it appears that the appropriate course of action, as suggested by both Commissioner Scott and Mr. Lazarony, would involve a request for records maintained by the Greenhaven Correctional Facility. For your information, regulations adopted by the Department of Correctional Services pursuant to the Freedom of Information Law indicate that a request for records kept at a correctional facility may be directed to the facility superintendent.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John F. Lazarony, Records Access Officer
Dr. John R. Scott, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4283

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

September 17, 1986

Mr. Harold Mondshein
[redacted]

Dear Mr. Mondshein:

I have received your letters of August 28 and September 2 and attachments, in which you requested that I "correct the typographical errors in [my] July 1st letter" and that this office render an advisory opinion in regard to the July 9 letter you received from New York City Assistant Corporation Counsel, Laurence A. Levy.

First, in your August 28 letter, you refer to a statement in my July 1 opinion in which I quoted from your letter of July 9. As you indicate, the correct quote should be "3/15/83-Meeting of Public Members to review cases docketed for 3/22/83 consideration of the Board." Due to a typographical error, my letter referred to cases docketed for 3/23/83 consideration.

Second, also in regard to my July 1 opinion, you state "2. Under item marked 'Fifth' page 2 you made the following statement: '...your request for a further hearing was denied in March 1983' (emphasis yours) without stating a date and specific meeting." You further state that the exact meeting and date of the denial should be indicated in my letter. I note, initially, that my statement that you quoted does not contain a typographical error. Additionally, as you have been previously advised, this office is authorized to render advisory opinions under the Freedom of Information Law and the Open Meetings Law. It is not the responsibility or within the authority of this office to obtain or provide facts, information or records maintained by other agencies.

Third, in regard to all other issues raised in your August 28 letter, I refer you to my letter of August 25 relating to the Board of Collective Bargaining.

Fourth, your letter of September 2 relates to your request to the Off-Track Betting Corporation (OTB) for a copy of a document allegedly waiving your right to a Step II grievance hearing. You enclose a copy of a letter from the records access officer certifying that, after a diligent search, they have been unable to locate the waiver. You request the opinion of this office as to what constitutes a "diligent search". Further, you state that:

> "It would seem that the following items should be included.
>
> 1. A showing by OTB and the Corporation Counsel that DC 37 has been contacted and a request made for the copy of the waiver.
>
> 2. A statement by OTB General Counsel Alan M. Moss that he had seen the waiver and to whom he gave it.
>
> 3. A statement by OTB Hearing Officer Richard Labriola that he conducted the Step III hearing based on the waiver, and had included it in the minutes.
>
> 4. A statement by OTB Vice President Palumbo that he had received the waiver from DC 37, and had forwarded it to Mr. Labriola of his staff."

As indicated on many previous occasions, under the Freedom of Information Law, an agency is required to make available records which it maintains, except to the extent that the records fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. Section 89(3) of the Law states that, where applicable, the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search".

The Law does not, to the best of my knowledge, require any additional proof from the agency as to whether the record exists or whether the record can be located. Further, there is no requirement in the Law of which I am aware that an agency obtain a record from another source if it does not maintain the record requested. In sum, the Freedom of Information Law does not in my view require an agency, upon certifying that it cannot locate a record, to furnish additional proof that it has conducted a diligent search for the record, other than the certification itself. Thus, I refer you to my letter of August 25 and reiterate that it appears that the OTB has satisfactorily responded to your requests for records under the Freedom of Information Law.

Unless there is some new, substantive issue regarding the Freedom of Information Law or the Open Meetings Law with respect to which advice can be offered, I do not believe that I can add to the comments made during the course of our lengthy correspondence.

I hope that I have been of some assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: Malcolm D. MacDonald
Laurence A. Levy

COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4284

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279[illegible]

COMMITTEE MEMBERS

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 17, 1986

Mr. Shaun Assael
Westchester Rockland Newspapers
1825 Commerce Street
Yorktown Heights, NY 10598

<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. Assael:

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

According to the correspondence attached to your letter, you requested from the Village of Mount Kisco various records pursuant to the Freedom of Information Law, including reprimands of police officers. The Village Attorney, John J. Donohue, wrote that:

> "it is the position of the Village that these records are exempted from the Freedom of Information Law by virtue of Section 50(A) of the Civil Rights Law of the State of New York which prohibits inspection of review of personnel records of police officers without their written consent or without a lawful Court order. In addition it is the position of the Village that such disclosures of records requested by you would constitute an unwarranted invasion of personal privacy."

You have asked "whether a municipality may use Section 50(A) of the Civil Rights Law of the State of New York to shield reprimands of police officers contained in municipal records".

In this regard, I offer the following comments.

First, section 50-a(1) of the Civil Rights Law, which pertains to police officers and correction officers, states in relevant part that:

> "All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof...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."

Based upon the language quoted above, it had been contended that certain personnel records concerning police officers were exempt from disclosure under the Freedom of Information Law. In conjunction with such a contention, those records would be deniable under section 87(2)(a) of the Freedom of Information Law, which pertains to records that "are specifically exempted from disclosure by state or federal statute".

Notwithstanding that contention, the Court of Appeals, the State's highest court, reviewed the legislative history leading to its enactment and held that section 50-a is not a statute that exempts records from disclosure when a request is made under the Freedom of Information Law. More specifically, it was found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 109 AD2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to exempt intervenor's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context under Public Officers Law section 87(2)(a)" (Capital Newspapers v. Burns, __ NY 2d __, NYLJ, July 15, 1986).

Under the circumstances, since the reprimands were requested under the Freedom of Information Law, and not in conjunction with litigation, section 50-a of the Civil Rights Law is, in my view, inapplicable and cannot be asserted as a basis for denial.

The other ground for denial offered by the Village Attorney involves a claim that disclosure of the reprimands would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, section 87(2)(b)]. Once again, based upon judicial interpretations of the Freedom of Information Law, I disagree with that contention. Although the standard in the Freedom of Information Law is flexible and reasonable people may have different views regarding privacy, the courts have provided significant direction, particularly with respect to the privacy of public employees. It has been held in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. Further, with respect to the Freedom of Information Law, it has generally been determined that records pertaining to public employees that are relevant to the performance of their duties are available, for disclosure in those instances would result in a 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, supra, Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. Several of the decisions cited above, Farrell, Sinicropi and Geneva Printing, dealt with situations in which the determinations of disciplinary actions pertaining to particular public employees were made available. Further, one of the first decisions rendered under the Freedom of Information Law as originally enacted in 1974 dealt with reprimands of police officers. In granting access, it was found that:

> "To disclose these will not result in an unwarranted invasion of personal privacy; they are 'relevant-to the ordinary work of the-municipality'. In effect, they are 'final opinions' and 'final determinations' which the Legislature directed be made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured. Disclosure of the written reprimands will not harm the overall public interest" (Farrell, supra, 908-909).

In another decision that dealt with the settlement of a disciplinary action reached prior to an arbitrator's determination, and in which one of the terms of the settlement specified that the settlement itself would remain confidential, the Court held that the stipulation regarding confidentiality could not be upheld and that the records must be made available. In Geneva Printing Co., supra, it was stated that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement."

Similarly, in its discussion of the intent of the Freedom of Information Law, the Court of Appeals in the recent decision rendered in Capital Newspapers, supra, found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers."

For the reasons discussed in the preceding paragraphs, it is my view that reprimands of police officers are available under the Freedom of Information Law. As you requested, a copy of this opinion will be sent to Mr. Donohue, the Village 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: John J. Donohue, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON PEN[illegible]

COMMITTEE MEMBERS

LIAM BOOKMAN
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

FOIL-AO-4285

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

September 19, 1986

Mr. Harry Gaillard
84-B-2346
Box 501
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. Gaillard:

I have received your letter of September 8 in which you made several inquiries regarding the availability of the "directives in the Employee Rule Books" for the employees of New York State correctional facilities.

Specifically, you ask whether New York State law requires correctional facilities to keep copies of the "Employee Rule Book" in their libraries. You also ask what provision of law determines the availability of each portion of the rule book. In this regard, I offer the following comments.

First, this office is authorized to render advice under the Freedom of Information Law. The Law pertains generally to rights of access to records maintained by units of state and local government.

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

Third, in my view, the Employee Rule Books are records of an agency and, as such, are subject to the Freedom of Information Law. While administrative staff manuals and rules are often available under the Law, it is possible that a ground for denial might be asserted, perhaps with respect to portions of the records sought. Specifically, section 87(2)(e)(iv) states that an agency may withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would...

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures..."

It is noted that a determination rendered by the Court of Appeals, the State's highest court, upheld a denial of certain portions of State Police rules and regulations on the ground that certain investigative procedures were not routine [DeZimm v. Connelie, 64 NY 2d 860 (1985); see also Fink v. Lefkowitz, 47 NY 2d 567 (1979)]. In short, without knowledge of the contents of the records about which you inquire, the extent to which they may be available is unclear.

Fourth, you also ask whether the law requires that correctional facilities' law libraries maintain copies of such "Employee Rule Books". I am not aware of any provision of law, which contains requirements of that nature. However, it is noted that this issue relates to an issue which is outside the scope of authority and expertise of this office.

Finally, I point out that that regulations promulgated under the Freedom of Information Law by the Department of Correctional Services indicate that a request for records kept at a correctional facility may be directed to the facility superintendent. If records are kept at the Department's central offices, a request may be sent to the Assistant Commissioner for Administration in Albany.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4286

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518 279

September 19, 1986

Mr. John Vandeloo
[redacted]

Dear Mr. Vandeloo:

I have received your letter of September 17 in which you request records from this office.

In this regard, the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. The Committee is not a repository of records. Further, it has no legal authority to compel an agency to grant or deny access to records. In short, I cannot provide you with the record in question because this office does not possess the record.

As a general matter, a request made under the Freedom of Information Law should be directed to the "records access officer" at the agency that you believe maintains the record. Based on your letter, it appears that the report in which you are interested may be maintained by the Office of General Services. Assuming that is so, a request may be sent to Mr. Arnold Steigman, Records Access Officer, Office of General Services, Corning Tower, Empire State Plaza, Albany, NY 12242.

To provide you with additional detail concerning the Freedom of Information Law and its use, enclosed is "Your Right to Know", which describes the Law and contains a sample letter of request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4287

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 122
(518) 474-2518, 279

September 19, 1986

Hon. Peter L. Giambrone
[redacted]

<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. Giambrone:

I have received your letter of September 12 and appreciate your kind comments concerning my presentation in Corning.

As a member of the Steuben County Legislature, you have asked whether the election of the Chairman of the County Legislature may be carried out by secret ballot, or by means of an "open ballot", or whether the Legislature has the option of using either method.

In this regard, I offer the following comments.

First, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open meetings" requirement. Although the Freedom of Information Law pertains to existing records and generally does not require that a record be created or prepared [see attached, Freedom of Information Law, section 89(3)], an exception to the rule involves votes taken by public bodies. Specifically, relevant part, section 87(3) of the Freedom of Information Law has long required that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Stated differently, when a final vote is taken by an "agency", which is defined to include a municipal board [see section 86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

Second, as I recall the questions on the subject raised during my presentation, it appears that a series of ballots may be taken until a particular member receives an affimative vote of a majority of the membership of the body. If that is so, it does not appear that the preliminary votes, i.e., those votes that do not result in a majority, must be recorded, for they are not "final". However, the vote resulting in an affirmative total of a majority of the membership of the County Legislature would, in my opinion, be required to be recorded and indicate how each member voted. Some have suggested that, in a series of secret ballots, there may be no way of recording the vote in the manner required by the Freedom of Information Law. A possible solution would involve each member marking his or her ballot, i.e., by means of a name or initials. While preliminary votes not resulting in a majority need not be recorded, the marked ballots resulting in a majority vote could be tabulated and identified by each voting member.

Third, in terms of the rationale of section 87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its elected representatives may have voted individually with respect to particular issues.

Further, although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of section 87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listing to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

I hope that I 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-4288

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

September 19, 1986

Mr. Francis Barnes
[redacted]

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

Dear Mr. Barnes:

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

According to your letter, on August 27, you delivered a request to the Town of Ticonderoga for the following:

> "1. A copy of add(s) placed, publications in which they were placed in the Town's quest for a person to fill the position of Chief of Police.
>
> 2. A copy of the voucher used to pay for the publication(s).
>
> 3. A copy of the contract, if any, between the town and Horace Snow.
>
> 4. If Horace Snow was appointed from a list of three, a copy of the list."

As of the date of your letter to his office, you had not received a response. You have requested my opinion on the matter and, in this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records of an agency, such as the Town. Further, section 89(3) of the Law states in part that an agency is generally not required to create or prepare a record in response to a request.

Therefore, if, for example, there is no written contract between the Town and a particular individual, there would be no such record to be made available.

Second, with respect to existing 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.

Under the circumstances, to the extent that the records sought exist, I believe that they would be available, for none of the grounds for denial could be asserted. An advertisement, a record of the publication in which it appeared, and a voucher indicating an expenditure incurred by the Town would be available. With respect to contracts, including employment contracts, it has consistently been advised that they are available, for they are reflective of expenditures as well as agency determinations. It is assumed that the "list of three" to which you referred would be a civil service "eligible list", which is available under Civil Service rules and, in my view, the Freedom of Information Law.

Lastly, I point out that the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force of law, contain prescribed time limits for response to a 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 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
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4289

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

September 22, 1986

Mr. Richard G. Greene
Assistant Corporation Counsel
City of Schenectady
Schenectady, NY 12305

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

Dear Mr. Greene:

I have received your letter of September 15 in which you requested an advisory opinion under the Freedom of Information Law.

Specifically, you ask:

> 1. Must the City permit an individual to examine the attendance records of all (emphasis yours) police officers working for the city Police Department for the entire year of 1985 to date?
>
> 2. Must the City permit an individual to examine the dates and reasons (e.g. illness, injury, union business, military service, etc.) for said absences from assigned work days?
>
> 3. Can and should the City redact the names on said records?
>
> 4. What affect, if any, would there be if the individual requested copies of the records as opposed to merely examining the records?

In this regard, I offer the following comments.

First, in general, the Freedom of Information Law is based upon a presumption of 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) though (i) of the Law.

Second, section 87(2)(a) provides that records may be withheld to the extent that they "are specifically exempted from disclosure by state or federal statute". Section 50-a(1) of the Civil Rights Law, which pertains to police officers and correctional officers, states in relevant part that:

> "All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof...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."

Based upon the language quoted above, and read in conjunction with section 87(2)(a), it has been contended that certain personnel records concerning police officers were exempt from disclosure under the Freedom of Information Law.

Notwithstanding that contention, the Court of Appeals, the State's highest court, reviewed the legislative history leading to its enactment and held that section 50-a is not a statute that exempts records from disclosure when a request is made under the Freedom of Information Law. More specifically, it was found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 109 AD2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to exempt intervenor's 'Lost Time Record' from

disclosure by the Police Department in a non-litigation context under Public Officers Law section 87(2)(a)" (Capital Newspapers v. Burns, __ NY 2d __, NYLJ, July 15, 1986).

Further, it is noted that the records sought in Capital Newspapers involved a request under the Freedom of Information Law for records pertaining to sick leave taken by a particular police officer during a certain month.

In view of the Court's decision, it is clear, in my opinion, that when a request for records is made under the Freedom of Information Law and not in conjunction with litigation, section 50-a of the Civil Rights Law is inapplicable and cannot be asserted as a basis for denial.

Thus, attendance records of police officers are likely available except to the extent that they fall within the scope of the remaining grounds for denial.

The only other ground for denial which appears to be relevant is section 87(2)(b), which states that an agency may deny access to records or portions thereof that "if disclosed would constitute an unwarranted invasion of personal privacy". Although the standard in the Freedom of Information Law is flexible and reasonable people may have different views regarding privacy, the courts have provided significant direction, particularly with respect to the privacy of public employees. It has been held in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. Further, with respect to the Freedom of Information Law, it has generally been determined that records pertaining to public employees that are relevant to the performance of their duties are available, for disclosure in those instances would result in a 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, supra, Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981].

In my view, a record indicating attendance of police officers, including statistical or factual information concerning the use or accumulation of sick, vacation or personal leave, for example, would be available.

With respect to "reasons" for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that section 87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

In support of this view, I again point to the recent decision rendered by the Court of Appeals in Capital Newspapers, supra. In its discussion of the intent of the Freedom of Information Law, the court found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers."

Third, under the Freedom of Information Law, a request for records must reasonably describe the records sought. Accordingly, it has been advised that a request for records should be sufficiently detailed to enable agency personnel to reasonably locate the records requested [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. However, the Law does not, in my view, limit the number of records which may be requested. Thus, upon request, the "attendance records of all police officers working for the City Police Department for the entire year of 1985 to date" should likely be made available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy, as discussed above.

Finally, there is no substantive difference under the Freedom of Information Law in the response required where a request is made to obtain copies of records as opposed to a request to inspect records. Assuming that the records sought contain

descriptions of medical problems or similar information that could be withheld as an unwarranted invasion of personal privacy, it is suggested that a redacted copy, for which a fee could be charged, 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:jm

cc: Richard Nelson, Chief of Police
Joseph Formosa, Asst. Chief of Police
Kay Ackerman, City Clerk
Office of Administrative Operations

ERROR

No AO #F4290

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4291

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

September 25, 1986

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 September 15 and the materials attached to it.

The materials indicate that you submitted a request dated August 31 under the Freedom of Information Law to John R. Zakian, Director of Yonkers Industrial Development Agency. As of the date of your letter to this office you had not received a response to the request.

In this regard, I offer the following comments.

First, according to section 856(2) of the General Municipal Law, an industrial development agency "shall be a corporate governmental agency". Therefore, I believe that it is subject to the requirements of the Freedom of Information Law.

Second, pursuant to the regulations promulgated by the Committee on Open Government, which have the force of law (21 NYCRR Part 1401), the governing body of the Industrial Development Agency should have designated one or more "records access officers". The records access officer is responsible for coordinating an agency's response to requests made under the Freedom of Information Law. It is unclear whether Mr. Zakian is the records access officer; however, the request should in my opinion be dealt with by Mr. Zakian or forwarded to the records access officer in order that a response could be given on a timely basis.

Third, the Freedom of Information Law and the Committee's regulations prescribe 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 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: Hon. John R. Zakian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4292

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

September 25, 1986

Mr. Kenneth Frankl
86-B-467
Auburn Correctional Facility
135 State Street
Box 618
Auburn, New York 13021

Dear Mr. Frankl:

I have received your recent letter, which reached this office on September 24, in which you requested records.

In this regard, please note that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. The Committee does not have possession of records generally, nor does it have the authority to compel an agency to grant or deny access to records. In short, I cannot provide the records sought, because this office does not maintain those records.

Nevertheless, I offer the following comments and suggestions.

First, the Freedom of Information Law is applicable to records of an agency, which is 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Second, a request should generally be directed to the "records access officer" at the agency or agencies that you believe maintain the records in which you are interested.

And third, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, you should include sufficient detail to enable agency officials to locate the records.

Enclosed is "Your Right to Know" which describes the Freedom of Information Law in greater detail.

I hope that I 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-4293

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

September 26, 1986

Ms. Elaine Werbell
Freedom of Information Officer
NYC Dept. of Consumer Affairs
80 Lafayette Street
New York, New York 10013

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

Dear Ms. Werbell:

I have received your letter of September 15 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, the New York City Administrative Code requires that certain types of businesses and services obtain licenses from the Department of Consumer Affairs. You wrote that you often receive requests for information pertaining to licenses, "including the home address of an individual licensee and the names and home addresses of principals and officers of a particular corporate licensee, the identity of whom is not available through other sources". You added that the applicant might use the information for litigation or a commercial purpose.

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, of relevance is section 87(2)(b), which permits an agency to withhold records or portions of records the disclosure of which would constitute "an unwarranted invasion of personal privacy". In the past, it has been advised that, while the business address of a licensee should be made available, the home address, which is often irrelevant to the work of the agency or the relationship between the public and the licensee, may be

withheld as an unwarranted invasion of personal privacy. The exception to that advice would involve a situation in which the home and business addresses are the same, or in which the licensing agency maintains only a home address. With respect to the home addresses of principals or officers of a corporate licensee, again, I believe that disclosure would likely constitute an unwarranted invasion of personal privacy.

I point out that, in a decision involving a request for records containing similar information, it was inferred that disclosure of home addresses of directors, stockholders and officers of check cashing licensees would result in an unwarranted invasion of personal privacy. It was stated that:

> "Respondent argues that revealing the identities of the principals of check cashing licensees would be an invasion of their personal privacy (Sec. 89[2][b][i]). With the possible exception of their home addresses, it would not. After all, the applicants sought, by license, the patronage of the public-at-large. In supplying this information to the agency, the licensees' reasonable expectation probably was that this information would be available to the public. Nor is there any indication by rule or otherwise that the applicants had any expectation or had received any assurance that this information as to their principals would be shrouded from disclosure" [American Broadcasting Companies, Inc. v. Siebert, 442 NYS 2d 855, 858 (1981)].

Lastly, since you referred to the purpose for which a request might be made, I point out that, as a general matter, that factor is irrelevant to rights of access. It has been held, for example, that a person involved in litigation with an agency may seek records from the agency despite that person's status as a litigant. Stated differently, any person may assert rights granted by the Freedom of Information Law, regardless of status or interest [M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984); also Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4294

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

September 26, 1986

Mr. Robert Neuwrith
[redacted]

The staff of the Committee 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. Neuwirth:

I have received your letter of September 12 and attachments in which you requested assistance under the Freedom of Information Law.

According to your letter, you made a written request for records under the Freedom of Information Law to the New York City Financial Services Corporation (NYCFSC). The records requested involved an Urban Development Action Grant (UDAG) for the construction of a movie theatre complex on 125th Street and "any other material relevant to the construction of this theatre or any other theatres in New York City". You were advised by Mr. John F. Cocola, Assistant Counsel of the NYCFSC, by letter of August 29, that he had "difficulty understanding what you are requesting". Mr. Cocola asked you to "state specifically what project or projects you are filing to review". He also requested that you specify the particular documents you are seeking. By letter of September 9, you again requested a copy of the UDAG application for the 125th Street project and any determination on the application including pertinent specifics. You stated additionally that you "seek to know if the City is financing any other developments which include movie theatres..." As of September 12, the NYCFSC had not provided you with any of the requested records. In this regard, I offer the following comments.

First, I contacted Mr. Cocola to determine whether the matter can readily be resolved. It appears that the delay in complying with your request is due in large part to a lack of

communication. Mr. Cocola has suggested that you speak with him directly so that he can assist you in identifying the records you are seeking. You can telephone him at (212) 341-5900.

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.

It appears that two grounds for denial may be relevant to the records you seek. Section 87(2)(d) of the Law states that an agency may deny access to 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..."

Thus, those portions of the requested records which consist of trade secrets of applicants, could likely be withheld. For example, in some instances, financial information submitted by an applicant might be characterized as a trade secret which if disclosed would cause substantial injury to its competitive position.

The second ground for denial which may be relevant is section 87(2)(g) of the Law, which states that an agency may withhold records or portions thereof that:

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

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

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 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. Therefore, while a portion of a record might justifiably be denied, the remainder might be accessible.

Third, under the Freedom of Information Law, an agency is required to respond to a request for existing records. The Law does not require that an agency answer questions or prepare a record in response to a request. Several of the requests in your August 20 and September 9 letters are phrased in such a way that you appear to be asking for information instead of records. It is suggested that, when making requests under the Freedom of Information Law, you make it clear that you are seeking records, even if you are not able to identify the documents you seek.

Fourth, the Law does require that a request for records "reasonably describe" the records sought. Therefore, it is also suggested that when making requests you should be as detailed as possible to enable agency personnel to locate the requested records. It is also noted, however, that the Court of Appeals has held that a record is "reasonably described" if the description is sufficient to allow agency personnel to locate the record [M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Fifth, pursuant to the Freedom of Information Law, the Committee on Open Government has promulgated regulations (21 NYCRR 1401) involving the procedural implementation of the Law. I point out that section 1401.2(b)(2) of the regulations provides that "the records access officer is responsible for assuring that agency personnel...assist the requester in identifying requested records, if necessary." Since Mr. Cocola has indicated a willingness to assist you, I suggest that you contact him.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:jm
cc: John F. Cocola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4295

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

September 29, 1986

Mr. Frank Lichtensteiger
[redacted]

Dear Mr. Lichtensteiger:

I have received your recent note in which you asked that I "orient [you] in the proper procedures for opening a personnel file".

Although it is not clear exactly what you mean, it appears that your inquiry was precipitated by a request to examine your personnel folder under the Freedom of Information Law. The request involved records of the Harlem Primary Care Network.

In this regard, it is emphasized that the Freedom of Information Law is applicable 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 proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature".

Therefore as a general matter, the Freedom of Information Law is applicable to entities of state and local government; it does not apply to private organizations. Consequently, if the Harlem Primary Care Network is not a governmental entity, the Freedom of Information Law would not be applicable. If it is a governmental entity, I believe that a response to your request must be given in compliance with the Freedom of Information Law.

Further, in terms of "opening a personnel file", assuming that the Freedom of Information Law is applicable, it is noted that it does not deal with the nature or manner in which records are kept or created, but rather with rights of access to existing records. In short, without additional clarification concerning your question, I regret that I cannot be of greater assistance.

Should any further questions arise pertaining to the Freedom of Information Law, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4296

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

September 30, 1986

Mr. John Wright
[redacted]

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

Dear Mr. Wright:

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

According to your letter and the correspondence attached to it, you requested a variety of records from Essex County. In response to your request, James P. Dawson, County Attorney, granted the request in part and denied in part. The portions denied were withheld on the basis of section 50-a of the Civil Rights Law. Further, Mr. Dawson wrote that the cost of the copies sent to you would be $10.00.

You have questioned both the denial and the fee for copies. Apparently the records denied pertain to the completion of certain training programs by certain police officers. 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) though (i) of the Law.

Second, section 87(2)(a) provides that records may be withheld to the extent that they "are specifically exempted from disclosure by state or federal statute". Section 50-a(1) of the Civil Rights Law, which pertains to police officers and corrections officers, states in relevant part that:

> "All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof...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."

Based upon the language quoted above, and read in conjunction with section 87(2)(a), it has been contended that certain personnel records concerning police officers were exempt from disclosure under the Freedom of Information Law.

Notwithstanding that contention, the Court of Appeals, the State's highest court, reviewed the legislative history leading to its enactment and held that section 50-a is not a statute that exempts records from disclosure when a request is made under the Freedom of Information Law. More specifically, it was found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 109 AD2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to exempt intervenor's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context under Public Officers Law section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

In view of the Court's decision, it is clear, in my opinion, that when a request for records is made under the Freedom of Information Law and not in conjunction with litigation, section 50-a of the Civil Rights Law is inapplicable and cannot be asserted as a basis for denial.

Therefore, in my opinion, rights of access are governed by means of the remaining provisions of the Freedom of Information Law. Perhaps most relevant in terms of the records sought is section 87(2)(b), which permits an agency to withhold records or portions thereof to the extent that disclosure would result in "an unwarranted invasion of personal privacy". Although the standard in the Freedom of Information Law is flexible and reasonable people may have different views regarding privacy, the courts have provided significant direction, particularly with respect to the privacy of public employees. It has been held in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. Further, with respect to the Freedom of Information Law, it has generally been determined that records pertaining to public employees that are relevant to the performance of their duties are available, for disclosure in those instances would result in a 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, supra, Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981].

The decision most closely analogous to the situation in question is Steinmetz, supra, which dealt with a request for personnel records of teachers who had taken courses relevant to their teaching duties. The cost of courses was apparently borne by the school district. In short, the court granted access to records indicating the approval to take courses, the names of courses and the number of credits granted and "verification of satisfactory completion of the courses". Further, the Court specifically found that "the disclosure of the foregoing does not constitute an unwarranted invasion of the privacy of the seven teachers" who were the subjects of the records.

Based upon the holding in Steinmetz and the other determinations cited above, I believe that similar or equivalent records pertaining to police officers are accessible.

Lastly, with respect to fees for copying, you did not indicate the volume of records made available to you. However, section 87(1)(b)(iii) of the Freedom of Information Law provides that an agency may charge up to twenty-five cents per photocopy for records not in excess of nine by fourteen inches, unless a different fee is prescribed by statute. Therefore, unless a statute, an act of the State Legislature, permits or requires the County to impose a higher fee, the fee for photocopies cannot, in my opinion, exceed twenty-five cents per photocopy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: James P. Dawson, Essex County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4297

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

September 30, 1986

Mr. Ronald Rich
President
SCRAP, Inc.
Box 101C
RD #3
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. Rich:

I have received your letter of September 17, with attachments, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you made requests for records under the Freedom of Information Law to the Columbia County Planning Department, the County Public Works Department and the County Board of Supervisors. The requests involve records consisting of hydrological or geological data on the Stockport site reflecting results of tests performed by Browning Ferris Industries or by Barton & Loguidice, P.C., or subcontractors of that firm. Each request was denied. The reason given for each denial was that the requested record "is not possessed or maintained by this agency". You indicate that you believe certain data exists as the result of tests performed by Barton & Loguidice, P.C. in its capacity as consultant to the County of Columbia, or by their subcontractors. In this regard, I offer the following comments.

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

Second, as you are aware, the definition of the term "record" under the Law is broad. Section 86(4) defines "record" to mean:

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

In view of the breadth of the language quoted above, the courts have interpreted the definition literally [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980) and Washington Post v. Insurance Department, 61 NY 2d (1984)] and have held that reports prepared by outside consultants, for the purpose of aiding in the deliberative process of the agency, are "records" which are subject to the Freedom of Information Law [see Niagara Environmental Action v. City of Niagara Falls, 473 NYS 2d 653, 100 AD 2d 742 (1984) and Matter of Xerox Corporation v. Town of Webster, 65 NY 2d 131]. While the County might not have physical possession of the materials in question, if they were "produced...for an agnecy", I believe taht they constitute "records" subject to rights of access.

Additionally, the courts have held that such materials as records of soil borings, analyses, handwritten field logs and drafts of air monitoring reports are "records" that fall within the scope of the Freedom of Information Law [see Niagara Environmental Action, supra and Steele v. New York State Department of Health, 464 NYS 2d 925 (1983)].

Thus, in my view, hydrological or geological data compiled by a consultant would, even in rough form, likely be subject to the Freedom of Information Law.

Third, it appears, based on the facts you presented, that only one of the grounds for denial under the Law is relevant to your request. 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. Since records prepared by a consultant at the request of an agency have been held to be "intra-agency material" [see Xerox Corporation, supra], to the extent that hydrological or geological data consist of "statistical or factual data", the requested records are, if they exist, likely available under the Law.

Fourth, I have spoken with Mr. George Dolan, Columbia County Attorney, in regard to this matter. It appears, from our conversation as well as a review of the responses you received, that the agencies did not intend to "deny" your requests. Under the Law, a request is "denied" when the agency maintains the record in question but determines that the record should be withheld on the basis of one or more of the grounds for denial under the Law. Mr. Dolan advised me that Browning Ferris Industries, a company interested in building a privately owned garbage disposal plant in the area, has not provided the County with any hydrological or geological data. He further advised me that Barton & Loguidice, P.C., has been performing tests and collecting data on the Stockport site as consultants for Columbia County. However, that form has not yet submitted a report or data in any form to the County. Finally, he indicated that if the agencies maintained the requested records they would have been made available, except to the extent that the records or portions thereof fall within one or more of the grounds for denial under the Law. Thus, the intent of the responses was to indicate that the records were not being made available because they do not exist or are not maintained by the agency. There was apparently no intention on the part of the agencies to deny access to existing records.

Finally, the question arises as to whether preliminary materials compiled by a private firm acting as consultant for an agency are subject to the Freedom of Information Law when the materials are not submitted to the agency, but are used in preparing a final report. This issue has not, to my knowledge, been addressed by the courts. However, in my view, if the records are compiled on behalf of the agency, they are subject to the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: George Dolan, Columbia County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4298

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 1, 1986

Mr. Cyril Morgan
[redacted]

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

Dear Mr. Morgan:

I have received your letter of September 20, in which you raised a series of general issues concerning the Freedom of Information Law.

First, in terms of the entities that are subject to the Freedom of Information Law, the Law is applicable to records of an "agency", a term defined to include:

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

Therefore, as a general matter, the Freedom of Information Law pertains to records maintained by entities of state and local government.

Second , with respect to right 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, a request should be directed to the "records access officer" at the agency or agencies that you believe maintain the records sought. It is noted that section 89(3) of the Law requires that an applicant "reasonably describe" the records requested. Therefore, when making a request, you should include sufficient detail to enable agency officials to locate the records. The same provision requires an agency to respond to the request within five business days of its receipt. If a request is denied in writing, or if the agency fails to respond within the appropriate time limits, an appeal may be made pursuant to section 89(4)(a) of the 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 records the reasons for further denial, or provide access to the record sought."

To provide you with additional and more detailed information, enclosed are copies of the Freedom of Information Law and "Your Right to Know", which contains sample letters of request and appeal.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-45
FOIL-AO-4299

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

October 1, 1986

Mr. Michael S. Thomas
77A-0834 B7
2911 Arthur Kill Road
Staten Island, NY 10309

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

Dear Mr. Thomas:

I have received your letter of September 18 and the voluminous materials attached to it.

Your inquiry concerns a variety of requests directed to the Division of Parole. In all honesty, on the basis of the materials, I can not ascertain exactly what you want. Further, I have contacted Mr. William Altschuller of the Office of Counsel at the Division of Parole, and he told me that he can not determine which records you want beyond those that have been made available. He also suggested that a request for records within your parole file should initially be directed to the senior parole officer at your facility. If any of the records sought are denied, you can appeal to the Division in Albany.

In addition, I would like to take this opportunity to clarify what appear to be misconceptions on your part.

First, as a general matter, the title of the Freedom of Information Law may be somewhat misleading. That statute generally pertains to existing records; it is not a vehicle under which an applicant has the right to obtain information or answers to questions, unless the information exists in the form of records maintained by agency. Further, section 89(3) of the Freedom of Information Law states in part that, unless otherwise provided, an agency is not required to create or prepare a record in response to a request.

Second, an exception to the general rule involves the "subject matter list", for each agency must prepare such a list. You refer to the "subject matter list" in several requests, and

in most of those instances, the requests involved records pertaining to you. For example, in one letter you requested "a subject matter list of all inter and intra departmental memorandum, correspondence pertaining to the subject (data subject) herein..." From my perspective, an agency clearly is not required to prepare a subject matter list concerning records pertaining to a single individual. The provisions concerning the preparation of a subject matter list are found in section 87(3)(c) of the Freedom of Information Law, which states that each agency shall maintain:

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

As such, the subject matter list in my view is a categorization of the types of records maintained by an agency; it is not an index that identifies each and every record of an agency, nor is it a list of records that pertain to a single individual.

Lastly, in several items of correspondence, you assert rights under section 95 of the Public Officers Law. That section is part of the Personal Privacy Protection Law. Although that statute generally grants rights of access to "data subjects" to records pertaining to them when the records are maintained by a state agency, section 95(7) provides that "This section shall not apply to public safety agency records." Section 92(8) of the Personal Privacy Protection Law defines "public safety agency record" to include records of the Division of Parole that pertain to "confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order..." Therefore, I do not believe that the Personal Privacy Protection Law or rights granted by that statute are applicable to the records in which you are interested.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: William Altschuller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4300

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 1, 1986

Mr. Robert Lachowsky
86-A-2375
Adirondack Correctional Facility
P.O. Box 110
Raybrook, NY 12977

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

Dear Mr. Lachowsky:

I have received your letter of August 23 in which you requested assistance from this office.

Specifically, you want to obtain a copy of an evaluation report pertaining to yourself which was prepared by "a Mr. Stone of Network Program". In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records maintained by units of state and local government in New York State. It is my understanding that "Network" is a program of the Department of Correctional Services. As such, the records of the Network program are subject to the Freedom of Information Law.

Second, 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.

Third, from the facts you presented, it appears that section 87(2)(g) is a relevant ground for denial. Section 87(2)(g) permits an agency to 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. Concurrently, those portions of inter-agency or intra-agency materials reflective of advice, opinion, recommendation and the like could in my view be withheld. Thus, in my opinion, an evaluation report such as the one you are seeking could likely be withheld to the extent that the content is evaluative in nature or reflective of an opinion, for example.

Fourth, enclosed for your use and information 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 if the records sought are maintained at your facility, a request should be directed to the facility superintendent (see section 5.20).

Also enclosed is a copy of "Your Right to Know", a pamphlet which describes 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Encs.

K
TATE
EN GOVERNMENT FOIL-AO-4301

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 3, 1986

Mr. Joseph C. Dwyer
Weststar Professional Bldg.
1616 West State Street
P.O. Box 648
Olean, New York 14760

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

Dear Mr. Dwyer:

I have received your letter of September 23 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, your firm represents a client "whose son was placed in a non-secure juvenile detention home operated by the Cattaraugus County Youth Bureau". The Youth Bureau is " a municipal county agency, and its homes are certified and overseen by the New York State Division for Youth". The client's son "ran away from the home, stole a car and was killed in a one-car accident", and she has asked you to attempt to obtain records concerning her son's "placement, running away, and death".

Your inquiry concerns rights of access to records pertaining to the son, such as "daily logs, psychological reports, social worker records, incident reports, the investigation into his death, and so forth". You also seek advice relative to "Youth Bureau records or manuals which describe intake policies, rules of operation, parental-child contact policies, runaway policies..." and the like.

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, of likely significance is the initial ground for denial, which pertains to records that are "specifically exempted from disclosure by state or federal statute". If I interpret the facts correctly, I believe that rights of access to the records identifiable to your client's son would not be governed by the Freedom of Information Law, but rather by section 372 of the Social Services Law. Subdivision (1) of section 372 pertains to the maintenance of particular kinds of records by

> "Every court, every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..."

As such, I believe that a county youth bureau certified by the Division for Youth must maintain certain records and be subject to section 372 of the Social Services Law.

Subdivision (3) of section 372 states in relevant part that:

> "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."

In view of the foregoing, it appears that records identifiable to your client's son may be made available only pursuant to a court order.

I point out, too, that the regulations promulgated by the Division for Youth refer to records prepared and maintained by facilities, such as the County Youth Bureau, and state that

"records and reports maintained by the facility related to children under the jurisdiction of the Division shall be confidential, pursuant to section 372 of the Social Services Law..." [9 NYCRR section 180.12(c)].

Third, with respect to the other class of records in which you are interested, such as manuals, rules, policies and similar records, I believe that they would generally be available. Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold inter-agency or intra-agency materials, with certain exceptions. Specifically, within those materials, subparagraphs (ii) and (iii) of section 87(2)(g) respectively grant access to "instructions to staff that affect the public" and "final agency policies or determinations".

Although it is unlikely, in my opinion, that it may be asserted, I point out that section 87(2)(e)(iv.) permits an agency to withhold records "compiled for law enforcement purposes" when disclosure would "reveal criminal investigative techniques or procedures, except routine techniques and procedures". In situations in which certain aspects of law enforcement manuals or rules would enable potential lawbreakers to evade the law or detection, for example, those portions of a manual have been determined to be deniable [see Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979); also DeZimm v. Connelie, 64 NY 2d 860, 487 NYS 2d 320, (1985)]. However, once again, it does not appear that the records in question would contain information that would fall within the scope of section 87 (2)(e).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4302

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

October 3, 1986

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 three items of correspondence from you, two of which are dated September 5, and one of which is dated September 17.

The first issue that you raised pertains to appeals made under the Freedom of Information Law relative to the New York City Board of Education and community school districts. In my opinion, neither the Freedom of Information Law nor the regulations promulgated by the Committee deal with the specific qualifications within an agency's hierarchy of a person or body designated to determine appeals. As you know, 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 records the reasons for further denial, or provide access to the record sought."

The only qualification concerning the person who renders a determination on appeal is found in the regulations, 21 NYCRR 1401.7(b), which states in part that the records access officer and the appeals officer or body cannot be the same person.

I do not know enough about the structure or the functions of individual officers of the Board of Education or the Office of the Chancellor to suggest that their functions in terms of the Freedom of Information Law are being carried out properly or otherwise.

Further, I believe that you may be misconstruing the appeal process and making it more complicated than it must be. There is nothing in the Freedom of Information Law that requires that a hearing must be held when an appeal is made. While an appellant may offer justifications for an appeal or contend that an initial denial may be inappropriate, there is no requirement that such steps be taken. The appellant, as a general matter, merely indicates that a denial of records was made by a records access officer or by means of a failure to respond to a request on a timely basis. Moreover, there is nothing in the Law or the regulations to the effect that an appeals officer is bound to the reasons for a denial initially offered by the records access officer. Similarly, there is nothing that binds a court to the reasons for denial stated by an agency when it reviews the matter in a judicial proceeding.

With respect to the decision rendered by the Court of Appeals in Xerox Corporation v.Town of Webster (65 NY 2d 131 (1985)], I will not second guess the motivation of the state's highest court. From my perspective, however, the Court sensibly determined the issue insofar as it involved the relationship between the Freedom of Information Law and another statute. The provision to which you alluded, section 2116 of the Education Law Law, states, in essence, that all records of a school district are available. Should that be construed to mean that all student records are available, notwithstanding federal law, or that highly personal information about employees, such as medical information, social security numbers, or psychological evaluations should be available to anyone? I doubt that would be so, even if the Freedom of Information Law or other provisions had not been enacted.

Other aspects of your correspondence again deal with records relating to observations of teachers and related records. In short, I disagree with your view of what may be "factual". You refer to "supporting data" involving a characterization of a teacher's performance. In my view, "supporting data" might sometimes be factual; but in other situations it may consist of an evaluative opinion or an impression that is not factual. Similarly, while a "final agency determination", such as a com-

mendation or perhaps a reprimand, is generally available, I disagree with your contention that all records leading to a determination are available. A determination may be preceded by a variety of opinions or advice, some of which may be conflicting, and which may be accepted, rejected or modified by a decision-maker. Those preliminary, advisory materials may, in my opinion, generally be withheld under section 87(2)(g).

You suggest that records of assistance rendered to teachers should be available. Without knowledge of the contents of the records, I could not conjecture as to rights of access. It may be a "fact" that assistance was rendered; however, the record relating to such an event might consist of advice given by a supervisor to a teacher.

Lastly, I agree with your contention that lists of school district employees which identify employees by name, public office address, title and salary, as well as business telephone numbers would be available. I also agree with your view regarding time limits on responses to requests in relation to section 1401.5 of the Committee's regulations.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Ruth Bernstein
Edward Clark

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4303

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

October 3, 1986

Mr. George Clark
#78A3876
P.O. Box 10
Malone, NY 12953

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

Dear Mr. Clark:

I have reviewed your letter of September 22 in which you requested an advisory opinion concerning the Freedom of Information Law.

You wrote that you are attempting to obtain information from the Department of Correctional Services concerning a transfer from one correctional facility to another. It is your belief that the transfer was the result of information provided by an informant. However, there is apparently nothing in your records pertaining to such an incident. Having requested that information, you indicated that it was denied, most recently in June. You also indicated that you might "file an Article 78 asking the court to turn this information over to [you].

In this regard, I offer the following comments.

First, it is unclear whether the information you seek exists in the form of a record or records. Here I point that the Freedom of Information Law is applicable to existing records. Further, section 89(3) of the Law states in part that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if the information sought does not exist in the form of a record, the Freedom of Information Law would not be applicable.

Second, assuming that records on the matter do exist, it is likely that they fall within the scope of 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 intraagency 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, recommendations and the like may generally be withheld.

It appears that a record involving reasons for a transfer could be characterized as "intra-agency" material. To the extent that it consists of advice, a recommendation or evaluative information, I believe that it could be denied.

In addition, if such records include the identification of an informant, two additional grounds for denial might be applicable. Section 87(2)(b) states that an agency may withhold to the extent that disclosure would result in "an unwarranted invasion of personal privacy". Also potentially relevant is section 87(2)(e)(iii), which permits an agency to withhold records compiled for law enforcement purposes which, if disclosed, would "identify a confidential source or disclose confidential information relating to a criminal investigation".

Lastly, although you wrote that you appealed on June 10, and that you have not yet received a response to the appeal, you did not indicate to whom you appealed. For your information, the regulations promulgated by the Department of Correctional Services pursuant to the Freedom of Information Law state that an appeal may be directed to Counsel to the Department. I point, too, that section 89(4)(a) of the Freedom of Information Law states in part that a determination on an appeal must be rendered within ten business days of the receipt of the 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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4304

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 6, 1986

Mr. David Zaire
83-A-2242
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. Zaire:

I have received your letter of September 11, which pertains to a denial of an appeal rendered by the New York City Police Department on September 3.

According to your letter and the determination on appeal, you requested "records of all arrests effected and recorded by all officials connected with the Midtown South Police Precinct for the date of August 18, 1982". John J. Grimes, Assistant Deputy Commissioner, wrote that "you did not indicate the specific records you seek". He added that, if the records sought pertain to persons other than yourself, he "would have to deny disclosure on privacy grounds...among other possible exemptions". You indicated that you need the information to prove "incidences of impropriety" by a particular official. You noted, too, that the names of persons arrested "are crucial and imperative to criminal and civil litigations" in which you are currently involved.

You have requested my assistance and, in this regard, I offer the following comments.

First, although I do not believe that you must specify the records in which you are interested, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, a request should provide sufficient detail to enable agency officials to locate the records.

Second, while I believe that records indicating an arrest are often available, there are likely certain arrest records that may be denied. For example, pursuant to section 160.50 of the Criminal Procedure Law, records of arrest and related documents pertaining to persons who were charged, but where the charges were later dismissed in their favor, are generally confidential. In those situations, the first ground for denial appearing in the Freedom of Information Law, section 87(2)(a), would be applicable. That provision permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". Therefore, it is likely that some of the records of arrest would be considered confidential.

Third, it appears that the focus of your inquiry involves a particular individual. Without knowing the nature of the alleged improprieties, I cannot provide specific direction. However, it might be worthwhile to request particular records pertaining to that person.

Lastly, it is suggested that you discuss the matter with an attorney. Since you are involved in litigation, there may be vehicles other than the Freedom of Information Law 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:gc

cc: John J. Grimes, Assistant Deputy Commissioner

NEW YORK STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1332
FOIL-AO-4305

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

October 6, 1986

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 September 26 in which you raised several issues.

First, you alluded again to the possibility of a requirement that a form be used when requesting records under the Freedom of Information Law. To reiterate, there is nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government that refers to the use of a form. Section 89(3) of the Law indicates that an agency may require that a request be made in writing and requires that the request "reasonably describe" the records sought. As such, it has been advised that any written request that reasonably describes the records sought should suffice. It has also been advised that, while an agency may prepare a request form for purposes of administrative convenience, a failure to use a form prescribed by an agency cannot validly serve to delay a response to a request or to deny a request.

Second, in an unrelated area, you wrote that the Town Board of the Town of East Hampton indicated that "if [you] wanted to discuss a complaint about police conduct with the Town Board it would be done in executive session under the personnel section of the exemptions". In this regard, the so-called personnel exemption, section 105(1)(f) of the Open Meetings Law, permits a public body to enter into executive session to discuss:

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

Based upon the language quoted above, if a complaint pertains to a "particular" public officer, for example, I believe that an executive session could appropriately be held. On the other hand, if a complaint deals with the conduct of the police department generally, it is unlikely, in my view, that section 105(1)(f) would apply.

Third, you asked whether "anything [has] yet developed on Notices of Claim". I do not recall that you raised that subject as an issue. In brief, although notices of claim pertain to "legal matters", it has been advised that they are generally available when they come into the possession of an agency.

Lastly, you questioned the amount of time within which an agency must respond to an appeal. Section 89(4)(a) of the Freedom of Information Law states in relevant part that the person or body designated to determine an appeal "shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought".

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Theodore Sklar, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1333
FOIL-AO-4306

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

October 7, 1986

Mr. Dana F. Higgins
Rowland, Bellinger & Comstock, Inc.
211 W. Court Street
P.O. Box 231
Rome, New York 13440

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

Dear Mr. Higgins:

I have received your letter of September 19 in which you inquire as to whether the "New York Automobile Insurance Plan (the 'Assigned Risk' plan)" is subject to the provisions of the Open Meetings Law or the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records maintained by "agencies". The term "agency" is defined in the Law [section 86(3)] as:

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

Second, the Open Meetings Law pertains to meetings of public bodies. The term "public body" is defined in the Law [section 102(2)] as:

> "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."

Third, section 5301(a) of the Insurance Law mandates the creation of the assigned risk plan. It provides as follows:

> "All insurers licensed to write motor vehicle insurance in this state shall subscribe to and participate in the reasonable plan or plans, approved, or which may be approved, by the superintendent after consultation with such insurers, for equitable apportionment among such insurers, for equitable apportionment among such insurers of applicants for such insurance who are in good faith entitled to procure it through ordinary methods."

Section 5302(a) of the Insurance Law relates to the creation of the committee to administer the plan. It states:

> "In addition to the members of the committee elected by the subscribers to administer the plan, the superintendent shall appoint annually two additional members who shall be duly licensed insurance agents or brokers representative of broad segments of the public obtaining insurance through the plan."

Fourth, as I understand it, the insurers required to participate in "the plan" are non-governmental entities. They are businesses which function as an integral part of the private sector.

From my perspective, it appears that neither "the plan" nor the committee designated to administer "the plan" are within the scope of the term "agency" as defined under the Freedom of Information Law. Although the insurers are required by statute to take part in "the plan", they do not, in my view, constitute a "governmental entity" or "perform a governmental or proprietary function" by virtue of that fact. Thus, in my opinion, neither "the plan" nor the committee are likely subject to the Freedom of Information Law.

Similarly, it does not appear that "the plan" or the committee designated to administer "the plan" "conduct public business" or "perform a governmental function". As such, it is not likely that the plan or the committee are subject to the Open Meetings Law.

Finally, I contacted Counsel's Office for the Insurance Department in regard to this issue. The Deputy General Counsel concurred fully with the opinion that neither "the plan" nor the committee are subject to the Freedom of Information Law or the Open Meetings Law. He did indicate, however, that the insurers participating in "the plan" are required by law to file certain records with the Insurance Department. Since the department is an "agency", in my view, its records are subject to the Freedom of Information Law. Thus, you may make a request under the Freedom of Information Law for those records you seek which are maintained by the Insurance Department. You should direct your request to: New York State Department of Insurance, Office of General Counsel, Agency Building 1, Empire State Plaza, Albany, New York 12257, Attention: Robert A. Ginnelly, 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: Paul Altruda, Deputy General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4302

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 7, 1986

Ms. Marilyn C. King
[redacted]

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

Dear Ms. King:

I have received your letter of September 26.

According to your letter, your son was "killed by a hit and run driver" in August of 1985. You added that "The State Police took pictures of him at the scene and the pathologist took pictures of him during the autopsy." Your question is whether it is "illegal" to obtain copies of those pictures.

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 of the grounds for denial appearing in section 87(2) (a) through (i) of the Law.

Second, with respect to photographs taken at the scene by police officers, I believe that both the Freedom of Information Law and section 66-a of the Public Officers Law, which deals specifically with motor vehicle accident reports, are relevant.

Section 66-a of the Public Officers Law 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."

It is noted that several judicial determinations indicate that photographs taken at the scene of an accident by police officers are considered "records" subject to the disclosure requirements imposed by section 66-a [see Fox v. New York, 28 AD 2d 20 (1967); Romanchuk v. County of Westchester, 42 AD 2d 783, aff'd 34 NY2d 906 (1973)].

In view of the foregoing, the only possible basis for withholding, in my opinion, would involve a justifiable contention that disclosure "would interfere" with an investigation or prosecution of a crime. Due to the passage of time, it appears unlikely that such a claim could be made.

A similar conclusion would be reached under the Freedom of Information Law, which states in section 87(2)(e)(i) that records compiled for law enforcement purposes may be withheld when disclosure would "interfere with law enforcement investigations or judicial proceedings..."

In short, it is likely, in my opinion, that photographs taken by the State Police should be made available to you. Further, I do not believe that there is anything in the Freedom of Information Law that would prohibit release of those records to you.

Third, with regard to photographs taken by the pathologist, I believe that rights of access are governed by section 677 of the County Law. Subdivision(2) of section 677 states that:

> "The report of any autopsy or other examination shall state every fact and circumstance tending to show

> the condition of the body and the cause and means or manner of death. The person performing an autopsy, for the purpose of determining the cause of death or means or manner of death, shall enter upon the record the pathological appearances and findings, embodying such information as may be prescribed by the commissioner of health, and append thereto the diagnosis of the cause of death and of the means or manner of death. Methods and forms prescribed by the commissioner of health for obtaining and preserving records and statistics of autopsies conducted within the state shall be employed. A detailed description of the findings, written during the progress of the autopsy, and the conclusions drawn therefrom shall, when completed, be filed in the office of the coroner or medical examiner."

Further, subdivision(3)(b) of section 677 states in relevant part that:

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

Based on the foregoing, if the photographs are considered as part of the autopsy report, I believe that they would be available to you, assuming that you are next of kin. If the photographs are not part of the autopsy report, it appears that they would be available only by means of a court order.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4308

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 8, 1986

Mr. Michael Malinowski
Box B; 84A5568
Clinton Correctional Facility
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 September 26 in which you seek an advisory opinion concerning a request made under the Freedom of Information Law.

Attached to your letter is a request numbered 1 through 10 directed to the Records Coordinator at the Clinton Correctional Facility. The first five aspects of the request pertain to "any and all memorandum, past and present", involving certain procedures and functions of the facility and its personnel. The next four involve "log books" concerning the assignments of particular employees. The last involves an "index" identifying employees assigned to the "Annex Correspondence office by title".

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Freedom of Information Law states that, as a general rule, an agency need not create or prepare a record in response to a request. The extent to which the information sought exists in the form of a record or records is unknown to me, for I am unfamiliar with the specific kinds of records kept at a facility.

Second, section 89(3) of the Law also requires that an applicant "reasonably describe" the records sought. As noted earlier, several of the requests involve certain memoranda "past or present". While it may not be difficult to locate currently used memoranda relating to a given subject, depending upon the nature of an agency's filing system, it may be difficult to lo-

cate "past" memoranda. The capacity of agency officials to locate records based on the terms of your request would, in my view, determine the extent to which you "reasonably described" the records sought.

Third, it appears that all of the records that you requested fall within the scope of one of the grounds for denial. Due to the structure of that provision, the records in question might be available or deniable, in whole or in part. Specifically, section 87(2)(g) of the Law permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those aspects of inter-agency or intra-agency materials consisting of opinion, advice, recommendation and the like may, in my view, be withheld. In short, rights of access to the records in question are dependent upon the specific contents of the records.

Another ground for denial of possible significance is section 87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person". Without knowledge of the use or function of the records sought, I cannot conjecture as to the result of their disclosure. Therefore, I cannot provide specific advice or direction concerning the extent to which section 87(2)(f) or perhaps other grounds for denial might apply.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4309

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

October 10, 1986

Mr. A. Rabb Alamin-R. Price
86C0143
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. Alamin-Price:

I have received your letter of September 23 in which you seek assistance regarding a request made under the Freedom of Information Law.

Attached to your letter is a copy of a request in which you sought a variety of records pertaining to a criminal proceeding pertaining to you. The request was denied on the basis of section 87(2)(e)(i) of the Freedom of Information Law, which states that an agency may withhold records compiled for law enforcement purposes when disclosure would "interfere with law enforcement investigations or judicial proceedings". Mr. Kenneth S. Goldman, Assistant Onandaga County Attorney indicated that the forgoing basis for denial would apply, because the case has been appealed.

I have contacted Mr. Goldman on your behalf to discuss the matter with him. From my perspective, most if not all of the records sought are likely available, for they were made available to you or your attorney during the course of judicial proceedings. To that extent, I do not believe that disclosure would "interfere" with an investigation or a judicial proceeding. Further, those records should, in my opinion, be made available upon payment of the appropriate fees.

Further, Mr. Goldman and I agreed that perhaps the most appropriate source of the records is the court in which the proceeding was conducted. It might be worthwhile, as an alternative, to seek the records from the clerk of the appropriate court. It is likely, too, that your attorney maintains many of the records in question.

Lastly, you seem to have suggested in your letter that the Freedom of Information Law provides you with a right to "challenge any and all errors" contained in the records concerning you. If indeed that is your contention, I disagree. The Freedom of Information Law pertains to rights of access to records, it does not deal with the accuracy of the contents of records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4310

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

October 10, 1986

Mr. Michael McKinley
78-C-343
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. McKinley:

I have received your letter of September 24 together with attachments in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, you made a request for records under the Freedom of Information Law to the New York State Police. The records sought consist of certain photographs, a lab report and witness statements which were presented as evidence at your 1978 trial. The photographs show the backyard and the outside of the house where you resided for several years. In regard to the lab report, you indicate that the only procedures and techniques described in the report are chemical tests for blood and microscopic examination of certain articles for blood, fibers and hairs. Regarding the lab report, you state "All of the procedures described...are available to the public and are known by many people". The statements you requested are those given by David S. McKinley to the State Police. According to your letter, the statements were made public at your trial and were testified to at great length. You indicate that your initial request was denied on the grounds that "the materials requested were prepared for law enforcement purposes, which, if disclosed, would interfere with normal law enforcement investigations, tend to identify confidential sources of such information and/or reveal investigative techniques and procedures, and disclosure would constitute an unwarranted invasion of personal privacy of those concerned". By letter of September 15, you appealed the denial. In this regard, I offer the following comments.

First, this office has received from Mr. Joseph J. Strojnowski, Chief Inspector and Committee Chairman of the FOIL Appeal Board of the New York State Police, a copy of the response to your appeal. As you are aware, your appeal was denied for the same reasons set forth in the original denial.

Second, 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.

Third, 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". However, this office has advised that disclosure of a record to the person to whom the record pertains does not constitute an invasion of privacy. Stated differently, a person cannot invade his or her own privacy. I point out, though, that to the extent that the records sought identify other individuals, disclosure might constitute an unwarranted invasion of personal privacy of those individuals. Thus, those portions of the requested records the disclosure of which would constitute an unwarranted invasion of the privacy of other individuals could be deleted.

Fourth, section 87(2)(e) allows for the withholding of records or portions of records which:

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

As you know, the denial of your request and the affirmance of that denial were based in part upon the grounds set forth in section 87(2)(e)(i), (iii) and (iv). Based upon the facts presented in your letter and attachment, it does not appear likely that those grounds for denial are applicable to the records requested. You indicate that the records you seek were presented as evidence at your trial in 1978. Unless a law enforcement investigation is currently ongoing or pending which

relates to the requested records, there is no basis, in my view, for a denial on the ground that disclosure would interfere with law enforcement investigations [section 87(2)(e)(i)]. Even if such a law enforcement investigation is ongoing or pending, the law allows for denial of access only where disclosure "would interfere" with the investigation. Thus, in my view, the possibility that disclosure "might interfere" would be insufficient.

In regard to section 87(2)(e)(iii), the requested photographs and lab report are not, by their nature the type of records which would identify confidential sources. As for the witness statements, you indicate that they were made public at your trial and were read from and testified to at great length. Thus, from my perspective, section 87(2)(e)(iii) is not likely applicable to your requests.

Section 87(2)(e)(iv) is also cited as a ground for the denial of your request. In my view, the photographs and witness statements are not, by their nature, the types of records which would, if disclosed, "reveal criminal investigative techniques or procedures". In regard to the lab report, you indicate that the procedures and techniques described in the report were revealed at your trial and are commonly known and widely used. It is therefore not likely that section 87(2)(e)(iv) provides a proper ground for denial of your request, for the lab report would reveal "routine" criminal investigative techinques or procedures.

Fifth, it is my understanding that a record entered in evidence at a trial becomes a part of the trial record and that trial records are usually available from the court which heard the case. It has been advised by this office that when a record is known to be available from another source, it is not likely that an agency could properly deny that record under any of the grounds for denial set forth in the Freedom of Information Law.

Sixth, it is also noted that access to court records is determined by the Judiciary Law, possibly in conjunction with other state statutes, not by the Freedom of Information Law. However, as indicated above, it appears that the records you seek may be available to you from the court, upon your request.

Finally, I am enclosing copies of the Freedom of Information Law and "Your Right to Know", a pamphlet which describes the Freedom of Information Law and contains sample letters of request and appeal.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

cc: Joseph J. Strojnowski

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4311

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

October 14, 1986

[redacted]

The staff of the Committee on 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 29 in which you seek assistance concerning a request made under the Freedom of Information Law.

According to your letter and the correspondence attached to it, you unsuccessfully requested a claim file involving a workers' compensation claim. The request was directed to the State Insurance Fund, which is defending your employer, a civil court, that is apparently under the aegis of the Office of Court Administration. The Executive Director of the Fund, Arnold Kideckel, denied the request on the basis of section 87(2)(g) of the Freedom of Information Law. It is your contention, however, that some of the file consists of "instructions to staff that affect the public" which should be made available in accordance with section 87(2)(g)(ii) of the Freedom of Information Law.

While I sympathize with your position, it does not appear that your contention is valid. In short, the employees of the State Insurance Fund could not, in my opinion, be characterized as the "staff" of the Civil Court or the Office of Court Administration. If that is so, the documentation in question could not in my view be considered as an "instruction to staff".

The correspondence indicates that you are involved in a lawsuit against your employer. As such, it is possible that other avenues of disclosure may be available to you. Therefore, it is suggested that you confer with your attorney.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF
DEPARTM
COMMITT

FOIL-AO-4312

162 W.SHINGT... :W YORK, 12231
(518) 474-2518, 279...

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 20, 1986

Ms. Gladys Hourihan

[redacted]

Dear Ms. Hourihan:

I have received your letter of October 14 in which you requested records concerning yourself in your capacity as the holder of a liquor license.

Please be advised that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not generally maintain possession of records, 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 its records. In short, I cannot make the records sought available because this office does not maintain those records. Nevertheless, I offer the following comments.

First, as a general matter, a request made under the Freedom of Information Law should be directed to the agency that you believe maintains the records sought. In this instance, the request should be directed to the State Liquor Authority.

Second, as you may be aware, each agency should have designated one or more "records access officers" who have the responsibility of coordinating an agency's response to requests. Further, a request should be sent to the records access officer.

Third, section 89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Therefore, when making a request, sufficient detail should be provided to enable agency officials to locate the records in question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Hon. Thomas A. Duffy, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4313

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

October 20, 1986

Mr. Gordon Vasquez
[redacted]

Dear Mr. Vasquez:

I have received your letter of October 16 in which you requested documentation concerning the Freedom of Information Law.

In this regard, enclosed are copies of the Freedom of Information Law and "Your Right to Know", which describes the Law in detail.

You also asked how you might "obtain such things as sentencing minutes, and trial minutes". In my view, it is unlikely that the Freedom of Information Law pertains to those records. 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 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 Freedom of Information Law does not include the courts or court records within its scope. There are, however, other provisions of law that often grant rights of access to court records, and it is suggested that a request for court records be directed to the clerk of the court in which the proceeding was conducted.

With respect to "sentencing minutes", if you are referring to a pre-sentence report and related materials, I direct your attention to section 390.50 of the Criminal Procedures Law, which governs right 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:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1336
FOIL-AO-1314

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

October 21, 1986

Mr. Joseph DiBenedetto
Cole & Dietz
175 Water Street
New York, NY 10038-4924

The staff of the Committee 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. DiBenedetto:

I have received your letter of September 30 and attachments in which you requested an advisory opinion from this office.

According to your letter, Mr. Jay Boyle, a client of Cole & Dietz, Attorneys at Law, made a request to the Town of Smithtown under the Freedom of Information Law for certain records. The records requested include the minutes or tapes of executive sessions of the Town Board held in connection with Town Board meetings of August 26, September 2 and September 9. Further, you indicate that Sandra Berman, Town Attorney for the Town of Smithtown, denied the request on the ground that "existing case law in the State of New York...has excluded minutes of an executive session from disclosure under the Freedom of Information Law". In this regard, I offer the following comments.

First, I direct your attention to section 106 of the Open Meetings Law concerning minutes. The cited provision states:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Second, section 106(3) requires that minutes of an executive session be made available to the public within one week from the date of the executive session in accordance with the Freedom of Information Law. I would point out, too, that the summary of any final determination required to be included in the minutes "need not include any matter, which is not required to be made public by the Freedom of Information Law" [see section 106(2)]. Stated differently, even though a public body might take final action during an executive session, information that would be deniable under the Freedom of Information Law need not be made available as part of the minutes of the executive session. Further, if no action is taken during an executive session, minutes in my opinion need not be prepared.

Third, in brief, the Freedom of Information Law requires that all records be made 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. As a consequence, there may be situations in which some aspects of minutes of an executive session might justifiably be deleted, if those deletions represent information that falls within one or more of the grounds for denial. Since you have not provided any facts concerning the contents of the requested minutes, I cannot comment as to whether or to what extent any of the grounds for denial might apply to them.

Fourth, I spoke with Sandra Berman about the denial of your request. Specifically, I questioned the "existing case law" which she contends provides for denial of access to minutes of executive session, generally. Ms. Berman advised me that the case to which she referred is Matter of Gabriel v. Turner, 50 AD

2d 889, 377 NYS 2d 527 (1975). The case was decided prior to certain major amendments to the Freedom of Information Law which became effective in January, 1978 and which greatly broadened the availability of records under the Law. Additionally, the case was decided prior to the enactment of the Open Meetings Law, including its requirements regarding minutes of executive sessions. Thus, in light of the changes in the law, the case cited clearly does not, in my view, retain any precedential value relative to this matter. In sum, it is my opinion that minutes of executive sessions are available under the Freedom of Information Law except to the extent that the minutes, or portions of them, fall under any of the grounds for denial in section 87(2)(a) through (i).

Lastly, Ms. Berman indicated that there are no tape recordings of the executive sessions in question.

In an effort to enhance compliance with the Law, a copy of this advisory opinion is being sent to the Smithtown Town Attorney's 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:jm

cc: Sandra Berman, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4315

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

October 22, 1986

Mrs. Judy Freeman
[redacted]

The staff of the Committee on 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. Freeman:

I have received your letter of October 6 as well as the correspondence attached to it.

According to a request dated September 26, you sought from the Cayuga County Health Department "a copy of communications regarding septic system problems for the Town of Owasco homes on East Lake road between Owasco Road and Bevier Road and also the homes on East Lake Road (lakeside) beginning at the north end of the lake and including all the homes down to Fire Lane 1B". In a response by Thaddeus M. Medrek, Director of the Environmental Health Division, it was stated that the County Attorney advised "that the records of these two cases should not be made public until the review and violation abatement process is completed". You added in your letter that the Department "has verbally cooperated by discussing the cases with [you]".

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, in my opinion, the response to your request is inadequate. Although there was a statement that the request would be denied, no reason for withholding, based upon the grounds for denial, was offered. From my perspective, in view of judicial interpretations of the Freedom of Information Law, a denial of access to records must be based upon one or more of the grounds for denial appearing in section 87(2).

Third, it is noted that many of the grounds for denial are based upon potentially harmful effects of disclosure (i.e., would disclosure "impair" present or imminent contract awards; would disclosure of records compiled for law enforcement purposes "interfere" with an investigation). If the contents of the records have been discussed and essentially disclosed to you verbally, it is questionable in my view whether the harmful effects of disclosure described in the grounds for denial would arise if the request was granted.

Lastly, in your request, you asked that you be furnished with the name and address of the person to whom an appeal be made in the event of a denial. Mr. Medrek did not include that information in his letter of denial. I point out that the regulations promulgated by the Committee, which have the force of law, state in part that a written denial must inform an applicant of the right to appeal and identify the name and address of the person to whom an appeal may be directed [21 NYCRR 1401.7(b)]. As such, it is suggested that you contact Mr. Medrek for the purpose of ascertaining the name and address of the appeals officer.

In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to Mr. Medrek and to the County Attorney, Mr. Sant.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thaddeus M. Medrek
Raymond Sant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-436

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

October 22, 1986

Mr. Walter K. Munkelwitz
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Munkelwitz:

I have received your letter of October 6, which pertains to your unsuccessful attempts to obtain information from the Suffolk County Support Collection Unit of the Child Support Enforcement Bureau. As I understand the situation, you are in need of records indicating alimony and child support payments for particular years, as well as additional, related information.

In this regard, I offer the following comments and suggestions.

First, your inquiry involves areas of law with which I have no specific expertise. I would conjecture that there are both state and federal statutes that deal with issues involving child support, alimony and record-keeping pertinent to records relating to payments. Nevertheless, the Freedom of Information Law pertains to all records of an agency, and agency officials must comply with the procedural requirements of the Freedom of Information Law, whether or not the records sought are accessible.

Second, 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. The Committee has done so (21 NYCRR Part 1401 et seq.). In turn, section 87(1) of the Law requires head or governing body of an agency (i.e., a county legislature) to adopt its own regulations consistent with the Law and the Committee's regulations.

One aspect of an agency's regulations must include the designation of one or more "records access officers", a person or persons to whom requests may be directed. The records access officer has the duty of coordinating an agency's response to requests made under the Freedom of Information Law (see regulations, section 1401.2). It is suggested that you contact the County Legislature or perhaps, the office of the County Attorney to determine the identity of the records access officer. A request should be directed to the records access officer, rather than the "bureaucrat" to whom you referred, assuming that the bureaucrat is not the records access officer.

Second, as a general matter, 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.

Third, the Freedom of Information Law and the regulations promulgated by the Committee contain prescribed time limits for responding to requests and appeals in the event that a request is denied.

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)].

Lastly, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that, as a general rule, an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, there is no record containing "totals" of alimony payments, the County would not be obliged to review individual records and prepare a tabulation on your behalf. However, assuming that the individual records are accessible to you, you could prepare such a total yourself.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, and "Your Right to Know", which describes the Law in detail.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4317

GTON AVENUE, ALBANY, NEW YO.
(518) 47- 25.

October 23, 1986

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 October 5, which again pertains to teacher personnel records generally and to lesson observation reports in particular.

We have corresponded concerning this and related issues for years, and I doubt that I can add to comments made in the past. Your most recent research involves several decisions rendered by federal courts, which, according to your letter, appear to be grounded upon constitutional requirements of due process. I am neither familiar with those decisions, nor am I an expert with respect to constitutional law. If you believe that you enjoy constitutional rights to the records, it is suggested that you assert those rights.

With respect to the Freedom of Information Law, I believe that rights of access are questionable, do in great measure to the nature and contents of the records in question. Some aspects of the reports might be factual; other aspects might be reflective of advice, opinion, suggestion and the like, which would likely be deniable under section 87(2)(g).

You alluded to disclosures of lesson observation reports that have been released by the New York City Department of Law when those reports have been used in litigation. In those situations, I believe that the reports have become part of court records and, therefore, would be available from a court clerk (see e.g., Judiciary Law, section 255). Nevertheless, if the records do not come into the custody of a court, but rather remain only in the possession of an agency, I believe that the Freedom of Information Law would be applicable.

Lastly, you requested a clarification of the [illegible] "instructions to staff the public". For example, you [illegible]sed whether direction or advice given to a teacher that is derived from a lesson observation report could be characterized as an instruction to staff that affects the public. Although there is little judicial direction of which I am aware, I do not believe that an instruction given to a single teacher involving activities in that teacher's classroom could be considered as an instruction to staff that affects the public. From my perspective, an instruction to staff that affects the public would involve direction that must generally be carried out by a group or category of public employees and which involves its treatment of or relationship with the public, for example. Instructions to staff that affect the public might often be contained in an administrative staff manual or a directive applicable to employees generally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:gc

...MENT FOIL-AO-4318

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 27, 1986

Mr. Kenneth J. Nilsson
#85A2225
P.O. Box AG
Fallsburg, NY 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 Mr. Nilsson:

I have received your letter of October 3 in which you described difficulties in obtaining records under the Freedom of Information Law.

In this regard, I offer the following comments.

First, since several of your requests involve the Department of Correctional Services, I point out that Department regulations indicate that requests for records kept at a facility should be directed to the facility superintendent or his designee; requests for records kept at the Department's Albany offices may be directed to the Assistant Commissioner for Administration.

Second, both the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) prescribe 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 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 acknowl-

edged 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)].

And third, there is nothing in the Freedom of Information Law that pertains to a waiver of fees for photocopies. As such, despite your status as an inmate and an indigent person, the Freedom of Information Law does not require that fees be waived. Further, according to section 87(1)(b)(iii) of the Law, an agency may generally charge up to 25 cents per photocopy when such copies are 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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

FOIL-AO-4319

October 28, 1986

Mr. Michael S. Thomas
77-A-0834 B7
2911 Arthur Kill Road
Staten Island, NY 10309

<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 October 12.

In the past, requests have been made that may be so vague that agency officials cannot determine the nature of the records sought, and you indicated that, in the future, your requests would be presented more clearly. However, with respect to the earlier requests, you asked whether it would have been appropriate for an agency official to "formally respond...with a declaration of inability to determine the nature of the request as opposed to remaining silent".

I agree with your inference. As you are aware, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the record sought. If a request does not meet that standard, I believe that the appropriate agency official should respond and so state. Otherwise, a failure to respond could be construed as a constructive denial of access.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4320

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 28, 1986

Mr. Anthony J. Furio
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Furio:

I have received your letter of October 7, which pertains to rights of access to lesson observation reports concerning teachers.

The issue, as you suggested, has arisen in the past. To the best of my knowledge, however, the questions concerning such reports have been raised, for the most part, by one individual. While I appreciate that you included a "sample" of such a report, I believe that their form and content may vary depending upon the author of the reports. As such, it cannot be advised that the reports in question are, in their entirety, accessible or deniable, in whole or in part. With respect to the issue generally, 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, perhaps the most relevant ground for denial, under the circumstances, is section 87(2)(g). The cited provision states that an agency, such as a school district, may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. 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, impression, suggestion, and the like could in my view justifiably be withheld.

The extent to which a report may contain "factual" data is in my opinion dependent upon the contents of a report. Depending upon the manner in which such a report is prepared, it may contain factual information; on the other hand, it may be written in the form of an evaluation that consists largely of one's opinion.

Further, from my perspective, direction given in a report to a particular teacher relative to a certain class would not likely constitute an "instruction to staff that affects the public". Such an instruction might affect the students in a class; however, I do not believe that it would be so broadly applicable that it would "affect the public". An administrative staff manual or similar directive applicable to all teachers, or to teachers of a certain subject, might be available, but I believe that a manual of general application differs from a directive given to an individual teacher.

With respect to "final agency policies or determinations", I do not know enough about the procedures or rules concerning the reports to know whether certain aspects of the reports constitute final agency policies or determinations. It does not appear that they are reflective of policy. Further, it is questionable whether a characterization of a lesson would be "final". In short, without additional knowledge of the procedures involved, rights of access are conjectural with respect to section 87(2)(g).

Second, you raised questions concerning the "right to privacy" and access to personnel files. In this regard, section 87(2)(b) permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Although that standard is flexible and reasonable people may have different views regarding privacy, the courts have provided significant direction, particularly with respect to the privacy of public employees. It has been held in a variety of contexts that public employees enjoy a lesser degree

of privacy than others, for public employees are required to be more accountable than others. Further, with respect to the Freedom of Information Law, it has generally been determined that records pertaining to public employees that are relevant to the performance of their duties are available, for 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; Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Capital Newspapers v. Burns. 109 AD 2d 92, affirmed 67 NY 2d 562 (1986)].

As such, personnel files may be accessible or deniable depending upon their contents. Medical information, a social security number, a teacher's marital status and similar information could in my view be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy, because those kinds of information are not generally relevant to the performance of one's official duties. However, a written reprimand, attendance records or a record of disciplinary action have been found to be available, for they are relevant to the performance of one's official duties.

Further, it is emphasized that the Freedom of Information Law is permissive. While an agency may withhold inter-agency or intra-agency materials under certain circumstances, it is not obligated to do so. Similarly, while a school district may withhold records when disclosure would result in an unwarranted invasion of personal privacy, there is no requirement that it must withhold.

In sum, I do not believe that any specific rule, provision or judicial decision can be cited to indicate that the reports in question are either always available or always deniable. Again, rights of access in my opinion would be dependent upon the contents of each such report. However, section 87(2)(g) and the capacity to withhold opinions and similar types of materials would appear to be most relevant.

I hope that I 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-4321

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

October 28, 1986

Mr. Lawrence 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 letter of October 9 in which you seek assistance concerning the use of the Freedom of Information Law.

According to your letter, you requested from the South Country School District copies of a school bus transportation contract and a statement submitted by the bus company that is required in order to offer a bid. In an attempt to follow the appropriate procedure, you apparently sought to know the identities of the District's records access and appeals officers. You wrote, however, that you were refused because you are not a resident of the District.

In this regard, I offer the following comments.

First, based upon the language of the Freedom of Information Law and its interpretation by the courts, your identity, your residence and your reason for seeking records are irrelevant. As a general matter, it has been held that records accessible under the Freedom of Information Law should be made available to "any person, without regard to status or interest" [Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Further, in a similar situation, it was contended that only "qualified voters" of a school district could request and obtain records from the district due to the provisions of section 2116 of the Education Law. That provision grants right of access to school district records to qualified voters of the district. In holding to the contrary, it was determined that:

> "The Freedom of Information Law broadens the category of those to whom records are required to be made available beyond the disclosure required by Education Law section 2116. Respondent's reading of section 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...
>
> "Respondent is directed not to deny access based on section 2116 of the Education Law" [Matter of Duncan v. Bradford Central School District, 90 Misc. 2d 282, 394 NYS 2d 362, 363 (1977)].

"Article 6" of the Public Officers Law is the Freedom of Information Law, and, again, rights granted by the Freedom of Information Law may be asserted by any person, including a person who resides outside of the School District.

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.

From my perspective, a contract between an agency and a bus company, for example, is available, for none of the grounds for denial could appropriately be asserted. Similarly, records submitted by the successful bidder, after the bid has been awarded, are, in my opinion, generally available [see Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 430 NYS 2d 196 (1980)]. Without knowledge of the nature and content of a "financial disclosure" statement submitted by a bus company, I cannot advise that the statement is available in its entirety. It is possible, depending upon circumstances and the contents of such a record, that portions might be withheld as a trade secret [see Freedom of Information Law, section 87(2)(d)], or on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see section 87(2)(b)] if it pertains to individuals rather than a firm, for example.

Enclosed are copies of the Freedom of Information Law and an explanatory pamphlet that may be useful to you. In an effort to enhance compliance with the Freedom of Information Law, copies of this opinion will be sent to the District Superintendent, the Assistant Superintendent and the President of the Board of Education.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: William Sells, President, Board of Education
James J. Gerardi, Superintendent
Mark Schissler, Assistant Superintendent

encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4322

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 28, 1986

Ms. Carolyn Schwan
Youngs & Linfoot, Inc.
5877 Big Tree Road
Lakeville, NY 14480

The staff of the Committee on 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. Schwan:

I have received your letter of October 13, as well as the correspondence attached to it.

Your inquiry concerns several unsuccessful attempts to obtain copies of accident reports from Richard Kane, Livingston County Sheriff. The request involves reports of accidents that may have occurred within a specific location during a particular period of time. Further, the request indicates that you are a resident "in the area and require this information to properly defend a zoning change".

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, except in unusual circumstances, accident reports are in my opinion available under both the Freedom of Information Law and section 66-a of the Public Officers Law. 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."

The Freedom of Information Law is consistent with the language quoted above, for while accident reports are generally available, section 87(2)(e)(i) states in relevant part that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings". Further, the state's highest court, the Court of Appeals, has held that a right of access to accident reports "is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public" [Scott, Sardano & Pomeranz v. Records Access Officer, 65 NY 2d 294, 491 NYS 2d 289, 291 (1985)]. As such, I do not believe that you are required to show any particular interest in the accident reports as a condition precedent to gaining access to them.

Third, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) prescribe time limits for responding 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 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)].

Lastly, under the circumstances, it appears that your request has been constructively denied and that you may appeal. An appeal should be directed to the County Legislature or whomever it has designated to render determinations on appeal. It is suggested that you contact the Clerk of the Legislature in an effort to ascertain the identity of the person or body to whom an appeal may be directed.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this advisory opinion will be sent to Sheriff Kane.

I hope that I have 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 Kane

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1323

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 29, 1986

Mr. Ignacio Reynoso
#86A5178
B-7-29, 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. Reynoso:

I have received your letters of October 9 and October 27, both of which deal with unanswered requests for records maintained by the Supreme Court, Bronx County.

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.

Second I do not believe that the records in question are subject to the Freedom of Information Law. That statute pertains to records of an "agency", a term 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 Freedom of Information excludes from its scope the courts and court records.

Third, although the Freedom of Information Law is not applicable, other provisions of law often grant rights of access to court records (i.e., Judiciary Law, section 255). The materials attached to your letters indicate that your requests involved records identified by "Law Department" numbers. Perhaps additional information included in a request, such as names, dates, docket, index or indictment numbers would bring better results. Further, it may be worthwhile 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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4324

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

October 30, 1986

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, which appears on a letter addressed to Chancellor Quinones of October 15, and the materials attached to it.

You have asked how I "feel" about a "specific request such as the one [you] composed". The specific request to which you refer is not clearly indicated. However, having reviewed the materials attached to your letter, I found a series of requests dated September 27 that were sent to several records access officers of community school districts located in Queens. The requests involve unsatisfactory lesson observation reports containing certain categories of information. You identified those categories under some 60 headings. Further, the last category, number 60, is broken down into three additional subdivisions identified as a, b and c. You also noted at the end that "The preceding categories constitute 60 individual requests for item a, 60 individual requests for item b and 60 individual requests for item c."

Since you seek my "feeling" concerning that kind of specific request, I must admit that if I were the recipient of such a request, I doubt that I would review and attempt to respond with regard to each of the total of 180 categories. Further, despite your research and your knowledge of the Freedom of Information Law, I believe that often your citations are misleading or perhaps irrelevant.

In terms of the records sought, as you are aware, two of the grounds for denial appearing in the Freedom of Information Law are relevant. Virtually all of the information sought could

be characterized as "inter-agency or intra-agency material" [section 87(2)(g)]. Within such materials, unless a different ground for denial applies, the public has the right to obtain those portions consisting of:

> "i. statistical or factual tabulations or data;
> ii. instructions to staff that affect the public; or
> iii. final agency policy or determinations"

Concurrently, those portions of the materials consisting of advice, opinion, suggestion, impression and the like may, in my view, be withheld.

Unless I am misreading your request, you are inferring that the information described in the 60 categories is accessible. If my interpretation of your request and its inference is accurate, I disagree with your view of the Law. Although I could provide many examples, I will only offer a few.

Most of the 60 categories are referenced as "statements". It may be a "fact" that a statement was made, but that does not necessarily mean that the statement consists of "factual" information. I may offer "statements reflective of mental events" (see category 25), but the statements might consist of thoughts or opinions expressed on paper. A statement may contain "names of numbers spelled out in words or containing numerals" (category 32), but that alone would not govern rights of access (i.e. A statement containing a number might be: "In my opinion, 14 categories are specious and misleading"). Similarly, a statement might pertain to incompetence or "waste, negligence, or abuse" (category 52), but it might be an opinion or an allegation. In short, many of the "statements" that might be found within records to which you alluded in your request would, in my opinion, be deniable pursuant to section 87(2)(g). Although I could offer similar analyses with respect to other categories, I do not believe that it is necessary to do so.

In a related vein, several of the categories involve "instructions". I merely want to reiterate comments made in early letters that "instructions to staff that affect the public" are accessible; however, I do not believe that all instructions given to a teacher would fall within that area of accessible records.

The other ground for denial of potential significance is section 87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy". Without knowledge of the contents of the records, I could not conjecture as to the extent to which section 87(2)(b) might apply. I agree that a reprimand that is

the result of a disciplinary action has been determined to be available [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup Ct., Wayne Cty., March 25, 1981; Sinicropi v. County of Nassau, 76 AD 2d 838 (1980)], for it would be reflective of a final agency determination, and because the courts have held that disclosure of such a record would constitute a permissible, rather than an unwarranted invasion of personal privacy. However, a charge, an allegation, or an opinion regarding performance could, in my opinion, likely be withheld as an unwarranted invasion of personal privacy [see Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, if the reports in question are not reflective of instructions to staff that affect the public or final agency policies or determinations concerning teachers, but rather are solely evaluative, it is possible, due to the absence of any finality, that disclosure would often constitute an unwarranted invasion of personal privacy.

Lastly, as I have indicated in the past, you have raised the same or related issues many times over the course of several years. While my intent is not to be unresponsive, I do not believe that, at this juncture, it is necessary to provide further advice, unless you raise an issue that has not been the subject of an earlier opinion rendered at your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Chancellor Nathan Quinones
Edward J. Clark
Arlene M. Scherne
Stanley Weber
Vincent S. Romano
Stanley W. Schlessel
Marvin R. Aaron

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4325

182 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279-

October 30, 1986

Mr. Vernon Ryder
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ryder:

I have received your letter of October 16 in which you raised questions concerning access to records.

Your inquiry concerns your right to review a budget for fire protection services in your community. On the basis of your letter, it appears the fire department that maintains the records is a volunteer fire company, for you indicated that "they claim to be a private organization". If the budget is available, you also asked whether it should be itemized "to show what they need the money for".

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 Law to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, if the fire department is a part of a municipal government (i.e., a city, town or village), its records would, in my opinion, clearly be subject to rights granted by the Freedom of Information Law.

Second, the status of volunteer fire companies had long been unclear, for they are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they were covered by the Freedom of Information Law. Nevertheless, in a case brought under the Freedom of Information Law dealing with volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i).

From my perspective, a budget or related records indicating the manner in which a volunteer fire company expends money would be available, for none of the grounds for denial would apply.

Lastly, I am unfamiliar with the degree of specificity required in such a budget, or whether it must be "itemized". Nevertheless, ledgers, books of account and similar documents would in my opinion, 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4326

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 3, 1986

Mr. Gerald S. De Pasquale
City Clerk
City of Lackawanna
Room 215
City Hall
Lackawanna, NY 14218

The staff of the Committee 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. De Pasqaule:

I have received your letter of October 15 with attachments, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter and our telephone conversations, you, the City of Lackawanna gave notice of a firefighter examination and indicated that Lackawanna residents would be given preference for appointment. The exam was given and the appointments were subsequently made. You have received a request for copies of statements of residency of persons who received appointments. Additionally, you have enclosed a copy of the City's Freedom of Information Ordinance for review. In this regard, I offer the following comments.

First, as you know, the Freedom of Information Law is based upon a presumption of 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.

As I pointed out to you during our recent telephone conversation, the grounds for denial under the Law are permissive rather than mandatory. In other words, the Freedom of Information Law permits an agency to deny access to records or portions thereof that fall within one or more of the grounds for denial,

but does not prohibit an agency from granting a request for records. You indicated that you have no objection to disclosure of the requested records and that you, therefore, no longer require an advisory opinion on that matter. For instance, while disclosure of public employees' home addresses might result in an unwarranted invasion of personal privacy [see section 87(2)(b)], an agency is not required to withhold that information.

Second, I have reviewed the City's Freedom of Information Ordinance. It appears that the ordinance was drafted to parallel the Freedom of Information Law as it was enacted in 1974. However, since 1974, there have been major amendments to the Law which, in my view, necessitate amending to the ordinance to bring it into conformity with the current Law. Section 87(1)(b) of the Law requires each agency to promulgate regulations in conformity with the Law and with the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401). A city ordinance which accomplishes the same purposes as regulations is, in my view, likely an acceptable alternative. The Committee has prepared model regulations to be used by agencies as a guideline in preparing their own regulations. I am enclosing a copy of both the official regulations promulgated by the Committee and the model regulations for your use and information.

Additionally, I am enclosing copies of the Freedom of Information Law and "Your Right to Know", a pamphlet which describes 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4327

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 3, 1986

Mr. James R. Loeb
Drake, Sommer, Loeb & Tarshis, P.C.
873 Union Avenue
Post Office Box 1479
Newburgh, New York 12550

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, except as otherwise indicated.

Dear Mr. Loeb:

I have received your letter of October 17, as well as the materials attached to it.

Your inquiry concerns a request sent to the Town of Cornwall, your client, by the CSEA for the names and addresses "of those paying agency shop fees". The information is needed, according to CSEA, in order to comply with a decision of the U.S. Supreme Court, Chicago Teachers Local No. 1 v. Hudson, which was handed down on March 4. The correspondence attached to your letter expresses the belief that CSEA, as a public employee union, has a right to the information under the Freedom of Information Law. In addition, an attorney for the CSEA wrote that it is his opinion that "PERB would require an employer to provide the information necessary to comply with the decision".

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, it has been advised on previous occasions that home addresses of public employees would, if disclosed, constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, section 87(2)(b)]. Although that standard is flexible and reasonable people may have different views regarding

privacy, the courts have provided significant direction, particularly with respect to the privacy of public employees. It has been held in a variety of contexts that public employees enjoy a lesser degree of privacy than others, for public employees are required to be more accountable than others. Further, with respect to the Freedom of Information Law, it has generally been determined that records pertaining to public employees that are relevant to the performance of their duties are available, for 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; Geneva Printing Co. v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Capital Newspapers v. Burns. 109 AD 2d 92, affirmed 67 NY 2d 562 (1986)]. Conversely, to the extent that records or portions thereof are irrelevant to the performance of one's official duties, disclosure often would constitute an unwarranted invasion of personal privacy [see e.g. Wool, Matter of, Sup. Ct., Nassau Cty., NYLJ, November 22; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1980]. The home address of a public employee, in my view, is not generally relevant to the performance of his or her official duties. Therefore, in conjunction with section 87(2)(b), I do not believe that an agency is required to disclose employees' home addresses.

Further, by way of background, one of the few instances in which the Freedom of Information Law requires that an agency prepare a record involves payroll information. Specifically, section 87(3)(b) of the Law states that each agency shall maintain:

> "a record setting forth the name, public office address, title and salary of every officer or employee of the agency."

It is noted that the analogous provision in the Freedom of Information Law as originally enacted [formerly Public Officers Law, section 88(1)(g)] referred to a payroll record identifying employees by name and address. That provision did not indicate which address, home or public office address, should be disclosed. Having received questions and complaints regarding the disclosure of home addresses of public employees, the "payroll provision" was clarified by the Legislature in its repeal of the original statute and the enactment of the current Freedom of Information Law in 1977, which became effective on January 1, 1978. Again, the extant provision refers specifically to the "public office address", rather than the "address", as in the original statute.

Third, the correspondence sent to the Town suggested that section 89(7) of the Freedom of Information Law indicates that "providing such information to an employee organization recognized or certified pursuant to the Taylor Law is not to be considered an invasion of privacy". However, a close review of that provision does not, in my opinion, necessarily lead to that conclusion. Section 89(7) states that:

> "Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of an officer, employee or retiree of such employer, if such name or home address is otherwise available under this article."

The language quoted above indicates in its initial clauses that the home addresses of present and former public employees need not be disclosed under the Freedom of Information Law. Further, although the last clause of the provision refers to rights of access to home addresses by an employee organization, the cited provision grants such rights "if such name or home address is otherwise available under this article". Since I do not believe that there is a right to home addresses granted by "this article", it does not appear that CSEA has the right to obtain home addresses of employees under the Freedom of Information Law.

I point out as a matter of good faith that, some time ago, I discussed the matter with Steven Wiley, the author of some of the correspondence attached to your letter. To the best of my recollection, it is his view that the proviso at the end of section 89(7) is meaningless unless public employee unions can obtain home addresses. While that may be so, its specific language pertains to rights otherwise granted by the Freedom of Information Law, and, again, I do not feel that the public generally enjoys a right granted by the Freedom of Information Law to public employees' home addresses.

In addition, since I have neither the expertise nor the authority to advise with respect to the Taylor Law, I contacted the Office of Counsel at PERB to determine whether, in PERB's view, the Taylor Law requires disclosure. I was informed that, at this juncture, PERB has not yet rendered a determination involving the application of the Taylor Law to the specific circumstances that you have presented. As such, whether the Taylor Law would require disclosure of home addresses of public employees in this circumstance apparently remains unresolved.

Lastly, as indicated earlier, a payroll record identifying each agency employee by name, public office address, title and salary is available to any person under the Freedom of Information Law. Perhaps CSEA could communicate with employees via their public office addresses. Further, in such a communication, each employee could be asked to supply his or her home address. By so doing, employees could determine individually to disclose or withhold their home addresses, information that might otherwise, if disclosed, result in an unwarranted invasion of personal privacy.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Steven J. Wiley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1340
FOIL-AO-1328

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 5, 1986

Mrs. Sharon F. Waagner
[redacted]

The staff of the Committee on 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. Waagner:

I have received your letter of October 23, as well as a news article attached to it, which describe a series of difficulties in obtaining information from the Town of Long Lake.

The first two paragraphs of the article state that:

> "Town Supervisor Morrison J. Hosley, Jr. recently refused to reveal projected costs to the public at a hearing on the proposed 1987 Long Lake budget.
>
> "In an apparent disregard for the New York State Open Meetings Law, Hosley claimed he was not allowed to give out preliminary figures. No figures were presented either verbally or in printed form."

Later in the article, it was written that:

> "Prior to this meeting, it was learned the two councilman were opposing the supervisor's salary increase. Bissell explained that a meeting had taken place where Hosley proposed the increase and received the support of Bird and Gagnier.

> "Because the press had not been aware of this meeting, Hosley was contacted for comment. He would only say it was a committee meeting and that he received what he requested. Bissell and Emerson, at that time, said it was likely that copies of the proposed budget would be made available at the public hearing."

In this regard, I offer the following comments.

First, although the Freedom of Information and Open Meetings Laws are generally relevant to rights of access to records of the Town and meetings of the Town Board, it appears that other provisions of law may be relevant to issues surrounding the adoption of the budget. Specifically, enclosed are copies of sections 105 through 109 of the Town Law. In brief, those statutes set forth the requirements concerning the preparation, form, and content of a town budget. They also provide direction concerning public disclosure of materials prior to the adoption of a budget by a town board. With respect to the difficulties that you encountered, section 108 requires that a town board shall hold a public hearing on the preliminary budget and directs that:

> "The notice of hearing shall state the time when and the place where the public hearing will be held, the purpose thereof and that a copy of the preliminary budget is available at the office of the town clerk where it may be inspected by any interested person during office hours. Such notice shall also specify the proposed salaries of each member of the town board, an elected town clerk and an elected town superintendent of highways."

Therefore, although the article indicated that the Town Supervisor "said he was not allowed to release any figures until the budget was approved", I believe that he was not only allowed to release them, but that the figures would be available under both the Town Law and the Freedom of Information Law.

Second, I point out that, in terms of the Freedom of Information Law, the "figures" could be characterized as "intra-agency material" [see Freedom of Information Law, section 87(2)(g)]. However, intra-agency materials consisting of "statistical or factual tabulations or data" are accessible [see section 87(2)(g)(i)]. Further, it has been held that numbers prepared in the budget process, even though they may be estimates

that are not reflective of "objective reality" constitute statistical tabulations that are available under the Freedom of Information Law [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

Third, it appears that a meeting was held to discuss issues involving the budget in private, and that the justification for holding the meeting without public notice was that it was a "committee meeting". It also appears that a majority of the Town Board, or perhaps its entire membership, attended the meeting.

Here I point out that the Open Meetings Law is applicable to meetings of public bodies, and that the phrase "public body" is defined in section 102(2) of the Law to include:

> "...any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based upon the language quoted above, a town board, a governing body, is clearly subject to the Open Meetings Law. In addition, since the definition also refers to a committee or subcommittee of a public body, a committee of the Town Board would, in my opinion, also constitute a "public body" required to comply with the Open Meetings Law.

Section 104 of the Law requires that notice of the time and place of every meeting to be held by a public body, including a committee, must be given prior to a meeting. Further, the courts have interpreted the term "meeting" expansively. In a landmark decision rendered in 1978 by the Court of Appeals, the state's highest court, it was determined that any gathering of a quorum of a public body for the purpose of conducting public business constitutes 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 may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, if a majority of the Town Board or committee of a town board seeks to convene to conduct public business, such a gathering in my view is a meeting that falls within the requirements of the Open Meetings Law that must be preceded by notice given in accordance with section 104 of the Law.

As you requested, copies of this opinion will be sent individually to members of the Town Board. In addition, enclosed are a dozen copies of "Your Right to Know", which you may distribute as you see fit to do so.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Hon. Morrison J. Hosley, Jr.
Hon. Thomas Bissell
Hon. James Emerson
Hon. Richard Bird
Hon. Venita Gagnier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4329

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 5, 1986

Mr. Edward H. Gangross
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gangross:

I have received your letter concerning your unsuccessful attempts to review records. Please accept my apologies for the delay in response.

Specifically, you wrote that on two occasions you visited the town hall in the Town of Parma for the purpose of inspecting maps and plans concerning a building site adjacent to your property. In both instances, the Town Building and Development Coordinator was out of the office. Further, although you apparently asked the Town Clerk for assistance, none was offered.

In this regard, I offer the following comments.

First, as you suggested, the records in question are, in my view, available for public inspection. 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. Under the circumstances, the maps and the plans would be accessible, for none of the grounds for denial would, in my opinion, be applicable.

Second, by way of background, the Freedom of Information Law [section 89(1)(b)(iii)] requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law. The Committee has done so (see regulations, 21 NYCRR Part 1401 et seq.). In turn, section 87(1) of the Law requires the governing body of a public corporation, in this instance, the Town Board, to adopt rules and regulations consistent with the Law and the Committee's regulations.

One aspect of the regulations pertains to the designation of a "records access officer", a person who has the duty of coordinating an agency's response to requests made under the Freedom of Information Law. In most towns, the Town Clerk is a records access officer, and that person generally responds to requests for records. Further, under the Town Law, section 30, the town clerk is the legal custodian of town records. Therefore, even though the records in question might be in the physical custody of the Building and Development Coordinator, I believe that they are in the legal custody of the Town Clerk. If indeed the Town Clerk is the records access officer, I believe that she has the duty to respond to a request and to assist you, if necessary (see regulations, section 1401.2).

Another aspect of the regulations deals with the hours for public inspection. Section 1401.4(a) states that:

> "Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

I point out, however, that an agency is not required to respond instantly to a request. Further, while an agency may accept oral requests, it may require that a request be made in writing [see Freedom of Information Law, section 89(3); regulations, section 1401.5]. In either case, a response to a request must be given within five business days of the receipt of a request.

Lastly, you asked whether Town building matters would "come to a stand still" if the Coordinator were to die. In all honesty, I cannot answer that question, for it is outside the scope of the jurisdiction or expertise of this office. However, I am sure that if the incumbent left his position for any reason, a suitable replacement could be found.

Enclosed for your consideration are copies of the Freedom of Information Law, the Committee's regulations, and an explanatory pamphlet that describes the Law in greater detail.

I hope that I have 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. Elsie Webster, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 4330

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279[illegible]

November 6, 1986

Mr. Alan Siegel
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Siegel:

I have received your thoughtful letter of October 21, in which you raised a series of issues.

One problem concerns an apparent failure on the part of agencies to adhere to time limits for responding to requests. As you may be aware, both the Freedom of Information Law and the regulations promulgated by the Committee, which have the force of law, deal with that issue.

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 a related area, in which you suggest that some sort of penalty be imposed if a request is ignored, I point out that the Committee has recommended legislation that would give a court broader discretion to award attorney's fees in a proceeding brought under the Freedom of Information Law. The recommendation is discussed on pages 22-24 of the Committee's latest annual report, a copy of which is enclosed.

It appears that most of the other issues to which you alluded deal with privacy. As you are aware, the general standard in both the Freedom of Information and Personal Privacy Protection Laws involves the authority to withhold to the extent that disclosure would result in "an unwarranted invasion of personal privacy". I note that the same or similar language exists in virtually every access law in the nation. The problem is that there is no clear definition of what might constitute an "unwarranted invasion of personal privacy". In short, equally reasonable people may differ in terms of the dividing line between what might be viewed as an unwarranted as opposed to a permissible invasion of personal privacy. I would conjecture that it is all but impossible to legislate a standard or series of standards that could be applicable in every instance in which a judgment concerning personal privacy must be made.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4631

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 6, 1986

Mr. Thomas H. Jones
85 C 193
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. Jones:

I have received your letter of October 20 and the correspondence attached to it.

The materials indicate that you sent a request to the Erie County District Attorney on September 20. As of the date of your letter to this office, you had not received a response. You asked whether your request was proper and suggested that you "cannot appeal what has not been denied".

In this regard, I offer the following comments.

First I have contacted the Office of the District Attorney on your behalf in an effort to learn the identity of the person to whom a request may be directed. It is suggested that you renew your request and send it to:

John DeFranks, Assistant District Attorney
Chief, Appeals Bureau
Erie County District Attorney's Office
25 Delaware Avenue
Buffalo, New York 14202

Second, for future reference, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1402), which govern the procedural aspects of the Law, prescribe time limits for responding to requests. I point out that a failure to respond may be considered a denial that may be appealed.

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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4332

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 6, 1986

Mr. Luis Reyes
84-A-0093 H-2-4
Mid Orange Correctional Facility
900 Kings Highway
Warwick, New York 10990

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Reyes:

I have received your letter of October 20, which pertains to your ability "to obtain a copy of the Grand Jury hearing minutes".

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 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."

In view of the foregoing, the Freedom of Information Law does not apply to the courts or court records.

Second, other statutes often grant access to court records under certain circumstances, and it is suggested that a request be directed to the clerk of the appropriate court. 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-Y333

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 6, 1986

Mr. David McKay Wilson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wilson:

I have received your letter of October 20 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter, the City Clerk of the City of White Plains has sought to impose a fee of $5.00 upon persons who request records under the Freedom of Information Law. Further, you pointed out that the City's application form, which is attached to your letter, indicates that "A fee of $5.00 is required for search and/or certified copy."

In this regard, I offer the following comments.

Section 87(1) (b) (iii) of the Freedom of Information Law states, in brief, that an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing records that cannot be photocopied, unless a different statute permits a higher fee to be assessed. The Freedom of Information Law makes no reference to the capacity to charge for personnel costs, search time, or the time needed to evaluate the contents of records in terms of rights of access. Moreover, the regulations promulgated by the Committee (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state in relevant part that:

> "[E]xcept when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:

(1) Inspection of records;

(2) Search for records; or

(3) Any certification pursuant to this Part" (section 1401.8).

In view of the foregoing, I do not believe that the City may assess a fee for making a request, for search or for certification, unless a statute other than the Freedom of Information Law permits such fees to be assessed.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to the City Clerk.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: William G. Maguire, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4334

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 6, 1986

Mr. Jose Rotger
79-A-3697 C-4-1
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. Rotger:

I have received your letter of October 14, which reached this office on October 22. It is noted that, although you indicated that you had enclosed a copy of a request made under the Freedom of Information Law, no such document was included with your letter.

You indicated that you directed requests under the Freedom of Information Law to both the Kings County Clerk and the Office of the District Attorney. Neither request was answered.

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) to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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."

Since you did not include a copy of your request, I point out that a county clerk often serves as the custodian of court records. Further, as indicated above, the Freedom of Information Law does not apply to the courts or court records. Consequently, if your request sent to the Kings County Clerk involves court records, the Freedom of Information Law, in my opinion, would not apply. It is noted that other statutes often grant rights of access to court records (see e.g., Judiciary Law, section 255), and that a request for court records may be made under other provisions of law.

Second, based upon both the definition of "agency" and judicial decisions, I believe that an office of a district attorney is an agency required to comply with the Freedom of Information Law [see 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., June 24, 1982]. Therefore, records maintained by an office of a district attorney are in my view subject to rights of access granted by the Freedom of Information Law.

Third, you wrote that you requested records that have your name on them. Here I point out 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, the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR, Part 1401), which govern the procedural aspects of the Law, prescribe time limits within 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 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4335

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

November 7, 1986

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, which reached this office on October 27.

Attached to your correspondence is a copy of your letter to the editor of the East Hampton Star. One of the issues raised in that letter pertains to the use of "camera surveillance" by local law enforcement authorities. As I understand your comments, "prisoners" confined in local jails can be viewed on closed circuit television. You wrote that the surveillance "grossly invaded the rights of privacy of prisoners" and that one town "has allowed male police to observe incarcerated females undressing, going to the bathroom, crying or whatever".

You have asked about the "availability of any tapes made from video observation", and "getting the local police to admit if their cameras have video capability".

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law pertains to all agency records, and section 86(4) of the Freedom of Information Law defines "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, fol-

> ders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon language quoted above, if a videotape is maintained by an agency, I believe that it constitutes a "record" subject to rights of access granted by the Freedom of Information Law.

Second, however, as you suggested in your letter to the editor, the use of closed circuit television represents an invasion of privacy and may show intimate details of peoples' lives. While the Freedom of Information Law does not protect against disclosure of every record in which individuals may be identified, section 87(2)(b) of the Law permits an agency to withhold records the disclosure of which constitutes "an unwarranted invasion of personal privacy". Although I am unaware of any judicial determination involving access to videotapes of people who are incarcerated, I would conjecture that disclosure would constitute an unwarranted invasion of personal privacy. Further, such records might become confidential under section 160.50 of the Criminal Procedure Law if the charges against an accused are later dismissed in his or her favor.

With respect to determining whether the cameras have video capability, it is possible that records involving the purchase of such equipment or manufacturers' manuals concerning the use of the equipment would contain the information in which you are interested. Further, I believe that those kinds of records would generally 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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4336

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 10, 1986

Ms. Christina Muldoon
[redacted]

The staff of the Committee on 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. Muldoon:

I have received your note of October 22, as well as the materials attached to it.

In short, you had been employed by the Deer Park Union Free School District as a clerk-typist in the May Moore School. Recently, apparently without warning, you were transferred to a different position. The materials indicate that a memorandum pertaining to your transfer was prepared and made available to the Board of Education. The Board, according to a news article, was made aware of the transfer, but took no specific action concerning the incident. You requested a copy of the memorandum, but the request was denied.

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, without knowledge of the contents of the memorandum, it cannot be advised with any degree of certainty that it is accessible or deniable, in whole or in part. However, of particular relevance is one of the grounds for denial, which, due to its structure, often requires disclosure of records or perhaps portions of records. Specifically, section 87(2)(g) of the Freedom of Information Law provides 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 policy or determinations must be made available. Concurrently, those portions of such materials consisting of advice, opinion, recommendation and the like could in my view be withheld.

Under the circumstances, I believe that the memorandum in question could be characterized as "intra-agency material" that would be accessible or deniable, in whole or in part, depending upon its specific contents. To the extent that the memorandum contains factual information, I believe that it would be available. Similarly, to the extent that it is reflective of a final determination, it would, in my view, be available to you.

Lastly, it is suggested that you review your collective bargaining agreement. Often such agreements grant rights of access to employees to records pertaining to them in excess of rights granted by the Freedom of Information Law. If that is so, the record might be available to you pursuant to the agreement, even though the Freedom of Information Law might not provide a right of access to you as a member of 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4337

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 10, 1986

Mr. James L. Green
80-A-357
Drawer B
Stormville, NY 12582

Dear Mr. Green:

I have received your letter of October 27 in which you requested assistance.

According to your letter, you recently submitted a request to the New York city Housing Authority involving a lease to which you were a party. You were informed that the record in question must be kept "for five years only" and that, as a consequence, it "no longer exists". You have asked whether I can suggest some other agency that might have a copy of the lease.

In all honesty, I have no knowledge as whether duplicates of the lease might be in possession of an agency other than the New York City Housing Authority. It is suggested that you raise that question with a representative of the Housing Authority. The only other source that might maintain such records is the State Division of Housing and Community Renewal, which is located at 55 W. 125th Street, New York, NY 10027.

Lastly, I point out that, as a general matter, the Freedom of Information Law pertains to existing records. Further, section 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.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1343
FOIL-AO-4338

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 10, 1986

Ms. Sandra Fonda-Reccio
Mr. Robert Galinsky
The Rainbow Alliance
P.O. Box 1253
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.

Dear Ms. Fonda-Reccio and Mr. Galinsky:

I have received your letter of October 28, as well as the materials attached to it. You have raised a series of issues pertaining to the Freedom of Information and Open Meetings Laws.

The first pertains to fees for copies. According to the materials, the City of Johnstown has charged five dollars per copy in response to your requests for particular maps. In this regard, as you are aware, section 87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy, up to nine by fourteen inches, or the actual cost of reproducing any other record, unless a different fee is prescribed by statute. As such, if the maps in question are not larger than nine by fourteen inches, I believe that you may be charged a fee of up to twenty-five cents per photocopy. If the maps are larger or cannot be photocopied by means of conventional methods, the City may base its fees upon the actual cost of reproduction. The regulations promulgated by the Committee, which have the force and effect of law, state that fees for copies of records in excess of nine by fourteen inches or which cannot be photocopied "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(c)(3)]. Therefore, unless the actual cost of reproducing the maps is indeed five dollars, it appears that you should have been charged a lesser fee. This is not to suggest that the fee cannot exceed twenty-five cents per photocopy, but rather that, if the maps are larger than nine by fourteen inches, the City may charge based upon its actual cost of reproduction.

In a related vein, in your letter of September 12 addressed to the Common Council in which the issue of fees was raised, you indicated that the City Engineer "has surveying/engineering maps for his private business copied on the machine in the City Engineer's office". You requested copies of receipts indicating the fee that he paid for copies of maps "made for his private business". From my perspective, assuming that such receipts exist, I believe that they are available, for none of the grounds for denial appearing in the Freedom of Information Law could in my view justifiably be asserted.

In addition, it appears that you received no response to that request. Here I point out 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)].

You also alluded to a "work session" of the Common Council and minutes of meetings. Although apparently you or a representative of the Alliance spoke at a particular meeting, no reference to your comments is included in the minutes. In this regard, the following points are offered.

First, the Open Meetings Law, based upon case law, is applicable to so-called "work sessions" to the same extent as "formal" meetings. In a landmark decision rendered by the Court of Appeals in 1978, it was held that the term "meeting" includes any gathering of a quorum of a public body for the purpose of conducting public business, whether or not there is an intent to take action and irrespective of the manner in which such a gathering might be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. It is noted that the decision dealt specifically with "work sessions" held solely for the purposes of discussion and without an intent to take action. Therefore, a "work session" is in my opinion a "meeting" subject to the requirements of the Open Meetings Law, including any requirements that might be applicable relative to the preparation of minutes.

Second, it is noted that the Open Meetings Law contains what might be considered as minimum requirements concerning the contents of minutes. Section 106(1), which pertains to 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."

Based upon the language quoted above, it is clear in my opinion that minutes need not consist of a verbatim account of what might have been said at a meeting. Further, the minutes need not necessarily include reference to comments made during a course of a meeting.

I point out, too, that section 106(2) indicates that minutes of executive sessions are required to be prepared only when action is taken during an executive session. If a public body engages only in a discussion during an executive session, but takes no action, there is no requirement that minutes be prepared.

Lastly, the materials attached to your letter indicate that the Mayor of the City of Johnstown directed a request to the Alliance under the Freedom of Information Law. I agree with your response in which you suggested that the Freedom of Information

Law is not applicable to the Rainbow Alliance. The Freedom of Information Law applies 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."

As such, as a general matter, the Freedom of Information Law pertains to records maintained by entities of state and local government; it does not generally apply to records of a citizens group, such as the Rainbow Alliance.

As you requested, copies of this opinion will be sent to the individuals that you identified in your letter.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor Donald Murphy
Robert Subik, Esq.
Peter Henner, Esq.
The Schenectady Gazette
The Leader Herald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4339

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 10, 1986

Mr. Cleveland Hines
72-A-1268
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. Hines:

I have received your letter of October 27 and the correspondence attached to it.

The correspondence consists of copies of requests made under the Freedom of Information Law to several government offices. The requests involve information allegedly used in Family Court against you in a civil matter. You indicated that none of your requests have yet been answered.

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 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 Freedom of Information Law does not apply to the courts or court records. Although the Freedom of Information Law is not applicable to records of Family Court, I do not believe that such records are necessarily confidential in every instance. For example, section 166 of the Family Court Act states in part that the records of proceedings "shall not be open to indiscriminate public inspection". Perhaps you might be more successful if, in your request to the clerk of the court, you indicate your relationship to the proceeding.

Second, the State and New York City offices to which you sent requests are, in my view, "agencies" required to comply with the Freedom of Information Law. It is noted that each agency is required to designate one or more "records access officers" who generally have the duty of responding to requests. Therefore, it is suggested that you renew your requests and direct them to the records access officers at the respective agencies. For records maintained by the State Department of Social Services, it is suggested that a request be sent to:

Mr. Ray Weiss
NYS Department of Social Services
40 North Pearl Street
Albany, New York 12243

A request for records of the New York City Police Department should be sent to:

Records Access Officer
New York City Police Department
1 Police Plaza
New York, New York 10038

Lastly, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. While the use of a docket number might enable court officials to locate records, that kind of identifier might not enable officials of a City or State agency to locate records. 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.

Enclosed for your consideration is an explanatory pamphlet that describes the Freedom of Information Law in greater detail 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4340

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 10, 1986

Mr. Richard Vollmer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Vollmer:

As you are aware, your letter of October 5 addressed to Governor Cuomo has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information Law.

According to your letter, you have attempted to review records from Westchester County that pertain to your family. You expressed particular interest in "court books between 1870 and 1895, for Westchester". You appear to have inferred that you may enjoy fewer rights of access to records in question than others, because you are a resident of Queens, rather than Westchester County.

In this regard, I have made several telephone inquiries on your behalf. Most recently, I spoke with Mr. David Carmichael, Director of Westchester County Archives, on your behalf. Both the County Clerk, by means of a letter dated July 18, and Mr. Carmichael, have indicated that significant searches were conducted in response to your requests. It appears that some of the information in which you are interested either never existed or no longer exists. It is possible that records concerning events that occurred at least one hundred years ago may have been legally destroyed. I was informed that, at the Office of the County Clerk, there are a variety of indices that reference judicial proceedings and other events. Perhaps after reviewing those records, you might be able to refer to particular proceedings by means of index numbers or other identifiers that could enable you to engage in a more focused search for records.

With respect to the Freedom of Information Law, as a general matter, your place of residence has no bearing upon rights of access. Stated differently, records that fall within the scope of the Freedom of Information Law are as available to residents of Queens as they are to residents of Westchester County. I point, too, out that section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. After reviewing the indices, if you can provide an index or docket number, you might be able to describe the records sought in a manner that enables agency officials to locate the records.

Lastly, having spoken with Mr. Carmichael, I believe that he has engaged in diligent efforts to attempt to locate the information in which you are interested. Nevertheless, once again, it appears that much of the information simply does not exist.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: David W. Carmichael

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-434/

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 11, 1986

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 November 1, and the voluminous materials attached to it.

As requested, enclosed are several copies of "Your Right to Know", as well as copies of the two judicial decisions to which you referred. I could not locate the opinion cited by the court that you requested. Although the petitioner relied upon the opinion, it was apparently not addressed to Mr. Hadley. If I locate it, I will send it to you.

With respect to circumstances that you described under which records were made available, I believe that those circumstances are unrelated to the Freedom of Information Law. As indicated in a previous correspondence, records filed with a court are generally available under statutes other than the Freedom of Information Law (see e.g. Judiciary Law, section 255). Another situation that you described involved disclosure required by a collective bargaining agreement. Often contractual agreements contain provisions granting rights of access to employees in excess of rights granted by the Freedom of Information Law.

The judicial decisions that you cited generally deal with final agency determinations concerning employees, particularly determinations involving disciplinary action taken against employees. As I pointed out to you recently, charges requested prior to a determination were found to be deniable [see Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, "predecisional material" prepared to assist a decision maker, but which is not itself reflective of a final

determination has been found to be deniable [see McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), 48 NY 2d 659 (aff'd w/no opinion); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Kheel v. Ravitch, 62 NY 2d 1 (1984)]. I have no knowledge of whether the reports that you are seeking could be characterized as "final agency determinations" analogous to determinations rendered following the initiation of disciplinary charges, for example.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4342

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 12, 1986

Mr. Steven M. Berman
Field Representative
NYS United Teachers
Mid-Hudson Regional Office.
115 Green Street
Kingston, New York 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. Berman:

As you are aware, I have received your letter of October 28, as well as the correspondence attached to it.

According to the correspondence, on October 8, a request was directed to the Superintendent of the Highland Central School District for records pertaining to the "District's expenditures and costs for negotiating a successor collective bargaining agreement with the Highland Teachers Association", to "reimbursements and payments to Board members, officials of the District and legal counsel for fees and expenses", and pertaining to "all expenses incurred by the District for legal counsel for the school years 1984-85 through the present". Since you did not receive a response to the request, you considered the request to have been constructively denied, and you appealed to the President of the Board of Education.

You have requested my assistance in obtaining the records and, 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. This office is not empowered to compel an agency to grant or deny access to records.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Third, bills, vouchers and similar records reflective of expenses incurred by an agency are in my opinion generally available, for none of the grounds for denial would be applicable. It is understood that such records might identify particular officials or persons who might have provided services to the District. Nevertheless, since those records are relevant to the performance of official duties, disclosure would in my view constitute a permissible as opposed to an unwarranted invasion of personal privacy [see Freedom of Information Law, section 87(2)(b); 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, 67 NY 2d 562 (1986)].

With respect to payments to legal counsel, I point out that, while the School District 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 or related records contain information that is confidential under the attorney-client privilege, those portions could in my view be deleted under section 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, section 4503). Therefore, while some identifying details or descriptions of services rendered in the records 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].

Lastly, it is noted that the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401) contain time limits for responding 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 day

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: Ronald Revelle, Superintendent
Elsa Murphy, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4343

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 13, 1986

Mr. George M. Leonard, Jr.
[redacted]

Dear Mr. Leonard:

I have received your letter of November 10 in which you requested information concerning inmate rights.

You asked how an indigent inmate may "get a lawyer" to bring an Article 78 proceeding under the Freedom of Information Law, and how an inmate may "keep personal records like probation reports, private and protected".

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. While that statute indicates that, after having exhausted one's administrative remedies, an Article 78 proceeding may be initiated if records are denied, it does not address the issue of representation by an attorney. As such, I cannot provide specific direction concerning your first question. It is suggested, however, that an inmate might discuss the matter with the attorney who represented him in a criminal proceeding, or perhaps with a representative of a legal aid group or Prisoners' Legal Services, for example.

With respect to the protection of "personal" records, the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute an "unwarranted invasion of personal privacy". In addition, the Personal Privacy Protection Law, which applies to state agencies, imposes restriction on the disclosure of records that are identifiable to a particular individual. Aside from those statutes, there are numerous other provisions of law that deal with particular kinds of records. For instance, pre-sentence reports are generally considered confidential pursuant to section 390.50 of the Criminal Procedure Law.

Enclosed for your review are explanatory brochures that describe the Freedom of Information Law and the Personal Privacy Protection Law in greater detail.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4344

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 14, 1986

Mr. Jeff Sinclair
#81-A-745
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. Sinclair:

I have received your letter of October 27 with attachments in which you requested advice under the Freedom of Information Law.

Specifically, you state that you recently made a request for records under the Freedom of Information Law to the Westchester County Department of Public Safety. In response, the agency sent you an application form to complete and return. You state that you believe the application violates the Freedom of Information Law, for it indicates that the following fees would be charged: "$.30 per certification - $1.00 minimum fee" and "if the record cannot be located...a certified statement to that effect, at a charge of $1.00". A copy of the application form was enclosed with your letter to this office. In this regard, I offer the following comments.

First, 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 reasonably describes the records sought should suffice.

Second, in regard to fees, section 87(1)(b) of the Freedom of Information Law states:

> Each agency shall promulgate rules and regulations in conformance with this article... and 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 availability of records and procedures to be followed, including, but not limited to:
> ...(iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute.

Additionally, the regulations promulgated by the Committee on Open Government pursuant to the Law (21 NYCRR 1401) state, in relevant part [(section 1401.8(a)]:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant this Part."

A relevant section of the regulations to which section 1401.8(a)(3) relates is section 1401.2 (b) paragraphs (5) and (6) as follows:

> "The records access officer is responsible for assuring that agency personnel...
> (5) Upon request, certify that a record is a true copy.

> (6) Upon failure to locate records, certify that:
> (i) the agency is not custodian for such records: or
> (ii) the records of which the agency is a custodian cannot be found after diligent search."

Thus, in my view, both the Freedom of Information Law and the regulations promulgated by the Committee direct that an agency may not charge more than twenty-five cents per page for photocopies not exceeding nine by fourteen inches, except when a different fee is otherwise prescribed by statute. Additionally, the regulations specifically indicate that no fee may be charged for certification of requested records or certified statements that requested records cannot be located, except as otherwise prescribed by statute.

I am not aware of any statute that specifically prescribes fees to be charged by the County Department of Public Safety for obtaining copies of records or certifications. Thus, in my view, the fees set forth in the application form are likely in violation of the Law.

Third, in another section of the form the applicant is asked to state his/her reasons for seeking inspection of the requested records. The courts have held that, under the Freedom of Information Law, the purpose for a request is irrelevant and, therefore, a person seeking access to records is not required to specify the reason for his/her request (see Hopkins v. Hennsssey, Sup. Ct., Rockland Cty., June 27, 1975).

In general, the Freedom of Information Law does not distinguish among applicants for records, and it has been held that accessible records should be made equally available to any person, regardless of status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165; M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Finally, in an effort to enhance compliance with the Law, I am sending copies of this letter, the Freedom of Information Law, the regulations promulgated by the Committee on Open Government and "Your Right to Know", a pamphlet which describes the Law, to the Westchester County Parkway Police.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
cc: Westchester County Parkway Police
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4345

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 19, 1986

Mr. Douglas A. Glazebrook
[redacted]

Dear Mr. Glazebrook:

I have received your letter of November 13 in which you requested "Freedom of Information Act Forms" for the purpose of seeking a civil service list.

Please be advised that this office does not maintain request forms. Further, I point out that, although an agency may require that a request be made in writing, there is nothing in the Freedom of Information Law that pertains to a particular form that must be used by an applicant when making a request. Stated differently, any written request that "reasonably describes" the record sought should suffice [see Freedom of Information Law, section 89(3)].

On the basis of your letter, it appears that you are interested in obtaining an "eligible list" concerning the position of New York State Park Police Officer. An eligible list generally identifies those who passed a civil service exam and, in my view, is available under both the Freedom of Information Law and the Civil Service Department rules.

To make a request, it is suggested that you write to:

Anthony J. Costanzo
Records Access Officer
Department of Civil Service
State Campus
Albany, NY 12239

In the alternative, I believe that you can request the list by phone by calling (518)457-5497.

Enclosed is "Your Right to Know", which describes the Freedom of Information Law in detail.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4346

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 20, 1986

Mr. Leo Levko
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Levko:

I have received your letters of October 25 and November 17, as well as the materials attached to them. Please accept my apologies for the delay in response.

Your letters pertain to requests for records directed to New York City agencies, particularly the Fire Department. You complained that the Department provided "censored copies" of records and asked whether this office would "get involved" in a legal action that might be initiated to obtain the records in their entirety.

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. This office has no authority, however, to compel an agency to grant or deny access to records . As such, although this office can advise prior to the initiation of litigation, it has no authority to litigate or to represent a person whose request for records has been denied. Further, I have no list of lawyers who might specialize in litigation brought under the Freedom of Information Law.

Second, with respect to your request, 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.

Third, it appears that the provision cited by Ms. Hafer in her letter of November 14 is relevant. Specifically, 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 intra-agency materials reflective of advice, opinion, recommendation and the like may, in my view, be withheld. If the "censored" portions of the records in question contain the kinds of information described in the preceding sentence, the deletions were likely appropriate.

Lastly, reference is made in the materials to a search fee of $10 imposed by the Fire Department. In my opinion, neither the Freedom of Information Law nor the regulations promulgated by the Committee (21 NYCRR Part 1401), which have the force of law, permit the assessment of a search fee, unless such a fee is prescribed by a statute other than the Freedom of Information Law. If the fee in question is based on a policy or an agency rule, for example, I do not believe that it would be valid; if it is assessed pursuant to statutory authority, I believe that the charge would be proper.

Enclosed is a pamphlet that describes the Freedom of Information Law in greater detail.

I hope that I 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: Carol Hafer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4347

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 21, 1986

Mr. Daniel Danilczyk
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Danilczyk:

I have received your letter of October 29. Please accept my apologies for the delay in response.

According to your letter, you requested a copy of the Racing and Wagering Board's "subject matter list". As of the date of your letter, 30 days had passed without any response to your request. As such, you asked that the Committee "get this information" for you.

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. However, 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 an applicant. In an effort to assist you, a copy of this opinion will be sent to the Racing and Wagering Board.

Second, the record that you requested is, in my view, clearly available. Moreover, although the Freedom of Information Law generally does not require an agency to create a record, an exception to the general rule involves the preparation of a subject matter list. Section 87(3) of the Freedom of Information 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."

It is noted that such a list is not, in my opinion, required to identify each and every record of an agency; I believe, however, that it is required to identify every category of records maintained by the agency, in reasonable detail, whether or not the records are accessible.

Third, both the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401) prescribe 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 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:gc
cc: Thomas Davide, Secretary
David Vaughn, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4348

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 24, 1986

Federation for Justice
in Public Interest Law
P.O. Box 419
Smithtown, NY 11787

Dear Messrs. Bonito, Bazzano and Dinneny:

Your recent letter addressed to the UCC Division of the Department of State has been forwarded to the Committee on Open Government for response. The Committee, a unit of the Department of State, is responsible for advising with respect to the Freedom of Information Law.

You requested information concerning a particular political party, as well as information concerning named individuals "in their individual capacity or corporate capacity".

In this regard, I offer the following comments.

First, the Department of State does not generally maintain records concerning political parties or their activities.

Second, as a general matter, the Freedom of Information Law, section 89(3), requires that an applicant "reasonably describe" the records sought. Stated differently, a request should include sufficient detail to enable agency officials to locate the records.

In the context of your request, the UCC unit conducted a search based upon the names that you provided, and I have enclosed records that could be found on that basis. It is emphasized that, since you provided names only, there is no certainty that the enclosed records in fact pertain to the individuals that you identified. Numerous individuals may have the same name, and, therefore, we have no basis for knowing whether the records relate to the specific persons in whom you are interested.

Further, much of the information maintained by the UCC unit is indexed by corporate name, rather than a personal name. Consequently, without a corporate name, no search could be conducted with respect to many of the records maintained by the UCC

unit. In short, it may be impossible to know that an individual has a relationship with a corporation unless a request is made pertaining to the corporation.

Enclosed for your review is "Your Right to Know", which describes the Freedom of Information Law in detail.

I regret that I could not be of greater assistance. Should any questions arise please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4349
PPPL-AO-46

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 24, 1986

Ms. Wendy A. Banen
[redacted]

The staff of the Committee on 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. Banen:

I have received your letter of October 14, with attachments, in which you requested an advisory opinion from this office.

Specifically, you made a request under the Freedom of Information Law to Metro-North Commuter Railroad, for copies of certain records pertaining to yourself, including your "personal file" (It is assumed you are referring to your "personnel file"); forms that you completed (Occupational request status change form and employment application for engineer training school); reports or results of interviews; results of tests administered to you (reading comprehension test, mechanical ability test, snowy pictures test, gestalt outlook test and personal image test); "medical physical test results"; background verification questionnaire, background investigation request and inquiries, responses and results; records of attendance, discipline, supervisory evaluations and recommendations regarding past performance or qualifications for engineer training school; and the reasons for the final decision to exclude you from engineer training school based upon Metro-North's selection criteria. Additionally, you are requesting copies of the following records which do not pertain specifically to yourself: the actual tests administered to you, scoring procedures for those tests and the names of the members of the Committee of Metro-North management, which selects the candidates for the engineer training school. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to access to records of an "agency". The term "agency" is defined in section 86(3) of the Law to include units of state and local government except the judiciary and the state legislature. Metro-North is an arm of the Metropolitan Transportation Authority, which is a public benefit corporation subject to the Public Authorities Law. Section 1263(5) of the Public Authorities Law states that the Metropolitan Transportation Authority "shall be a 'state agency' for the purposes of sections 73 and 74 of the public officers law". Thus, in my view, Metro North is a "state agency" and, as such, is an "agency" subject to the Freedom of Information Law.

Second, as a "state agency", I believe that Metro North is also subject to the Personal Privacy Protection Law. The Privacy Law generally grants rights of access to records maintained by state agencies containing personal information identifiable to the individuals to whom the records pertain. As such, some of the records sought would likely be subject to rights of access granted by the Freedom of Information Law or the Personal Privacy Protection Law, or both.

Under the Personal Privacy Protection Law, there are two provisions which might permit a denial of certain records or portions of records pertaining to you that you requested.

Section 95(6) of the Privacy Law states that state agencies shall not be required to disclose to a data subject, the person to whom the record pertains, "patient records concerning mental disability or medical records where such access is not otherwise required by law". Thus, the Privacy Law would not likely, in my view, grant access to your medical records maintained by Metro North or by the Grand Central Terminal Medical Department.

However, under section 17 of the Public Health Law, "upon the written request of any competent patient...an examining... physician or hospital must release...medical records and test records...regarding that patient to any other designated physician...". Stated differently, a family doctor or any other physician may request and obtain copies of medical records on your behalf from another physician or hospital. It is also noted that as of January 1, 1987, an amendment to of the Public Health Law will become effective, which, to a great extent, enlarges patients rights of access to medical records pertaining to them.

The second provision of the Personal Privacy Protection Law which might constitute a basis for withholding certain records or portions of records is section 96(1)(c), which provides for the denial of records which contain information the disclosure of which would constitute an unwarranted invasion of the personal privacy of an individual other than the person request-

ing the records. For instance, if the "Background Investigation Results" or the supervisory evaluations you request contain personal references, recommendations or complaints pertaining to you, details which might identify the sources of such information could likely be deleted.

Thus, under the Personal Privacy Protection Law, the records you requested which do not fall under either of these grounds for withholding likely should, in my view, be made available to you.

Fourth, in regard to those records you requested which do not pertain to yourself, the Freedom of Information Law is, in my view, applicable. The records you requested which are likely not subject to the Personal Privacy Protection Law but only to the Freedom of Information Law are, in my view, the "actual tests", the scoring procedures and the names of the members of the committee of Metro-North management which selects the candidates for engineer training school.

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. It appears that there is only one ground for denial which is likely relevant to the cited records.

Section 87(2)(h) states that an agency may deny access to records or portions thereof that:

> "are examination questions or answers which are requested prior to the final administration of such questions."

Thus, it is possible that your request for "actual tests" could be denied under section 87(2)(h) of the Law.

Fifth, your last three requests for records are:

> 9.(3) I would like the basis for a final decision founded on the criteria mentioned in the April 23, 1986 bulletin.
> (4) I am requesting the reasons and explanation based on the mentioned criteria of my exclusion.
> (5) I am requesting an explanation of the selection procedures in relation to the agreement between Metro-North and the UTE-E and my exclusion from the engineers school within the framework of said agreement.

It is, in my view, unclear as to what records you are requesting and as to the distinction between each of the three requests. It appears that the requests are, to a large degree, repetitive. Also, it may be that one or more of the records you describe in 9.(3), (4) and (5) may not exist.

It is noted that, under both the Freedom of Information Law and the Personal Privacy Protection Law, an agency is not required to create a record in response to a request. Thus, if any of the records you requested do not exist, there is no requirement under the Law that Metro-North prepare such a record for you. Further, neither statute requires that agency officials answer questions. For example, some aspects of your request seek "explanations". While agency officials may offer explanations, the Freedom of Information Law and the Personal Privacy Protection Law do not require that such records be composed.

Sixth, it is suggested that when requesting records pertaining to you that are maintained by a state agency, you indicate that your request is made under both the Freedom of Information and the Personal Privacy Protection Laws and that you direct your request to both the records access officer and the privacy compliance officer.

Seventh, for your use and information, I am enclosing copies of "Your Right to Know" and "You Should Know", two pamphlets, the first of which describes the Freedom of Information Law and the second of which pertains to the Personal Privacy Protection Law.

Finally, in accordance with your request, I am sending a copy of this letter to Mr. W. Zullig, General Counsel and records access officer for Metro North.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive
Director

RJF:DAK:gc
cc: W. Zullig, Esquire
Thomas A. K. Chesner, Esquire
enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4350

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 24, 1986

Mr. Gilbert Sanchez
85 A 4466
354 Hunter Street
Ossining, NY 10562

Dear Mr. Sanchez:

I have received your letter of November 11, which reached this office today.

It appears that you have appealed a denial of a request for records to this office. In this regard, please note that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. The Committee has no power to compel an agency to grant or deny access to records.

Further with regard to appeals, 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."

Since the denial involves records of a correctional facility, I point out that the regulations promulgated by the Department of Correctional Services indicate that an appeal may be addressed 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:gc

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4351

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 24, 1986

Mr. Samuel McCullough
85A5554-20-14
Box 149
Attica, NY 14011

Dear Mr. McCullough:

I have received your letter of November 17 in which you requested a copy of your "trial and appeal record" from this office.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not have possession of records generally, such as those that you requested, nor does the Committee have the power to compel an agency to grant or deny access to records. In short, this office cannot make the records available to you because we do not maintain such records.

It is suggested that you seek the records in question from your attorneys or from the clerk of the court in which the proceeding was conducted. I point out, for future reference, that the Freedom of Information Law does not apply to the courts or records. However, other provisions of law often grant rights of access to court records. If you seek records from a court, it is suggested that a request be directed to the clerk. Further, a request should include sufficient detail to enable the clerk to locate the records, such as names, dates, docket or index numbers.

I regret that I cannot be of further assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4352

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 25, 1986

Mr. Willie O. Wade
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wade:

I have received your letter of October 27, as well as the materials attached to it. Please accept my apologies for the delay in response.

You wrote that you are in need of assistance in relation to your status as an employee of the Orange County Correctional Facility. In this regard, it is noted that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. As such, issues that you raised that are unrelated to rights of access to records are outside the scope of the Committee's jurisdiction. Several items of correspondence, however, pertain to a request for records directed to the State Commission of Correction. Specifically, the request involved an unusual incident report allegedly sent to the Commission in 1984. Stephen Del Giacco denied the request, citing several provisions of the Freedom of Information Law.

Without knowledge of the contents of report in question, I cannot offer specific guidance concerning rights of access to the report. Nevertheless, I 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. It is emphasized that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of one or more of the grounds for denial that follow. Based upon the language quoted in the preceding sentence, I believe that the Legislature envisioned situations in

which a single record or report might be both available or deniable in part. Further, that language, in my view, imposes an obligation upon agency officials to review a record sought in its entirety to determine which portions, if any, may justifiably be withheld.

Second, Mr. Del Giacco relied upon three of the grounds for denial.

He initially cited section 87(2)(b), which permits an agency to withhold records or portions thereof the disclosure of which would constitute "an unwarranted invasion of personal privacy". It is assumed that section 87(2)(b) may be relevant if the report in question identifies or refers to persons other than yourself. In some instances, identifying details might be deleted to protect against an unwarranted invasion of personal privacy; however, in others, the deletion of those details might not alone serve to protect against such an invasion of privacy.

The next ground cited by Mr. Del Giacco, section 87(2)(e), pertains to records compiled for law enforcement purposes. As he indicated, records compiled for law enforcement purposes may be withheld only to the extent that the harmful results described in that provision would arise by means of disclosure. For example, if disclosure would "interfere" with an investigation, section 87(2)(e) would, in my opinion, be applicable. Again, without knowledge of the nature of the record sought, the propriety of the assertion of that provision is conjectural.

The remaining ground for denial offered by Mr. Del Giacco is section 87(2)(g), which pertains to inter-agency or intra-agency materials. Under the circumstances, a report prepared by facility staff and sent to the Commission could, in my view be characterized as "inter-agency material". Within those materials, unless a different ground for denial applies, rights of access exist with respect to those portions consisting of:

> "i. statistical or factual tabulations or data;
> ii. instructions to staff that affect the public; or
> iii. final agency policy or determinations".

Further, as a general matter, those portions of inter-agency or intra-agency materials consisting of advice, opinion, recommendation and the like could be withheld.

Lastly, Mr. Del Giacco referred to your right to appeal the denial to Counsel to the Commission. Such an appeal would be made pursuant to section 89(4)(a) of the Freedom of Information Law. In relevant part, that provision states that the appeals

Law. In relevant part, that provision states that the appeals officer must, within 10 business days of the receipt of an appeal, make the records available or fully explain the reasons for further denial in writing. It is suggested that you might want to appeal the initial denial.

Enclosed for your consideration is "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:gc
cc: Stephen Del Giacco
enc.

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4353

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 25, 1986

Ms. Lucille Lantz
[redacted]

The staff of the Committee on 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. Lantz:

As you are aware, I have received your letter of October 28. Please accept my apologies for the delay in response.

Your inquiry involves "procedures and rights of citizens in viewing particular school records". Specifically, as the result of a court imposed integration plan, it is your belief that many families have moved from the City of Yonkers or have enrolled their children in private schools. However, you wrote that "the Board of Education has stated that school enrollment has risen despite the loss of children". As such, you are interested in obtaining "the actual enrollment figures" for the Yonkers Public School System.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states that, as a general rule, an agency need not create or prepare a record in response to a request. Consequently, if the specific information in which you are interested pertaining to enrollment figures has not been prepared in the form of a record or records, agency officials would not, in my opinion, be required by the Freedom of Information Law to create such records on your behalf in response to a request. On the other hand, if the information in question has been prepared, I believe that it would be subject to rights of access granted by the Freedom of Information Law.

Second, in terms of rights of access, and assuming that records containing the information sought exist, the Freedom of Information Law is based upon a presumption of 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, under the circumstances, it appears that one of the grounds for denial is applicable. Nevertheless, due to its structure, I believe that records containing enrollment figures would be accessible. Specifically, section 87(2)(g) of the Law states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is 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.

Records prepared by school officials could, in my view, be characterized as "intra-agency materials". However, "enrollment figures" would likely consist of "statistical or factual" data that would be available pursuant to section 87(2)(g)(i). In short, assuming that the figures in question exist, I believe that they are accessible.

Lastly, although the materials sent to you earlier describe the procedural aspects of the Freedom of Information Law, I point out that a request must "reasonably describe" the record sought [Freedom of Information Law, section 89(3)]. Therefore, although you need not identify a particular record, a request should contain sufficient detail to enable agency officials to locate the records. Further, both the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) prescribe 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 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:gc

cc: Board of Education
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4354

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 25, 1986

Mr. Bernard M. Zabusky
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zabusky:

I have received your letter of November 1, as well as the materials attached to it.

In brief, you submitted requests for records to the New York City Police Department in August. Although receipt of the requests was acknowledged, as of the date of your letter sent to this office, you received no further response.

First, I point out that the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401) prescribe 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 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)].

Under the circumstances, it appears that your request has been constructively denied and that you may appeal. Further, I believe that an appeal may be directed to John J. Grimes, Assistant Deputy Commissioner, Civil Matters, at 1 Police Plaza.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4355

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

November 26, 1986

Mr. John W. 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, except as otherwise indicated.

Dear Mr. Kane:

As you are aware, I have received your letter of October 30. Please accept my apologies for the delay in response.

According to your letter, you submitted a request to inspect documents maintained by the Montgomery County Archives, which, I believe, is a County agency. As of the date of your letter to this office, you had not received a response to the request.

In this regard, I offer the following comments.

First the Freedom of Information is applicable to agency records, and the term "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."

As such, assuming that the Archives is part of Montgomery County government, the documents maintained at the Archives would, in my opinion, constitute "records" subject to rights of access granted by the Freedom of Information Law.

Second, both the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401), which have the force and effect of law, contain 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 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)].

Third, if I accurately recall our conversations, mention was made of a fee to inspect records kept at the Archives. Here I point our that section 87(1) of the Freedom of Information requires that the governing body of a public corporation, such as the legislative body of county, is required to adopt procedural rules and regulations consistent with the Law and the Committee's regulations. Further, section 87(1)(b)(iii) of the Law provides that an agency's regulations must include reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

As such, unless a statute other than the Freedom of Information Law permits the assessment of a different fee, an agency may charge up to 25 cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing a record that cannot be photocopied. Consequently, unless a statute permits the County to do so, I do not believe a fee can be imposed for searching for or inspecting records. In addition, section 1401.8 of the Committee's regulations states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Edgar Leonhardt, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4356

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 1, 1986

Mr. Harold Scott
Green Haven Correctional Facility
#84 A 4541
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. Scott:

I have received your letter of October 31, in which you complained that the New York City Police Department has not responded to requests in a timely manner.

In this regard, I offer the following comments.

First, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) prescribe 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 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)].

Second, in an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Assistant Deputy Commissioner Grimes of the New York City Police Department.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: John J. Grimes, Assistant Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4357

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

December 1, 1986

Mr. John W. Kane
[redacted]

Dear Mr. Kane:

As you are aware, I have received your letter of October 30, which pertains to an inquiry sent to the Department of Environmental Conservation (DEC).

I contacted DEC on your behalf to learn more about the situation. As I understand it, you directed a series of questions to the General Counsel, who responded by means of a letter dated October 3. I learned that DEC received another letter from you dated October 8 in which you alluded to the earlier inquiry. It was assumed by DEC officials that the Letter of October 3 was responsive to the questions raised on October 8, and that those items of correspondence crossed in the mail. As such, it was assumed that a response to your letter of October 8 was unnecessary. If, by some chance, you did not receive the letter of October 3, a copy can be obtained by contacting Mr. Richard Schneider at the DEC's Albany office or by phone at 457-1148.

It is noted, too, that your letters raised questions. Here I point out the Freedom of Information Law is a statute that requires an agency to respond to requests for records; it is not a vehicle under which an agency is required to answer questions. Further, 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.

Enclosed for your consideration is "Your Right to Know", which describes the Freedom of Information Law in detail.

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:gc
cc: Richard Schneider

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4358

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

December 2, 1986

Ms. Susan Harrigan
New York Newsday
780 Third Ave., 36th Floor
New York, NY 10017

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Harrigan:

I have received your letter of November 3 and the correspondence attached to it. Please accept my apologies for the delay in response.

Your inquiry pertains to a "blanket denial" of a request for records directed to the Office of the Inspector General. The request involved records relative to "the Hyfin Credit Union matter", including copies of memoranda and correspondence made available to the Inspector General by the Banking Department, interviews with Banking Department employees and others, an "Examiner's Handbook", and Banking Department manuals. Mr. Michael W. Friedman denied the request pursuant to provisions of the Banking Law, as well as the Freedom of Information Law, section 87(2)(a) and (g).

In this regard, I offer the following comments.

First, as a general matter, 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.

Second, the denial is based in part upon section 87(2)(a), which provides that rights granted by the Freedom of Information Law do not apply to records that are "specifically exempted from

disclosure by state or federal statute". Two statutes that exempt records from disclosure are sections 36(10) and 64(1) of the Banking Law, both of which were cited in the denial. Section 36(10) states that:

> "All reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations, including any duly authenticated copy or copies thereof in the possession of any banking organization, bank holding company or any subsidiary thereof (as such terms 'bank holding company' and 'subsidiary' are defined in article three-A of this chapter), any corporation affiliated with a corporate banking organization within the meaning of subdivision six of section and any non-banking subsidiary of a corporation which is an affiliate of a corporate banking organization within the meaning of subdivision six-a of this section, foreign banking corporation, licensed lender, licensed casher of checks, or the savings and loan bank of the state of New York or the banking department, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof, in which event he may publish or authorize the publication of a copy of any such report or any part thereof in such manner as he may deem proper."

Section 64(1) contains similar language.

During our telephone conversation, we discussed the possibility that the statutory exemptions from disclosure found in the Banking Law might not be applicable, because the records are in the possession of the Office of the Inspector General rather than the Banking Department. I have been unable to locate any judicial determination that is pertinent to the facts. Section 36(10) refers to the authority of the Superintendent to make "public" records that could otherwise be characterized as confidential. Under the circumstances, it does not appear that disclosure of records to the Inspector General represents the equivalent of a "public" disclosure. Nevertheless, it is possible that reliance upon the Banking Law provisions by the Inspector General may be misplaced.

Third, notwithstanding the possibility that the statutory exemptions from disclosure found in the Banking Law do not apply, other grounds for denial appearing the Freedom of Information Law likely do apply, at least in part.

The provision of the Freedom of Information Law cited by Mr. Friedman, section 87(2)(g), pertains to the authority 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 intraagency 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 reflective of advice, opinion, recommendation and the like could, in my view, be withheld.

Additionally, two other grounds for denial might be relevant. Section 87(2)(b) permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". Without knowledge of the contents of the records, the extent which privacy considerations are present is conjectural.

The remaining ground for denial of possible significance is section 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."

Some of the documentation sought might be considered records compiled for law enforcement purposes. Based upon the language quoted above, the authority to deny would be based upon the effects of disclosure (i.e., would disclosure interfere with an investigation or identify a confidential source).

Lastly, with respect to the "Examiner's Handbook" and Banking Department manuals, I agree that those kinds of documents are generally available, for they likely represent "instructions to staff that affect the public" accessible under section 87(2)(g)(ii) or "final agency policy" accessible pursuant to section 87(2)(g)(iii). It is noted, however, that some aspects of administrative manual have been found judicially to be deniable on the ground that they constitute records compiled for law enforcement purposes and which, if disclosed, would reveal "non-routine" criminal investigative techniques and procedures [see section 87(2)(e)(iv)]. Specifically, in Fink v. Lefkowitz [47 NY 2d 567 (1979)], the Court of Appeals, the State's highest court, found that disclosure of routine investigative techniques and procedures often encourages compliance with Law. But in distinguishing between routine and non-routine criminal investigative techniques and procedures, it was held that:

> "Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by those so inclined. Disclosing to unscrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibil-

> ity of being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

Once again, the extent to which the manuals and similar documents are available under section 87(2)(g) or perhaps deniable under section 87(2)(e) is dependent upon the specific contents of those documents and the effects of disclosure. It is suggested that a request for those materials be directed to the Banking Department, for officials of that agency would likely be most knowledgeable with respect to the contents of those documents.

I regret that I cannot be of further assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Michael W. Friedman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4359

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 2, 1986

Mr. Roy E. Fries
National Chairman
Right to Know Party
41 Willite Drive
Rochester, NY 14621

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fries:

I have received your letter of October 30, with an attachment, in which you request advice from the Committee on Open Government.

According to your letter, you made a request under the Freedom of Information Law to the City of Rochester Department of Environmental Services for records pertaining to work done on certain properties. You have enclosed a copy of that letter of request. It appears that, as of the date of your letter, you had not received a response from the Department. 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. In my view, it does not appear likely that any of the grounds for denial are applicable to the records you requested.

Second, it is noted that the Freedom of Information Law pertains to existing records. Therefore, if a record does not exist, an agency would not, in my view, be required to create such a record in response to a request [(see Freedom of Information Law section 89(3)]. It appears that several of the records you requested are not the types of records that would be routinely prepared by the Department and therefore, may not exist. For instance, you requested a cost breakdown for certain work done by the Department by usage cost of each vehicle and number of labor-

ers and supervisors employed. Additionally, you asked for explanations of the Department's method of entry onto certain property and the legality of assessing work costs to a property owner for work done on the property. The Department of Environmental Services would not, in my opinion, be required to prepare such cost break-downs or explanations if they do not already exist.

Third, the work orders of which you requested copies are likely available under the Freedom of Information Law. Records indicating the cost of work completed are also likely available. However, if a figure representing the "total cost of all work completed..." has not been computed, the Department is not, in my view, required to compute such a total in response to your request.

Fourth, it is noted that the Law provides time limits within which an agency must respond to a request for records. 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)].

Finally, you indicate that in contacting various city and county offices you found that "in a number of cases the office staffs don't even know that...(the Freedom of Information Law)

exists". The Committee on Open Government has promulgated regulations (21NYCRR Part 1401) in accordance with the statutory authority granted by the Freedom of Information Law [section 89(2)(b)(3)]. I point out that section 1401.2 of the regulations states in relevant part:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies...shall designate one or more persons as records access officer...who shall have the duty of coordinating agency response to public requests for access to records."

Thus, in my opinion, it is the responsibility of the records access officer and not the "office staff" of each agency to be knowledgeable in regard to the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
cc: Ed Dougherty, Commissioner
City of Rochester Department of Environmental Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4360

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 2, 1986

Mr. Armando Colon
82-A-3397 H-7-32
Box B
Dannemora, NY 12929

Dear Mr. Colon:

I have received your letter of November 26. Enclosed as requested are copies of "Your Right to Know" and the Committee's most recent annual report.

Attached to your letter is an appeal in which you requested that this office reverse a determination to deny access to records by the Department of Correctional Services. In this regard, it is emphasized that 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 compel an agency to grant or deny access to records, nor does it render determinations on appeal.

Following an initial denial, an applicant may appeal 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 records the reasons for further denial, or provide access to the record sought."

For your information, the regulations of the Department of Correctional Services indicate that an appeal should be directed to Counsel to the Department.

Lastly, if a denial is upheld pursuant to an appeal, a proceeding to challenge the denial may be initiated pursuant to Article 78 of the Civil Practice Law and Rules.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-4361

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 5, 1986

Mr. Richard Ferguson, Jr.
#85-B-305
P.O. Box 436
Albion, NY 14411

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ferguson:

I have received your letter of November 1 in which you requested advice from this office.

Specifically, you inquire as to the correct procedure to follow in requesting access to certain prison records pertaining to you. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records maintained by units of state and local government. In brief, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations pertaining to the procedural implementation of the Law. In turn, section 87(1) requires that each agency adopt regulations in conformity with the Law and consistent with the regulations promulgated by the Committee. Please note that the Department of Correctional Services has promulgated the appropriate regulations. One of the components of the regulations involves the designation of one or more "records access officers" who are responsible for receiving and handling requests made under the Freedom of Information Law. The regulations indicate, that, with respect to records kept at a facility, the records

access officer is the facility superintendent or his designee. With respect to records kept at the Department's central offices, the records access officer is the Deputy Commissioner for administration, Department of Correctional Services, Building 2, State Campus, Albany, New York 12226.

Third, please note that, under the Freedom of Information Law, a request for records must "reasonably describe" the records sought. Therefore, when requesting records, it is suggested that the request be suffficiently detailed to enable agency officials to locate the records.

Finally, for your use and information, enclosed are copies of the Freedom of Information Law, the regulations promulgated under the Freedom of Information Law by the Department of Correctional Services, and "Your Right to Know", a pamphlet which describes the Freedom of Information Law and contains a sample request 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4362

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

December 9, 1986

Mr. James L. Green
#80-A-357
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. Green:

I have received your letter of November 5, in which you requested advice under the Freedom of Information Law.

According to your letter, you made a written request for records under the Freedom of Information Law to Alice McGillion, Deputy Commissioner of the Public Information Office of the New York City Police Department. As of the date of your letter, you had not received a response. In this regard, I offer the following comments.

First, I spoke with a staff person at the Department's Public Information Office regarding this matter. I was advised that, according to their log book, your request was received on October 20 and subsequently forwarded to the Department's legal division. I then spoke with William Smarrito in the Legal division who advised me that your letter was not received by his office. Thus, it appears likely that your request has been mislaid.

Second, the Committee on Open Government has promulgated regulations (21 NYCRR part 1401) in accordance with the Freedom of Information Law. Under section 1401.2 of the regulations, each agency is required to designate a records access officer who is responsible for responding to requests for records. Thus, any further requests for records of the New York City Police Department should be directed to the records access officer as follows: Enita McAlister, Records Access Officer, Public Inquiry and Request Section, New York City Police Department, 1 Police Plaza, Room 152-A, New York, New York 10038-1497.

Third, both the Freedom of Information Law and the Committee's regulations establish time limits within which an agency must respond to a request for records. Specifically, section 89(3) of the Law and section 1401.5 of the 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)].

Thus, it appears that it would likely be proper for you to appeal the agency's failure to respond as a constructive denial. Your appeal should be directed to: John Grimes, Appeals Officer, Assistant Deputy Commissioner of Civil Matters, New York City Police Department, New York, NY 10038. It is suggested that you attach a copy of your original request to the letter of appeal.

In the alternative, you may re-submit your original request to the records access officer as indicated above.

Finally, I am enclosing a copy of "Your Right to Know", a pamphlet which describes the Freedom of Information Law and contains sample request and appeal letters.

I hope 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 Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4363

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 11, 1986

Mr. Charles Van Nostrand
The School House
Denning Plank Road
Claryville, NY 12725

The staff of the Committee on Open 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 Nostrand:

I have received your letter of November 6 in which you requested an advisory opinion. Please accept my apologies for the delay in response.

According to your letter, following your appearance at a public hearing held by the Board of Assessment Review of the Town of Denning, you requested a copy of the portion of the tape recording involving your grievance. Although the request was made on June 5, you received no response until July 17. The response, which was made by the Town Attorney, made no reference to your request for the tape. On September 20, you wrote to the Town Supervisor concerning the tape. The Supervisor referred to the earlier letter of the Town Attorney. Most recently, a letter of October 19 was read and discussed at a meeting of the Town Board on November 5. You wrote that you "polled the board members in attendance and each of them agreed [you] should have a copy of this tape. They then made a motion to refer the matter back to the town attorney".

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, such as a town. Further, section 86(4) of the Law defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As such, a tape recording of a public hearing kept by a town is, in my view, clearly a record subject to rights of access. Moreover, the Court of Appeals, the state's highest court, has construed the definition literally and as broadly as its specific language indicates [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980) and Washington Post v. Insurance Department, 61 NY 2d 557 (1984)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. Under the circumstances, a tape recording of a public hearing is, in my opinion, available, for none of the grounds for denial would be applicable. It is noted, too, that it has been determined judicially that a tape recording of an open meeting is accessible under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Sup. Ct., Nassau Cty., October 3, 1983]. Further, with respect to fees, based upon section 87(1)(b)(iii) of the Freedom of Information Law, the fee for a copy of tape recording would be the "actual cost of reproduction", excluding personnel costs or other fixed costs of the agency (i.e., heat, light, etc.).

Third, for future reference, I point out that section 89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law. The Committee has done so, and its regulations are published as 21 NYCRR Part 1401. In turn, section 87(1) of the Law requires that the governing body of a public corporation, in this instance, the Town Board, adopt similar procedural rules and regulations consistent with the Law and the Committee's regulations.

One aspect of the regulations deals with the designation of a "records access officer", a person charged with the duty of coordinating an agency's response to requests for records (see regulations, section 1401.2). Often the records access officer for a town is the town clerk, for the clerk is the legal custodian of all town records (see Town Law,section 30). It is suggested that further requests be directed to the designated records access officer.

Lastly, the Freedom of Information Law and the Committee's regulations contain prescribed time limits within 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 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)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, and an explanatory pamphlet entitled "Your Right to Know". In an effort to enhance compliance with the Law, this opinion and the materials described above will be sent to the Town Board and its 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 of Denning
Stephen L. Oppenheim, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4364

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 11, 1986

Mr. Steven Mesinger
Senior Town Planner
Queensbury Town Office Building
Bay at Haviland Road
Queensbury, NY 12801

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mesinger:

I have received your letter of November 10, in which you requested and advisory opinion. Please accept my apologies for the delay in response.

In your capacity as Senior Town Planner for the Town of Queensbury, you asked whether "detailed engineering plans, submitted to a Planning Board for site plan or subdivision approval, are documents available to the public under the Freedom of Information Act". You added that:

> "A local engineer has argued that his plans are for the Boards review only and that other parties, including competing engineers, should not be allowed to review these plans as it would cause an unfair competitive advantage. Further, he has argued that if his project has been withdrawn, the public should not be allowed to review the plans in our files, again because it could give competitors and (sic) unfair advantage."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all records of an agency, such as the Town or its Planning Board, and section 86(4) of the Law defines the term"record" broadly to include:

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As such, any documentation submitted to the Planning Board would, in my opinion, constitute a "record" subject to the requirements of the Freedom of Information Law. I point out that the State's highest court, the Court of Appeals, has construed the definition of "record" expansively and literally, regardless of the function to which a document might relate [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); Washington Post v. Insurance Department, 61 NY 2d 557 (1984)]. In short, once the documentation is submitted to the Town, I believe that it constitutes a "record" subject to rights of access.

Second, as a general matter, 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. Further, the Court of Appeals has on several occasions held that the Law is intended to provide maximum access and that the grounds for denial should be construed narrowly [see e.g., Capital Newspapers v. Burns, 67 NY 2d 562 (1986) Fink v. Lefkowitz, 63 AD 2d 610 (1978); modified in 47 NY 2d 567 (1979)].

Third, the only ground for denial of significance is section 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."

Therefore, if the records in question could be characterized as "trade secrets" which if disclosed would cause "substantial injury to the competitive position" of a firm, to that extent, records could be withheld. I point out, however, that the capacity to withhold on that basis would, in my opinions, be rare, due in part to other disclosure requirements. For example, much of the documentation in question may effectively be disclosed during open meetings or in conjunction with public hearings. Further, it has consistently been advised that building plans and related records maintained by a municipality are available. Often a review of those records may represent the only method by which the public can be assured of compliance with building codes or ordinances, 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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4365

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 11, 1986

Mr. David Rosenberg
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rosenberg:

I have received your letter concerning unanswered requests made under the Freedom of Information Law for records of the Monroe Woodbury School District. Please accept my apologies for the delay in response.

According to your letter, you and others have made several requests for records, followed by telephone calls. Nevertheless, the District has apparently failed to respond. You have asked whether the District may ignore your requests.

In this regard, I offer the following comments.

First, the Freedom of Information Law applies 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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, a school district is clearly an "agency" required to comply with the Freedom of Information Law.

Second, both the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, contain prescribed time limits within which agency officials are required to 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 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)].

Lastly, since you did not indicate the nature of records that you may have requested, I point out that an agency may require that a request be made in writing. Further, section 89(3) of the Law requires that an applicant "reasonably describe" the records sought. Therefore, while an applicant need not identify with particularity the records in which he or she may be interested, sufficient detail should be included to enable agency officials to locate the records.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, and an explanatory pamphlet entitled "Your Right to Know". In an effort to enhance compliance with the Law, copies of those materials and this opinion will be sent to the Board of Education.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4366

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 12, 1986

Mr. Robert Lloyd Raskopf
Townley & Updike
(Gifford, Woody, Palmer & Serles)
Chrysler Building
405 Lexington Avenue
New York, NY 10174

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, except as otherwise indicated.

Dear Mr. Raskopf:

I have received your letter of November 6, as well as the materials attached to it. Please accept my apologies for the delay in response.

Your inquiry pertains to a request by your client, Newsday, for photographs of individuals who were arrested by the Suffolk County Police Department. The request was denied on several grounds. In addition, the Police Department relied in part on an advisory opinion rendered by this office in 1983 at the request of Lieutenant James J. Gallagher of the Department. You have requested my views concerning rights of access to the records in question, as well as the Department's reliance upon the 1983 opinion.

In this regard, I offer the following comments.

First, the 1983 opinion involved rights of access to mug shots by an arrestee, the subject of the photographs, or his attorney. It was advised that, in my view, "there [was] but one ground for denial of relevance..." I then cited section 87(2)(b) of the Freedom of Information Law, which pertains to unwarranted invasions of privacy, and section 89(2)(c), which provides that, unless a different ground for denial applied, disclosure could not be construed to constitute an unwarranted invasion of personal privacy when the person to whom the record pertains seeks the record.

Often in the composition of an advisory opinion, reference is made to a series of grounds for denial that may be "relevant" to rights of access. Nevertheless, in many instances, an explanation of a particular ground for denial results in an opinion to the effect that the provision would not justify a denial. For instance, in the case of statistical data prepared by an agency, it might be suggested that section 87(2)(g) is "relevant" but that "statistical or factual tabulations or data" [section 87(2)(g)(i)] found within inter-agency or intra-agency materials are available.

In short, while in the context of the opinion addressed to Lieutenant Gallagher, reference was made to the relevance of section 87(2)(b), my comments were not intended to be construed that disclosure of mug shots would result in an unwarranted invasion of personal privacy if released to a person other than the subject of the record or his attorney, because that was not at issue. Further, in order to make the point that the records would be available in conjunction with the direction given by section 89(2)(c), it was necessary to relate that provision to section 87(2)(b).

Second, with respect to your request, in brief, three of the grounds for denial appearing in section 87(2) of the Freedom of Information Law were cited by Suffolk County officials.

One is section 87(2)(b), which, again, pertains to privacy. From my perspective, the standard in the Law is flexible and is subject to a variety of interpretations, some of which may be conflicting. A reasonable person viewing a particular item of personal information might feel that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy. An equally reasonable person might contend that disclosure of the same item would be innocuous or inoffensive, thereby resulting in what might be characterrized as a permissible invasion of privacy.

With respect to the subjects of the photographs, all are persons who were arrested. It is assumed that all could have been seen during judicial or other proceedings that were open to the public. If that is so, it might be contended that the photographs are records containing information that has or could have been viewed by the public. Nevertheless, in a letter prepared on October 10 by Theodore Sklar, Assistant County Attorney, it was contended that disclosure of "mug shots" would be "offensive and objectionable to a reasonable man of ordinary sensibilities". He added that "Photographs of this nature could embarrass or humiliate the individuals in these photos. Certainly, a photograph depicting a person's incarceration is not something that a reasonable person would take pride in, or would want made available to the public."

While I do not disagree with the "reasonable man" standard applied to issues of personal privacy, there are many instances in which records have been determined to be available when the records represent events or occurrences involving individuals that may be embarrassing, or of which the individuals would not be "proud". When individuals are arrested and/or convicted, their names and other details about them are generally made available and may be published; when a public employee is the subject of disciplinary action, that person's name and other details about him or her are accessible to the public, whether or not the individuals to whom the records pertain may be embarrassed by their actions. In short, in many cases, whether or not individuals take pride in particular aspects of their lives may have little or no bearing upon the disclosure of records concerning what might be considered as public events.

A recent decision may have some relevance to the issue. In a request for the names of inmates housed in a segregated housing unit in a correctional facility, the record was found to be available, notwithstanding claims based upon privacy considerations. In that case, the agency resisting disclosure alleged that:

> "the fact an inmate is housed in One Company, Special Housing Unit 14, necessarily implies he is either being punished for some rule infraction or that he has some physical or emotional problem which makes it impossible for him to function in the general population. There might also be a security reason for housing an inmate, when for instance there is some indication that threats have been made against him. Respondents allege that being housed in this Special Housing Unit carries with it a 'stigma' and that revealing this stigma to the general public would be an unwarranted invasion of personal privacy" [Bensing v. LeFevre, 506 NYS 2d 822, 824 (1986)].

The Court determined, however, that:

> "In light of the fact that New York still has yet to recognize an absolute right to privacy and that the names sought to be elicited are

> those of convicted felons who have been incarcerated in a State's prison, it is difficult to imagine what privacy rights need to be protected by refusing to disclose the material requested DeLesline v. New York, 91 A.D.2d 785, 458 N.Y.S.2d 79 (Third Dept., 1982). There is no doubt that a list of names of inmates incarcerated in a particular institution should be readily available for inspection, and the Court can see no distinction in making available the actual Housing Unit within the Facility that an inmate has been placed" (id.).

The decision pertained only to names of certain inmates, and it is possible that a court would find that disclosure of photographs of incarcerated individuals would result in a more significant invasion of privacy. Nevertheless, the Court rejected the notion that "stigma" would, under the circumstances, constitute a valid basis for withholding. The disclosure of the identity of a person convicted of a crime might carry with it some "stigma"; however, it is assumed that the Court recognized that, by virtue of public judicial proceedings and/or public court records, the stigma would not outweigh rights conferred by the Freedom of Information Law. While disclosure might result in an invasion of privacy, the invasion or "stigma" was not so significant that release of the records would constitute an "unwarranted" invasion of personal privacy.

Also of potential relevance is a contention expressed in your letter of November 6 sent to Mr. Sklar in which it was indicated that the names of some fifteen individuals who are the subjects of the photographs were published by Newsday. As such, the identities of many, if not all of those who are the subjects of the photographs have been publicly disclosed. From my perspective, the issue as it relates to privacy involves a matter of degree. How much greater an invasion of privacy would result if the photographs are disclosed with names that were previously made available and published?

As you are aware, should a judicial proceeding be initiated, section 89(4)(b) of the Freedom of Information Law places the burden of justifying a denial on the agency. While I could not advise with certainty that disclosure would result in a permissible rather an unwarranted invasion of personal privacy, I would conjecture that the burden of proof would be difficult to meet with regard to a denial on the basis of section 87(2)(b), at least with respect to photographs of persons who were convicted.

A second basis for denial offered by county officials involves photographs of persons who were not convicted, and where the records were sealed pursuant to section 160.50 of the Criminal Procedure Law. If records are considered confidential pursuant to that provision, it appears that they could be withheld on the basis of section 87(2)(a) of the Freedom of Information Law, which pertains to records that are "specifically exempted from disclosure by state or federal statute".

With regard to that claim, your letter of November 6 refers to the recent decision rendered by the Court of Appeals, Capital Newspapers v. Burns [67 NY 2d 562 (1986)]. To withhold records under section 87(2)(a) in conjunction with an "exemption statute", it must be proven that there was a "clear legislative intent to establish that confidentiality which one resisting a FOIL disclosure claims as protection" (Id. at 567). While I am not familiar with the specific intent of section 160.50, it appears that the sealing requirements were intended to protect privacy. A record of a conviction, which is available from a court, indicates that the people were able to prove culpability. If, however, the people could not meet that burden, and charges are dismissed in favor of an accused, it would appear that the sealing requirement was intended to preclude the disclosure of records pertaining to an individual, against whom the burden of proof could not be met, to his or her detriment. Nevertheless, the effect of section 160.50 could, in my view, be determined only by a court at this juncture. I point out that, in a decision rendered prior to Capital Newspapers, supra, it was determined that section 160.50 of the Criminal Procedure Law is a statute that exempts records from the Freedom of Information Law [see Journal Publications v. Office of the Special Prosecutor, 500 NYS 2d 919, 922 (1986)]. In the case of a person arrested but not convicted, it is possible, too, that section 87(2)(b) of the Freedom of Information Law concerning privacy would be relevant. For the reasons described in relation to the preceding discussion of section 160.50 of the Criminal Procedure Law, disclosure of a photograph concerning a person arrested but not convicted would, in my opinion, result in a more significant invasion of privacy than in the case of disclosure regarding a person who has been convicted.

The remaining basis for withholding offered by the County is section 87(2)(f), which permits denial when disclosure would "endanger the life or safety of any person". In a letter of November 25 sent to you by Mr. Sklar, it was indicated that fifteen individuals whose photographs you seek are "jailhouse informants", persons who "cooperated with the prosecution in cases against their fellow inmates". It was also stated that the "Police Department believes that the life or safety of each individual may be jeopardized if he is identified by a photograph in a newspaper as a 'jailhouse informant'." I believe that a review of specific facts and circumstances involving each of the fifteen would be necessary to determine the propriety of a denial

under section 87(2)(f). In short, without knowledge of the facts and circumstances concerning the informants, or whether their identities, as informants, were disclosed during public proceedings, I could not advise with respect to the propriety of a claim that disclosure would endanger particular individuals' lives or safety.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Theodore Sklar
Robert Kearon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4367

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 12, 1986

Ms. Sylvia Tomlinson
[redacted]

The staff of the Committee on 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. Tomlinson:

I have received your letter of November 5, with attachments, in which you requested an advisory opinion from this office.

According to the materials attached to your letter, you made two requests for records under the Freedom of Information Law to the Elmira City School District. The first request was for "all vouchers, records, statements, claims, bills and receipts for any financial payment made from July 1978 through September 10, 1986" pertaining to matters involving yourself. In your second request, you asked for "all vouchers and receipts for all legal expense the District has incurred since July 1, 1978 to September 22, 1986". It appears that you were denied access to all requested records, with the exception of forty vouchers containing cumulative amounts billed to the school district for legal services rendered, which do not itemize the services rendered. Upon your appeal, you were advised by James E. Carter, Superintendent of Schools, that copies of all vouchers for legal services would be made available to you. He also advised that you would be charged "based upon the hourly rate of the employee who must...be present when you are going through the District records". You indicate that as of the date of your letter only the forty cumulative vouchers had been made available. Additionally, you were advised that the "detailed backup information which supports the vouchers will not be made available to you because...(it) contains confidential material in the form of detailed descriptions of what the law firm has done for the District in carrying out their legal assignments". In this regard, I offer the following comments.

First, 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 section 87(2)(a) through (i) of the Law.

Second, I point out that section 87(2) of the Law refers to the authority to withhold "records or portions thereof" in accordance with the listed grounds for denial. In my view, the quoted language indicates a recognition on the part of the Legislature that, in some instances, a single record might be both accessible and deniable in part. I believe that it also imposes an obligation on an agency to review the records sought in their entirety to determine which portions, if any, may justifiably be withheld. When a portion of a record may be withheld, that portion may be deleted, while making the remainder available.

Third, while a school board may engaged 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 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 section 87(2)(a) of the Law, which permits an agency to withhold records or portions thereof which are "specifically exempted from disclosure by state or federal statute" (see Civil Practice Law and Rules, section 4503). Therefore, while some details in the vouchers, records, statements, claims or bills that you requested might justifiably be withheld, portions which identify specific amounts billed in regard to matters pertaining to you would, in my opinion, likely be accessible under the Freedom of Information Law.

Fourth, several of the letters you received from the School District indicate that the District is not required to fully comply with your requests because of the amount of time and effort which would be required to do so. In short, when records are accessible under the Freedom of Information Law, I believe that the Law imposes an obligation upon an agency to search for and make them available. To illustrate that point, in a case involving a request for 1500 records that required deletions to be made, it was contended that the records could be withheld due to the burden imposed upon the agency. Nevertheless, the Court held that a "defense" of a denial based upon a "shortage of manpower" would "thwart the very purpose of the Freedom of Information Law" [United Federation of Teachers v. NYC Health and Hospitals Corp., 428 NYS 2d 823, 824 (1980)].

Fifth, you were advised that you would be charged a fee for the time spent by employees of the District in assisting you. Both the Freedom of Information Law and the regulations promulgated by the Committee on Open Government in accordance with the Freedom of Information Law (21 NYCRR Part 1401) give direction in regard to fees. Section 87(1)(b)(iii) of the Law 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 actual cost of reproducing any other record, unless a different fee is prescribed by statute. Section 1401.8 of the regulations prohibits an agency from charging for the inspection of records, a search for records or any certification pursuant to the Freedom of Information Law. Thus, in my opinion no fee may be charged for the time spent by an agency employee in regard to a request to inspect, copy or search for records.

Finally, in an effort to enhance compliance with the Law, copies of this letter and "Your Right to Know", a pamphlet which describes the Law, are being sent to Frederick A. Betscher, Business Administrator and Records Access Officer, and James E. Carter, Superintendent of Schools and Appeals Officer.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:jm

Enc.

cc: Frederick A. Betscher, Business Administrator
James E. Carter, Superintendent of Schools

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4368

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 15, 1986

[redacted]
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 [redacted]:

I have received your letter of November 7. Please accept my apologies for the delay in response.

You have asked how you might "go about getting a copy of [your] psychiatric records from a New York City Jail." Further, you indicated that your requests have not been answered.

In this regard, I offer the following comments.

First, I point out that you referred to 5 USC 552. That citation pertains to the federal Freedom of Information Act, which is applicable to records of federal agencies. Records of units of state and local government in New York are subject to rights granted by the New York Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

With respect to records prepared by the staff of the facility, I direct your attention to section 87(2)(g) of the Freedom of Information Law. The cited provision permits the an agency 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 or psychiatric evaluations, or advice concerning treatment could likely be withheld.

Third, if you are the subject of clinical records prepared by a mental hygiene facility that have been forwarded to the jail, section 33.13 of the Mental Hygiene Law would in my view serve to exempt those records from disclosure. In brief, section 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 section 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".

Fourth, in terms of procedure, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more "records access officers", a person or persons having the duty of coordinating an agency's responses to requests made under the Freedom of Information Law. It is suggested that you attempt to learn the identity of the records access officer and that requests in the future be directed to that person.

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law in detail, and which contains a sample letter of requests that may be useful to you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4369

182 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 15, 1986

Ms. Edythe Wolfson
[redacted]

Dear Ms. Wolfson:

I have received two letters from you dated November 8. Please accept my apologies for the delay in response.

One letter apparently pertains to a request sent to the New York City Department of Investigation (DOI). You alluded to an enclosure, a letter addressed to Mr. Bruce Fogarty, Counsel to the Department. However, that letter was not included with your correspondence.

Although the facts are unclear, it appears that you requested records from the Department's Records Access Officer, Joseph Gubbay. In response, he referred you to a particular official of the New York City Board of Education. It is your view that the referral constitutes a failure to comply with the Freedom of Information Law, for you contended that officials of the Department do not know whether the Board of Education maintains the records you are seeking.

As I understand the situation, Mr. Gubbay and Mr. Fogarty were attempting to be helpful by suggesting that the records sought might be in possession of a different agency. In short, Department officials could neither grant nor deny a request for records not in possession of the Department. Unless the records sought are maintained by the Department, I do not understand how the efforts of its representatives to refer you to the appropriate agency could be viewed as a failure to comply with the Freedom of Information Law.

Further, you asked that I "direct DOI to send [you] copies of their procedures" concerning the implementation of the Freedom of Information Law. In this regard, this office does not have the authority to "direct" an agency to make its records available. I am sure, however, that DOI will make its procedures available to you on request.

The second letter pertains to requests directed to the Public Employment Relations Board (PERB), and you asked that I "review all outstanding FOIA requests with Chairman Harold R. Newman and advise [you] of the result of such review".

Once again, I point out that the Committee has no judicial or quasi-judicial authority. Nevertheless, I have contacted the Executive Director of PERB on your behalf. I was informed that records sought were reviewed and transferred, by courier, to PERB's New York City office, where the materials were made available for inspection and copying. I was also informed that you did not avail yourself of the opportunity to review the records. From my perspective, by forwarding the records to New York City, PERB likely took a step that it was not required to take. Agency officials could likely have made the records available for inspection in Albany or required that you pay photocopying fees for copies of the records. In short, based upon my discussion with its Executive Director, it appears that PERB has sought to comply with the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce Fogarty, General Counsel, DOI
Ralph Vatalaro, Executive Director, PERB

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4370

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 15, 1986

Mr. Lloyd T. Nurick
Executive Director
New York Association of Homes
& Services for the Aging
194 Washington Avenue
Albany, New York 12210

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nurick:

As you are aware, I have received your letter of November 12 and the correspondence attached to it. Please accept my apologies for the delay in response.

According to your letter, the New York Association of Homes and Services for the Aging (NYAHSA) routinely seeks information from the State Department of Health pursuant to the Freedom of Information Law (FOIL). You described a series of four requests submitted as long ago as July 29 and as recently as October 15. Although the receipt of each of the requests has been acknowledged, none of the information sought has been made available.

One request involved "the 1985 residential health care facility tape". Although you were informed that the data on the tape "will not be compiled and made available until some time in 1987", you wrote that the Department "is using a subset of data from this tape in analyses it is currently performing". As such, your initial question is whether the tape now being used should be made available "if it does not yet contain all the information that it will in its final format?"

In this regard, it is noted at the outset that the FOIL is applicable to agency records, and that section 86(4) of the Law defines "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The language quoted above indicates that the term "record" should be construed broadly to include traditional paper records, for example, as well as information contained in other kinds of media, such as computer tapes and discs. Moreover, the state's highest court has interpreted the definition of "record" as expansively as its specific terms provide [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); Washington Post v. Insurance Department, 61 NY 2d 557 (1984)]. Concurrently, I point out that the Law pertains to existing records, and that section 89(3) states in part that an agency need not create or prepare a record in response to a request.

If the specific record that you are seeking does not yet exist, in my opinion, rights granted by the FOIL would not yet apply. You indicated, however, that a "subset of data", presumably a portion of the data that will be contained within the tape when it is completed, has been prepared and is being used by the Department. Although I have reviewed the written communications attached to your letter pertinent to the request, I am unaware of other communications that might have occurred. It is suggested, absent a complete tape, that a request be made for any tape that has been prepared, whether or not it contains all of the data that will eventually be included in the completed tape.

With regard to a second request, you received an acknowledgment to the effect that the availability of the data would be determined within twenty days. That period passed and you appealed on the ground that the request was constructively denied. As of the date of your letter to this office, you have received no response to the appeal. It appears that the information requested is currently being used, for you asked whether the Department has "reason to withhold this information if it is still using the data contained in the Survey for analyses it is currently performing". As I interpret your question, the issue is whether the Department may withhold the information because the information is currently being used to prepare analyses.

Similarly, you appealed a third request, which also constructively denied. You asked whether the Department's appeals officer must "respond to appeals within the timeframe specified in the regulations", whether the Department must "release the information", and "how long...the agency [can] reasonably take to provide data once it agrees to do so."

Here I point out that section 89(3) of the FOIL requires the Committee on Open Government to promulgate general regulations pertaining to the procedural aspects of the Law (see attached 21 NYCRR Part 1401). In turn, section 87(1) requires the head of an agency to adopt similar procedural rules and regulations in conformity with the Law and the regulations promulgated by the Committee.

Both the FOIL and the Committee's regulations prescribe time limits within which agency officials must respond 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 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)]. From my perspective, the agency must either grant access to the records sought, or deny a request within five business days of the receipt of a request or at the end of the period of delay indicated in an acknowledgment of receipt of a request.

Further, as suggested above, a failure to respond within the designated time limits results in a denial that may be appealed pursuant to section 89(4)(a) of the 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 ex-

> plain in writing to the person requesting the records the reasons for further denial, or provide access to the record sought."

As such, following an appeal, within ten business days of its receipt, the appeals officer "shall...fully explain in writing...the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within 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 point out that the Supreme Court decision rendered in Floyd, supra, held that, since there was no basis offered for a denial by the agency pursuant to an appeal, the records sought should be made available, whether or not the material could otherwise have been withheld [see 437 NYS 2d 886 (1981)]. The Appellate Division opined that the lower court's determination was "too rigid", stating that:

> "as a policy matter, we do not think the statute should be interpreted so rigidly to require the result directed by Special Term. We recognize the importance of prompt response by the agency to the request for information. Such responsiveness and accountability are the very point of FOIL. But the same statute also expresses the public policy that some kinds of material should be exempt from disclosure. Both policies must be considered. To say that even the slightest default in timely explanation destroys the exemption seems to us too draconian. We think the seven-day limitation should be read as directory rather than mandatory, and that the consequence of failure by the agency to comply with the seven-day limitation is that the applicant will be deemed to have exhausted his administrative remedies and will be entitled to seek his judicial remedy" (Floyd, supra, 87 AD 2d at 390).

It is noted for purposes of accuracy that the Law had required that appeals be determined within seven business days; as indicated previously, the time period is now ten business days. Under either time period, it is reiterated that, in my view, based upon the language of section 89(4)(a), in short, an agency has ten business days from the receipt of an appeal to uphold the denial or to make the records available. The fact that the record may be in use would not in my view constitute a valid basis for a denial, constructively or otherwise.

Lastly, I am unaware of the specific contents of the records that you are seeking. Consequently, the preceding remarks should be construed to pertain to the agency's duty to respond to requests in a timely manner in accordance with law; they do not deal per se with the status of the records as accessible or 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:jm

cc: Donald McDonald
Peter Slocum

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4371

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 16, 1986

Mr. James L. Green
#80-A-357
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. Green:

I have received your letter of November 12. Please accept my apologies for the delay in response.

According to your letter, you recently requested records from a court pertaining to your trial. You were informed that the fee would be $4.00 per page and contended that the fee violates the Freedom of Information Law.

In this regard, I offer the following comments.

It is noted initially that 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."

As such, the Freedom of Information Law does not, in my view, pertain to the courts or court records.

I would conjecture that the fee of four dollars per page is based upon a statute. If you wish to question the fee, it is suggested that you raise the issue with the clerk of the court that possesses the records. In the alternative, you might confer with your attorney.

I regret that I cannot of further assistance. Should any further questions arise, please feel to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4372

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 17, 1986

Mr. James Ennis, President
Syracuse Hancock Professional
Fire Fighters Association
Local #1888, I.A.F.F.
Syracuse, New York, 13212

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ennis:

I have received your letter of November 13. Please accept my apologies for the delay in response.

According to your letter, the New York State Professional Fire Fighters Association recommended legislation concerning the Syracuse Airport Fire Department. Having discussed the matter with Mayor Young, it was apparently explained that the City of Syracuse would not support the legislation based upon reasons offered in a memorandum the City had received from its former Fire Chief. You were told informally that the memorandum was misplaced, but that a copy would be made available to you when it was located. When the memorandum was not made available, you requested it in writing under the Freedom of Information Law. The request was initially denied by Corporation Counsel, who wrote that "memorandums which contain internal advice and recommendations which are used to formulate a City's position on any issue are not subject to public disclosure". Thereafter, you were informed that the memorandum could not be located. It was also suggested that the advice given by the former Chief "may have been...verbal and not written". You also expressed the belief that the advice given by the Chief was rendered after he retired, and that he was no longer acting within the course of his official duties.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that, as a general matter, an agency is not required to create or prepare a record in response to a request. Therefore, if the "memorandum" in question was never prepared and the advice was given orally, the Freedom of Information Law, in my opinion, would not be applicable.

Second, the same provision also states that, in response to a request for a record, an agency, if requested to do so, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search". It is noted that according to regulations promulgated by the Committee, which have the force of law (21 NYCRR Part 1401), the agency's records access officer has the duty of assuring that such a certification is prepared on request [section 1401.2(b)(6)]. The regulations also indicate that no fee can be charged for certification [section 1401.8(a)].

Third, assuming that the memorandum can be found, I would generally agree with the statement made by Corporation Counsel concerning the denial, if the memorandum was prepared by the Chief while still employed as Chief. The relevant provision of the Freedom of Information Law is section 87(2)(g), which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Concurrently, those portions of inter-agency or intra-agency materials consisting of advice, opinion, recommendation and the like may, in my view, be denied.

If the memorandum was prepared by the Chief in that capacity in the performance of his official duties, the memorandum would be "internal" and could be characterized as "intra-agency material". If, however, it was prepared after his retirement, the Chief would no longer have been employed by the City and,

therefore, I do not believe that the exception concerning "intra-agency materials" would be applicable. Further, it does not appear that any other ground for denial listed in section 87(2)(g) of the Freedom of Information Law would be relevant.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: C. Frank Harrigan
James L. Gelormini

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4373

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 17, 1986

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:

As you are aware, I have received your letter of November 8. Please accept my apologies for the delay in response.

According to your letter, you were formerly employed as a court officer by the Office of Court Administration. In conjunction with a claim of job discrimination, you are attempting to "document" your work record. Specifically, you wrote that "While on duty in court a defendant gave [you] counterfeit $100 bills for bail money". Since you have "a background in printing", you "knew they were phoney", and you are seeking to "document" the incident. However, you are unsure of the date. Consequently, your question is whether you can request copies of incident reports filed with the Office of Court Administration "for the period April 24, 1980 through August 12, 1980 for NY Criminal Court". The incident reports are apparently filed when there is an "injury, assault, arrest or unusual incident in the courthouse". By reviewing the incident reports for that period, you believe that you can locate the particular report pertaining to the counterfeiting incident, which, in turn, would enable you to contact the Secret Service to obtain a letter verifying that you provided assistance in the matter.

In this regard, I offer the following comments.

First, since the incident in question occurred more than six years ago, I point out that the Freedom of Information Law pertains to existing records. Further, section 89(3) of the Law states in part that, as a general matter, an agency need not

create or prepare a record in response to a request. Therefore, if the incident reports pertaining to the period in question no longer exist, the Freedom of Information Law would not be applicable.

Second, assuming that the reports do exist, 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.

Without familiarity with the contents of incident reports, it is difficult to provide specific direction. In some instances, I would conjecture that certain reports would be accessible; in others, it is likely that portions of reports, or perhaps entire reports, could justifiably be withheld, for several of the grounds for denial could be relevant.

Without going into great detail, it appears that four grounds for withholding might be relevant. Their assertion, however, would be dependent upon the specific contents of the reports.

Section 87(2)(b) permits an agency to withhold records or portions thereof to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Depending upon the nature of an incident, such as the inclusion of identities of witnesses and similar personal details, there may be considerations of personal privacy.

Section 87(2)(e) pertains to records "compiled for law enforcement purposes", which may be withheld under certain circumstances specified in the cited provision. It would appear that section 87(2)(e) would not be applicable if the incident reports are compiled in the ordinary course of business, rather than for law enforcement purposes. Nevertheless, as indicated earlier, I am unfamiliar with the contents of the reports.

Also of potential relevance is section 87(2)(g), which permits an agency to withheld records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

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 opinion, advice, recommendation and the like could, in my view, be withheld.

Another possibility would involve a situation pertaining to an arrest. Under section 160.50 of the Criminal Procedure Law, if criminal charges are later dismissed in favor of an accused, the records pertaining to the event are generally sealed. In such a case, it would appear that sealed records would be specifically exempted from disclosure by statute and, therefore, deniable under section 87(2)(a) of the Freedom of Information Law.

In short, in my opinion, rights of access to reports covering the designated period could be determined only on the basis of a review of the contents of each and every report.

As an alternative to requesting all the reports filed for a period of nearly four months, it might be more appropriate to request the specific report in which you are interested. I am unaware of the number of incident reports that are prepared or of the method by which they are kept or filed. It is noted that section 89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought; a request must provide sufficient detail to enable agency officials to locate the record. If, for example, incident reports are numerous and filed chronologically, it may be difficult or perhaps impossible to locate a particular report. On the other hand, if the reports are filed by category, name or other identifier, it may be relatively easy to locate a particular report.

It is suggested that you contact the Office of Court Administration for the purpose of discussing the matter prior to making a request. It may be less burdensome to agency officials to attempt to locate the particular record in which you are interested than to review and determine rights of access to numerous reports.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4374

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 18, 1986

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 November 7 and the correspondence attached to it. Please accept my apologies for the delay in response.

According to the materials, you requested copies of documents that the Investigative Unit of the New York City Council obtained from the New York City Parking Violations Bureau. The request was denied because the documents are being reviewed and "revisions might still be made". The legal basis for the denial involves a contention that "the documents are inter-agency materials upon which final agency determinations have not been made". In your appeal of the denial, you wrote that the records in questions consist of:

> "a printout which the Council's Investigative Unit obtained from the New York City Parking Violations Bureau which simply put, takes the entire New York City Parking Violations Bureau judgment docket books that are docketed in the Civil Court of the City of New York, County of New York and also filed in the County Clerk's offices in each of the five counties that comprise New York City, and has by means of computer removed any and all judgments that are under $200 in value, and has then re-

> sorted each listing of the same judgments as in the county clerk's docket books and arranged them in order by geographical location..."

You added that is is your understanding that "the only copy that exists is with the Council's Investigative Unit".

In this regard, I offer the following comments.

First, as you are aware, 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.

Second, in my opinion, none of the grounds for denial could be asserted. While the response to your request alluded to section 87(2)(g), due to its structure and specific language, I believe that the cited provision requires disclosure. 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. Concurrently, those portions of inter-agency or intra-agency materials reflective of advice, opinion, recommendation and the like could, in my view, justifiably be withheld.

Under the circumstances, since the records in question were forwarded by the Parking Violations Bureau to the City Council, I believe that they could be characterized as "inter-agency" materials. Nevertheless, based upon the facts as described in the correspondence, the documents, in their entirety, appear to consist of "statistical or factual tabulations or data" accessible pursuant to section 87(2)(g)(i).

The fact no final agency determination may have been made is, in my opinion, of no moment. From my perspective, the three kinds of available records described in subparagraphs (i), (ii) and (iii) of section 87(2)(g) are independently accessible. Often agencies prepare statistical or factual data that are available, but which may never lead to or be used in relation to a final determination. Numerous examples could be given, such as vital statistics involving birth, death, or marriage rates; population figures and trends; numbers of users of highways or public transportation; housing units by type; costs of construction by geographical area; enrollment figures in public schools; employment categories and unemployment rates; amounts of fines imposed or collected by courts and other governmental entities. In short, statistical or factual data prepared by agencies may or may not pertain to determinations made by agencies.

Moreover, of significance is a decision rendered by the Court of Appeals in which it was held that consultant reports may be characterized as "intra-agency" materials that fall within the scope of section 87(2)(g) [Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)]. In its discussion of the issue, the Court determined on one hand that:

> "the fact that respondents ultimately took no action does not divest the reports of their quality as 'intra-agency materials', since the FOIL protects against disclosure of predecisional memoranda or other nonfinal recommendations, whether or not action is taken" (id. at 133).

Concurrently, however, on the other hand, the Court specified that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical of factual tabulations or data' (Public Officers Law section 87 [2][g][i]), or other material subject to production, they should be redacted and made available to appellant" (id.).

In view of the holding of the Court of Appeals, I believe that "statistical or factual" data, or the other items accessible under section 87(2)(g)(i), (ii) or (iii) are required to be disclosed, even if no final determination has been or will ever be made.

Further, it appears that the records sought consist of a series of what could be viewed as final agency determinations. In short, the record sought appears to consist of data indicating docketed judgments involving amounts due the City in excess of a particular monetary figure. The data, as I understand it, was derived from docket books that would be available to the public from another source (i.e., the courts or court clerks). If a judgment has been entered, it is assumed that it is based upon a finding, a final determination made by an agency, that particular individuals owe money to the City.

While I am not familiar with specific duties of the Investigative Unit of the City Council, I do not believe that the use of materials that are otherwise public and available from other sources in conjunction with an investigation would transform the materials into records "compiled for law enforcement purposes", which may be denied under certain circumstances pursuant to section 87(2)(e) of the Freedom of Information Law. By means of example, minutes of meetings of a public body were in possession of a district attorney pursuant to a grand jury subpoena and were thereafter requested by the subject of the investigation. Nevertheless, the court held that the minutes were "public records" subject to disclosure. Although they might have been used in or relevant to an investigation, the minutes "were not compiled for law enforcement purposes" (King v. Dennis Dillon, District Attorney, Supreme Court, Nassau County, December 19, 1984).

Lastly, for reasons similar to those offered previously, the possibility of revision of statistical or factual data would not, in my view, remove the data from rights of access or constitute a ground for withholding. Although I am unaware of judicial decisions involving records clearly analogous to those at issue, it has been held that statistical or factual data found with "handwritten field notes", and "drafts" of an "air monitoring report" are available [Steele v. NYS Department of Health (464 NYS 2d 925 (1983)]. Further, budget estimates that were subject to change that were presented in a numerical format were determined to be available, 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 similar situations in the past, where it has been advised that records are available but perhaps subject to change, it has been suggested that, prior to disclosure, records be

marked as "draft", "subject to change", "subject to revision" or "non-final", for example. By so doing, an agency may comply with law, while concurrently indicating that a record may be subject to change.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Harvey N. Fertig
Joseph Strasburg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4375

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 19, 1986

Mr. Jose Rotger
#79-A-3697-C-4-1
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. Rotger:

I have received your letter of November 17 and the materials attached to it. Please accept my apologies for the delay in response.

In brief, according to your letter, some time ago, you requested records from the office of the Kings County District Attorney. Although the receipt of your request was acknowledged in a timely manner, as of the date of your letter, you had received no further response. As such, you believe that the request has been constructively denied and that you may appeal. You inquiry involves the person to whom an appeal may be directed.

Here I direct your attention to section 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."

In all honesty, I do not know the identity of the particular individual who determines appeals made under the Freedom of Information Law for the Kings County District Attorney. However, to ensure that the appeal reaches the appropriate person, it is suggested that you appeal to the District Attorney, and that you write "Freedom of Information Law Appeal" on the envelope.

I regret that I cannot be of further assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Jack Jordan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4376

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 22, 1986

Mr. Harry Wenzel
83-A-4882
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. Wenzel:

I have received your letter of November 18, in which you raised a series of questions concerning access to records.

According to your letter, when you were arrested in 1981, personal property found in your hotel room was confiscated. You indicated that you were not given a receipt for "all" of your property. Further, although you applied to the Suffolk County Police Department for property invoices, your request was denied based upon a contention that the records are "confidential". You added that you appealed the denial twice to the Suffolk County Department of Law, but that you never received a reply.

In this regard, I offer the following comments.

First, as indicated in previous correspondence sent to you, the Freedom of Information Law is based upon a presumption of 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 application form attached to your letter indicates that the property invoices fall within a category of grounds for denial entitled "confidential disclosure". Based upon a review of the other categories listed on the form, I cannot ascertain what the category in question means or is supposed to mean. Often the term "confidential" pertains to a situation in which a statute other than the Freedom of Information Law permits or requires confidentiality with respect to particular

records. In such cases, records would be "specifically exempted from disclosure by state or federal statute" [see Freedom of Information Law, section 87(2)(a)]. However, the portion of the form that would pertain to a denial on that basis, entitled "Exempted by Statute Other than Freedom of Information Act", is unmarked. Therefore, the Police Department does not appear to have relied upon a statute other than the Freedom of Information Law concerning the claim of confidentiality.

Although I am not aware of the facts surrounding the event, it does not appear that any of the grounds for denial could be asserted. If the invoices pertain to your property, it is unlikely that there would be privacy considerations. Similarly, while the Freedom of Information Law permits an agency to withhold records "compiled for law enforcement purposes" under circumstances described in section 87(2)(e), due to the passage of time, five years, it would, in my opinion, be unlikely that any of those circumstances would be relevant.

Lastly, it is suggested that you appeal again, specifying that it should be directed to Theodore Sklar of the County Attorney's Office, at the same address as indicated on the form. Since section 89(4)(a) permits a person whose request has been denied to appeal within thirty days of the denial, it is also suggested that you explain to Mr. Sklar that your earlier appeals were not answered.

I hope that I 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

FPPL-AO-47
FOIL-AO-4377

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 22, 1986

Mr. Robert J. Troise
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Troise:

I have received your letter of November 21. Please accept my apologies for the delay in response.

Your initial question, as I understand it, pertains to the authority of "the military" to obtain personal information from agencies. I am unaware of the federal statutes that pertain to the military. However, I offer two points concerning privacy in relation to records maintained by government in New York.

First, the standard involves a finding that an item or items of personal information would, if disclosed, result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, sections 87(2)(b), 89(2)(b)]. Not every record that identifies an individual would, if disclosed, constitute an unwarranted invasion of personal privacy. For instance, records that identify public employees, their names and salaries are available; if you own a home, you name and other information may be contained in an assessment role open to the public. In those instances and others, disclosure would result in a permissible, not an unwarranted invasion of personal privacy.

Second, assuming that disclosure would constitute an unwarranted invasion of personal privacy, the "military" in my opinion enjoys no special rights under the Personal Privacy Protection Law. That statute in section 96(1) specifies the conditions under which personal information identifiable to an individual may be disclosed by a state agency. Unless one of those conditions can be met, I do not believe that the military would have the capacity to obtain the information. It is emphasized that the Personal Privacy Protection Law is applicable to state

agencies only; it does not apply to entities of local government. While a local government may withhold when disclosure would result in an unwarranted invasion of personal privacy, it is not obligated to do so.

Your second area of inquiry involves medical records. As a general matter, disclosure of medical and related records would in my opinion result in an unwarranted invasion of personal privacy [see Freedom of Information Law, section 89(2)(b)(i) and (ii)], unless the subject of the records consents to disclosure. If such records are maintained by a state agency, again, section 96(1) of the Personal Privacy Protection Law would govern the capacity to disclose, except when a different statute deals specifically with particular records. In addition, it is noted that a new statute pertaining to patient records, section 18 of the Public Health Law, will become effective on January 1, 1987.

For your information, enclosed are brochures published by this office, "Your Right to Know" and "You Should Know", which respectively describe the Freedom of Information Law and the Personal Privacy Protection Law. Also enclosed is the new provision concerning patient records mentioned above.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4378

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 22, 1986

Mrs. Cathy House
[redacted]

The staff of the Committee on 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. House:

I have received your letter of November 16. Please accept my apologies in the delay in response.

Your question is whether a transcript of a trial is "public information". In this regard, I offer the following comments.

First, I point out that the Committee on Open Government is responsible for advising with respect to the Freedom of Information Law. From my perspective, the Freedom of Information Law does not apply to the transcript of a judicial proceeding. The scope of that statute is determined in part by the term "agency", for the Law applies to agency records. Section 86(3) of the law defines "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 language quoted above, the Freedom of Information Law, in my opinion, would not be applicable to the courts or court records, such as transcripts of trials.

Second, while the Freedom of Information Law is not pertinent, other statutes often grant significant rights of access to court records. For instance, enclosed is a copy of section 255 of the Judiciary Law, which provides, in brief, that records maintained by a clerk of a court are generally available.

It is noted that there may be a distinction concerning rights of access to court records between cases in which there is a finding of guilt, and cases in which a defendant is found to be innocent. If charges against an accused are later dismissed in his or her favor, the records pertaining to the event, including court records, are generally sealed and made confidential pursuant to section 160.50 of the Criminal Procedure Law. Therefore, if, for example, a person who is the subject of criminal charges is found innocent, and the charges are dismissed, I would conjecture that the records pertaining to the trial would be confidential.

Lastly, it is suggested that you discuss the matter with the clerk of the court in which the proceeding was conducted.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4379

162 WASHINGTON AVENUE, ALBANY, NEW YORK. 12231
(518) 474-2518, 2791

December 23, 1986

Mr. Kenneth Franklin
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Franklin:

I have received your letter of November 11 in which you requested advice from this office.

According to your letter, you made a request under the Freedom of Information Law to the New York City Police Department for certain records. The records requested are notes in the form of memo book entries made by the arresting officer in regard to a particular arrest. You received a response advising you to request the records from the "Kept held file". In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records maintained by an agency. Under the Law, the term "record" is 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."

Second, although I have not been able to determine the meaning of the term "kept held file", the notes and memo book entries you seek are, in my opinion, clearly "records" subject to

the Freedom of Information Law. Thus, in my view, if the records sought are accessible under the Law they must be made available to you regardless of where they are maintained by or for the agency.

Third, pursuant to the direction in the Freedom of Information Law, the Committee on Open Government has promulgated regulations (21 NYCRR 1401) concerning the procedural implementation of the Law. According to section 89(3) of the Law and section 1401.5 of the regulations, an agency must respond to a request for records 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 required to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days of the receipt of a request or within ten business days of acknowledgement of the receipt of a request, the request may be 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)].

Fourth, according to section 1401.2 of the regulations, each agency is required to designate a records access officer who is responsible for responding to requests for records under the Freedom of Information Law. The records access officer for the New York City Police Department is Eneta McAllister, Public Inquiry and Request section, New York City Police Department, 1 Police Plaza, Room 152-A, New York, NY 10038-1497. Thus if your initial request was not directed to the records access officer, you may want to resubmit your request and direct it as indicated above.

Fifth, both the Law and the regulations state that a request for records must "reasonably describe" the records sought. Therefore, when requesting records, it is suggested that the request be sufficiently detailed to enable agency officials to locate the records.

Finally, for your use and information , enclosed are copies of the regulations promulgated under the Freedom of Information Law by the Committee on Open Government, and "Your Right to Know", a pamphlet which describes the Law and contains a sample request letter and a sample appeal 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

Deborah A. Kahn

BY Deborah A. Kahn
Assistant to the Executive Director

RJF:DAK:gc
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4380

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 23, 1986

Mr. Marvin H. Schaurer
#77-C-67
P.O. Box 338
Napanoch, NY 12458

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schaurer:

I have received your letter of November 20. Please accept my apologies for the delay in response.

According to your letter, in response to a request for a record maintained by the Eastern Correctional Facility, you received a copy of the record, but one-third of the page made available was deleted. Your question is:

> "when the person in charge of handling Freedom of Information Act demands, deletes anything from a document, are they not required to inform the person in writing that they have deleted a certain portion of the document in question, and the reason why certain portions of the document in question are exempt from disclosure."

In this regard, I offer the following comments.

First, as a general matter, when a record is requested and a portion is deleted when the record is made available, I believe that the deletion represents a denial.

Second, the Committee on Open Government, pursuant to section 89(1)(b)(iii) of the Freedom of Information Law, has promulgated general regulations that govern the procedural as-

pects of the Law [21 NYCRR Part 1401]. In turn, section 87(1) of the Law requires each agency to adopt regulations consistent with the Freedom of Information Law and the Committee's regulations.

I direct your attention to section 1401.2(b)(3) of the regulations, which states that the agency records access officer is responsible for assuring that agency personnel:

> "Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

Similarly, section 1401.7(b) provides in part that:

> "Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number."

Lastly, with respect to the right to appeal, 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."

For future reference, a denial of a request for records of the Department of Correctional Services or its facilities may be appealed 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:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4381

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 23, 1986

Mr. Kenneth C. Pope
86-A-5860
2911 Arthurkill Road
Staten Island, NY 10309

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pope:

I have received your letter of November 24. Please accept my apologies for the delay in response.

You wrote that you corresponded with the manufacturers of three medications that you are taking and requested "research data concerning the adverse reactions of the interactions of these drugs". They responded, stating that it is not their policy to provide that information. You asked whether the manufacturers can "be required to release this information..."

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 Law to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, records of drug companies and other private sector firms are, in my view, outside the requirements of the Freedom of Information Law.

Second, I would conjecture that the use of medications must be reviewed by the federal Food and Drug Administration (FDA). Therefore, it is suggested that you might seek the information from the FDA pursuant to the federal Freedom of Information Act (5 U.S.C. 552). Based upon my information, your inquiry may be directed to:

Director, Consumer Communications
Food and Drug Administration
5600 Fishers Lane
Rockville, MD 20857

I hope that I 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-4382

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

December 29, 1986

Ms. Nancy Bard
Patterson, Belknap, Webb
& Tyler
30 Rockefeller Road
New York, NY 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 Ms. Bard:

As you are aware, I have received your letter of November 26 and the correspondence related to it. Please accept my apologies for the delay in response.

According to your letter, your client, the Daily News, "is seeking information about the daily activities of Mayor Koch". In response to the request, the Office of the Mayor granted access to the Mayor's "public schedule" and his "private schedule", but denied access to his "appointment calendars". The basis for the denial, which was affirmed following an appeal, involves a contention that the appointment calendars are not "agency records" subject to the Freedom of Information Law.

The rationale for the denial was described by Susan R. Rosenberg, Deputy Counsel to the Mayor, in a letter of November 12. In discussing the appointment calendars, Ms. Rosenberg wrote that:

> "First, they are not agency records within the meaning of the Freedom of Information Law. They are not copied and distributed to other members of the Mayor's staff: the only persons who have regular access to the appointment calendars are the Mayor, his director of scheduling and her assistant, and the Mayor's Chief of Staff. They do not always reflect changes in appointments, cancellations and addi-

> tions of meetings, or changes in the people expected to be present at them. Moreover, the appointment books, which contain both personal and business appointments (including the topic of a particular meeting or event, its location and identity of the participants) were created for the convenience of the Mayor and his scheduling director and not for the purpose of conducting official City business. In Bureau of National Affairs, Inc. v. United States Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984), an analogous case decided under the Federal Freedom of Information Act, the District of Columbia Circuit Court of Appeals held that the appointment calendars sought in that case were not subject to disclosure. The same reasoning is applicable here."

As such, it appears that Ms. Rosenberg has relied heavily upon a judicial determination rendered under the federal Freedom of information Act (5 USC section 552). While interpretations of the federal Act may serve to provide useful guidance, I believe that the specific language of the New York Freedom of Information Law, as well as its judicial interpretation by the Court of Appeals, indicate that the appointment calendars are "agency records" subject to rights of access.

In this regard, I offer the following comments.

The decision cited by Ms. Rosenberg, Bureau of National Affairs, supra, in determining whether similar documents constituted "agency records" employed a "four-factor test" involving a review of the "totality of the circumstances" underlying the creation of a document. The four factors involve consideration as to whether:

(1) the document was generated within the agency seeking to avoid disclosure;

(2) the document has been placed into agency files;

(3) the document is within the agency's control; and

(4) the document has been used by the agency for an agency purpose.

The Court in that case, based upon considerations of the "totality of circumstances", concluded that appointment calendars were not "agency records" subject to rights granted by the federal Freedom of Information Act because they "were created for the personal convenience of individuals so that they could organize both their personal and business appointments" (id., 742 F.2d at 1496).

I point out that a more recent interpretation of the federal Act pertaining to similar records resulted in a different conclusion. In Washington Post v. U.S. Department of State [632 F.Supp. 607 (D.D.C. 1986)], the request involved similar records prepared by the staff of former Secretary of State Haig. By way of background, it was stated by the Court that:

> "the two staff members maintained daily handwritten logs chronicling the official and unofficial activities of the Secretary and containing information gleaned by their personal monitoring of events occurring both within and outside the Office of the Secretary of State. These logs included information on all anticipated and unanticipated meetings attended by Secretary Haig, both within and outside the Department of State, as well as information concerning the exact time, date and place of the meeting, and the identities of the participants."

The logs were later transcribed to form a "record of schedule", which was the subject of the request. As in Bureau of National Affairs, the Court rendered its determination in Washington Post based upon the "totality of the circumstances". In this instance, however, it was found that the documents were "agency records" subject to the federal Act.

In view of the case law rendered under the federal Act, I do not believe that the decisions are necessarily instructive or of precedential value in New York. Further, resolution of issues involving what might constitute "agency records" under the federal Act has been problematic. As stated by the Court in Bureau of National Affairs:

> "Neither the language of the statute nor the legislative history provides much guidance in fleshing out the meaning of the term 'agency records'. 'As has often been remarked, the Freedom of Information Act, for all its attention to the treatment of 'agency

> records', never defines that crucial phrase.' McGehee v. Central Intelligence Agency, 697 F.2d 1095, 1106 (D.C.Cir.1983) (footnotes omitted), modified in other respects, 711 F.2d 1076 (1983)" (742 F.2d at 1488).

Unlike the federal Act, which contains no specific direction concerning the phrase "agency records", it is significant in my opinion that the New York Freedom of Information Law defines both "agency" and "record".

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 or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The Office of the Mayor, in my view, is clearly an "agency", for it is a "municipal...office".

Perhaps most importantly, section 86(4) of the Law defines "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, I believe that the appointment calendars constitute "records" for they are kept, held and produced by the staff of the Office of the Mayor. Presumably, the calendars are prepared by staff in the performance of their official duties.

Further, while interpretations of the federal Act are conditioned, in part, upon the use of records, the Court of Appeals in construing the Freedom of Information Law has not imposed any such condition in determining whether or not a docu-

ment constitutes a "record".

The first decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)]. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for 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" (id.).

Similarly, in a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records", thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

While federal courts in construing the federal Act have applied tests involving certain factors, or the "totality of the circumstances" concerning the creation or use of documents to determine whether the documents constitute "agency records", those considerations, in my opinion, are irrelevant under the New York Freedom of Information Law. Based on the decisions rendered by the Court of Appeals discussed earlier, the "test" is whether a document is "kept, held, filed, produced or reproduced by, with or for an agency..." The appointment calendars, in my view, meet that test and constitute "records" subject to rights granted by the Freedom of Information Law.

In addition, the language of a recent decision of the Court of Appeals, although indirectly related to the issue here, provides a description of the intent and utility of the Freedom of Information Law in a manner that may be pertinent to the appointment calendars. Specifically, it was stated that:

> "The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of governmental officers" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986)].

Assuming that the appointment calendars are "records", I point out, as a general matter, that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Without knowledge of the contents of the documents, the extent to which they may be available is conjectural. However, it is noted that the introductory language of section 87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of one or more of the exceptions to rights of access. Therefore, I believe that the State Legislature envisioned situations in which a single record might be available or deniable in part. Further, I believe that the quoted language requires that agency officials review requested records in their entirety to determine which portions, if any, may justifiably be withheld. For instance, if certain aspects of the calendars characterized as "personal" would, if disclosed, result in an unwarranted invasion of personal privacy [see Freedom of Information Law, section 87(2)(b)], those portions might be deleted, while the remainder might be available. In short, even though a portion of a record might justifiably be denied, other portions might nonetheless 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

cc: Susan R. Rosenberg, Deputy Counsel to the Mayor
Patrick F.X. Mulhearn, Counsel to the Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4383

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 279

December 29, 1986

Mr. Martin Koehler
Fire Commissioner
High Falls Fire District
Box 333 - Canal Road
High Falls, NY 12440

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Koehler:

I have received your letter of November 26. Please accept my apologies for the delay in response.

Your inquiry pertains to rights of access to a list of persons who voted in a special fire district election.

In this regard, I offer the following comments.

First, I am unaware of any provision of law that specifically pertains to the issue in conjunction with an election conducted by a fire district.

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 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.

I hope that I 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-4384

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 29, 1986

Mr. Steven F. Wavra
85-A-7339
Clinton Correctional Facility
Box B
Dannemora, New York 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. Wavra:

I have received your letter of December 2. Please accept my apologies for the delay in response.

Your first question involves the statute of limitations regarding a suit brought under the Freedom of Information Law. It is emphasized that, as a condition precedent to bringing a suit, an applicant must exhaust his administrative remedies. Stated differently, when a request is initially denied, an applicant has the right to appeal 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 records the reasons for further denial, or provide access to the record sought."

Only after being denied pursuant to an appeal has an applicant exhausted administrative remedies. Following a denial on appeal, the person denied has four months to bring a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. I am unaware of the specific costs of a filing fee, and it is suggested that you discuss the matter with an attorney.

The second area of inquiry pertains to requests directed to the Division of Criminal Justice Services. You referred to "lists of records on file". It is assumed that you are referring to section 87(3)(c), which requires each agency to maintain:

> "a reasonably detailed current list by subject matter, of all records in possession of the agency, whether or not available under this article."

The so-called "subject matter list" should be made available by the agency's designated records access officer. Therefore, if I interpret your inquiry correctly, a request for the Division's subject matter list should be directed to its records access officer or public information 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-4385

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 29, 1986

Ms. Carol B. Hafer
Counsel
NYC Fire Department
250 Livingston Street
Brooklyn, NY 11201-5884

The staff of the Committee on 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. Hafer:

I have received your thoughtful letter of November 28 concerning requests made under the Freedom of Information Law by Mr. Leo Levko. Please accept my apologies for the delay in response.

According to your letter, Mr. Levko has often complained to the Fire Department concerning his neighbors' "rights to barbecue". You wrote that:

> "Every summer he registers a complaint and every year the Department inspects and finds no violations. The Department does not issue negative reports; in other words, had there been a violation, a violation order would have been served and Mr. Levko would have been given a copy. Because of Mr. Levko's incessant complaints, the inspecting unit was requested to give its recommendations as to whether or not a violation order should be served. These are intra-agency documents containing opinions and recommendations and, accordingly, I believe their production is exempted under F.O.I.L. Nonetheless, in an effort to appease Mr. Levko, I allowed him copies of these documents, deleting only the name of the officer or member..."

Your question is whether Mr. Levko is entitled to the documents without the names deleted.

In this regard, I offer the following comments.

First, it appears that you have granted access to records that you could justifiably have withheld. If indeed the records made available consist or recommendations made by an "inspecting unit", the recommendations could in my view be withheld pursuant to section 87(2)(g) of the Freedom of Information Law. The records in question could be characterized as "intra-agency materials". Further, as recommendations, they would not, in my opinion, be accessible in conjunction with subparagraphs (i), (ii) or (iii) of section 87(2)(g). As such, again, I believe that you have likely disclosed records that could have been withheld.

Second, under ordinary circumstances, the names of inspectors and the location of the premises inspected might constitute the only aspects of the records in question that might be available. Stated differently, while the recommendations within a report could be denied, the names of inspectors and the locations of inspections might be considered "factual" information available under section 87(2)(g)(i) of the Freedom of Information Law. Further, although I am unaware of whether any such record is kept, it is possible that inspectors maintain a log or similar document which indicates the locations of inspections. Such a document, which factually describes where an inspector's day is spent, would likely be available under section 87(2)(g)(i), unless a different ground for denial applies. As such, it is possible that Mr. Levko could obtain the names by requesting different records. Further, while he might not have had a right under the Law to the recommendations, a right to the names of the inspectors might be asserted.

I hope that I have been of assistance. If you would like to discuss the matter, please do not hesitate to call.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4386
OML-AO-1351

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 29, 1986

Hon. John L. Alfano
Member of the City Council
Alfano & Alfano, P.C.
550 Mamaroneck Ave.
Harrison, NY 10528

The staff of the Committee on Open Government is authorized to issue to advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Alfano:

I have received your letter of November 24, which reached this office on December 1. Please accept my apologies for the delay in response.

According to your letter, the City of Rye, which you serve as a member of the City Council, has an "Administrative Pay Plan which establishes pay ranges for various grades of non-union employees of the city government, both management and confidential". You wrote that, for the last several years, the Plan has been discussed in executive session pursuant to section 105(1)(f) of the Open Meetings Law, "since the job titles in each grade make it obvious whose salary is being discussed".

Your questions involve the propriety of conducting such discussions during executive sessions, and "whether all data supporting the Administrative Pay Plan is subject to disclosure under the Freedom of Information Law..."

In this regard, I offer the following comments.

As you are aware, section 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."

In my opinion, so-called "personnel" exception for entry into executive session is intended largely to enable a public body to protect the privacy of a "particular person" when a discussion involves one or more of the topics listed in that provision. In the context of your question, the specific nature of a discussion would determine whether or not an executive session could be held. If the discussion involves the salary that should be accorded a position, I do not believe that an executive session could be held. For example, if the issue pertains to the salary of the police chief, and the discussion involves the salaries given to police chiefs in municipalities of a size similar to the City of Rye, clearly the discussion would pertain to the position and the salary that the position merits. Even though there may be but one person in a position, the issue would concern an issue of policy regarding the position, irrespective of who might hold that position. In that situation, there would be no considerations of privacy and, consequently, the discussion in my view should occur during an open meeting. On the other hand, if the issue involves how well or poorly a particular employee carries out his or her duties, there would be privacy considerations, for the issue would focus upon an individual. To that extent, I believe that an executive session could appropriately be held.

With respect to the "supporting data" relative to the Plan, I direct your attention to the Freedom of Information Law. As a general matter, 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.

It appears that one of the grounds for denial would be particularly relevant. Due to its structure, it would likely grant access to portions of the data or perhaps permit a denial of other aspects of the data. 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 policy 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 described, supporting data prepared by the City could be characterized as "intra-agency materials". Public rights of access would be dependent upon the specific contents of the records. For instance, if the data includes information reflective of the salaries or benefits of public employees, those materials would consist of "statistical or factual tabulations or data" accessible under section 87(2)(g)(i). Conversely, if the data includes a subjective evaluation of a particular employee which is essentially an opinion concerning that person's performance, I believe that such a document could be withheld.

In short, with respect to both of the issues that you raised, the answers would be dependent upon the specific nature of a discussion or the specific contents of records in relation to the Open Meetings Law and the Freedom of Information Law respectively.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1350
FOIL-AO-4387

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 29, 1986

Mr. Peter A. Stark
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Stark:

I have received your letter of November 29. Please accept my apologies for the delay in response.

Your inquiry, as well as your suggestions, were apparently precipitated by a request directed to the Bedford School District. Although the request was made in writing, you were informed that a request was required to be submitted on a form prescribed by the School District. It appears, too, that School District officials believe that they are prohibited from disclosing records unless a formal request is made. As such, you suggested that the Freedom of Information Law should be amended to preclude a public body, such as a school board, from adopting policies or rules more restrictive than the Freedom of Information Law.

In this regard, I offer the following comments.

First, as a general matter, a public body cannot, in my view, unilaterally adopt rules or procedures more restrictive than a statute enacted by the State Legislature, such as the Freedom of Information Law.

Second, 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 aspects of the Freedom of Information Law. The Committee has done so, and I have enclosed a copy of its regulations (21 NYCRR Part 1401). In turn, section 87(1) of the Law requires that the governing body of a public corporation, in this instance, the Board of Education, adopt rules and regulations consistent with the Freedom of Information Law and the Committee's regulations.

In terms of direction, section 1401.1(d) of the Committee's regulations states that:

> "Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of records."

Further, section 1401.5 of the regulations provides in part that:

> "(a) An agency may require that a request be made in writing or may make records available upon oral request.
>
> (b) An agency shall respond to any request reasonably describing the record or records sought within five business days of receipt of the request."

Therefore, the regulations indicate that, while an agency may require that a request be made in writing, it may, nonetheless, respond to a request made orally.

It is also noted that nothing in the Freedom of Information Law or the Committee's regulations refers to a particular form that must be used for the purpose of requesting records. The only statement in the Law regarding the issue involves an agency's authority to require that a request be made in writing and that the request "reasonably describe" the record sought [see attached, Freedom of Information Law, section 89(3)]. Based upon the foregoing, it has consistently been advised that a failure to complete a form prescribed by an agency cannot constitute a valid basis for a denial of a request or delay in response to a request. It has concurrently been advised that any written request that reasonably describes the records sought should suffice. In my view, a requirement that a specific form be used can cause unnecessary delays.

It appears that your question concerning the use of a form may have initially arisen when you could not review records discussed or used by the Board at a meeting. It is noted that the situation has arisen often and is the subject of a recommendation offered to the Governor and the Legislature in the Committee's recent annual report. In brief, the Committee recommended that, with certain exceptions, records to be discussed at open meetings must be made available to the public prior to or at the time of the meeting.

You also suggested that section 107 of the Open Meetings Law insofar as it pertains to the award of attorney's fees should be amended in order that government cannot be awarded attorney's fees. While I might agree, I know of no judicial decision brought under the Open Meetings Law in which a public body was awarded attorney's fees payable by a member of the public. However, there are several decisions in which members of the public were awarded attorney's fees payable by a public body.

In addition, the Committee has recommended that the enforceability of the Open Meetings Law be enhanced. The recommendation, if enacted, would give a court greater discretion to invalidate action taken by a public body when the Law has been violated; it would also permit a court to fine members of a public body, individually and without the possibility of indemnification, when the court determines that the Law was flagrantly violated, or where a pattern of violations has been found.

Enclosed for your consideration is a copy of the annual report.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Mary Lou Meese, Executive Assistant
to the Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4388

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 29, 1986

Mr. Joseph R. Garrison
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Garrison:

I have received your letter of November 28 and the correspondence attached to it. Please accept my apologies for the delay in response.

Based upon a review of the correspondence, it appears that there are three significant issues, access to records of a village justice court, the application of the Freedom of Information Law to the office of a district attorney, and the timeliness of responses to requests made under the Freedom of Information Law.

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 Law to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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, in my view, the Freedom of Information Law is not applicable to the courts or court records. Nevertheless, it is noted that other statutes often grant significant rights of access to court records. For instance, in the case of a village justice court, section 2019-a of the Uniform Justice Court Act provides, in brief, that records of a justice court are available, unless a different statute precludes disclosure of particular records.

Second, based upon the language of section 86(3) and judicial decisions, I believe that an office of a district attorney is an "agency". Since an office of a district attorney is a "governmental entity" that performs a "governmental function" for the state and a public corporation, in this instance, Rockland County, I believe that it is an agency required to comply with the Freedom of Information Law. It is noted that one of the first decisions rendered under the Freedom of Information Law indicated that certain records of a district attorney are available [see Dillon v. Cahn, 79 Misc. 2d 300, 259 NYS 2d 981 (1974)], and that several later decisions confirm that records of district attorneys are subject to rights granted by the Freedom of Information Law in the same manner as records of agencies generally [see e.g., New York Public Interest Research Group, Inc. v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979; Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., June 24, 1982; Hawkins v. Kurlander, 98 AD 2d 14 (1983)].

Further, to the extent that records sought consist of "attorney work product", I would agree that such records are confidential. Section 87(2)(a) of the Freedom of Information Law states that rights granted by that statute do not apply when records are "specifically exempted from disclosure by state or federal statute". Section 3101 of the Civil Practice Law and Rules exempts such records from disclosure and, in my view, would render attorney work product outside the scope of the Freedom of Information Law.

Nevertheless, I point out that case law 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.

Since I am unaware of the contents of records maintained by the Rockland County District Attorney in which you are interested, specific direction cannot be offered. However, as a general matter, 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.

While several of the grounds for denial might be pertinent to records of a district attorney, perhaps the most important among them is section 87(2)(e). That provision permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The language quoted above enables an agency to withhold records compiled for law enforcement purposes under certain circumstances. Those circumstances, which are described above, are in my opinion, intended to permit a denial when disclosure would result in some harm, i.e., when disclosure would interfere with an investigation. Nevertheless, the extent to which "harm" would be the result of disclosure would be dependent upon the facts and the specific contents of the records.

The statement offered to you in a letter prepared by Mary Ann Finneran, Assistant District Attorney, that it is the "policy" of the District Attorney "to require a court order before we will permit anyone access to our files", is, in my opinion, inaccurate. Again, the judicial decisions cited earlier indicate that the records of a district attorney are subject to the Freedom of Information Law. While some of the records could undoubtedly be withheld, a "policy" reflective of a blanket of confidentiality would, in my view, be invalid to the extend that it conflicts with the Freedom of Information Law or other statutes.

Lastly, both the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401), which govern the procedural aspects of the Law, prescribe time limits within which agencies 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 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:gc
cc: Hon. Frank J. Haera, Mayor
Mary Ann Finneran, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4389

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 30, 1986

Ms. Maria E. Jimenez-Barreca
[redacted]

The staff of the Committee on 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. Jimenez-Barreca:

I have received your letter of November 17 and the materials attached to it, which reached this office on November 24. Please accept my apologies for the delay in response.

It is your view that your request for records directed to Community School District 13 was constructively denied. In a letter addressed to Ms. Argie Johnson of the District on September 10, you requested:

> "A) All information contained in my personnel folder (File No. 625690);
> B) All statements and policies made by the District Office regarding excessive absence;
> C) All statements and policies made by Ms. Doreen Hall regarding excessive absence;
> D) All personnel attendance records filed by Ms. Hall while she was principal at P.S. 44."

You received an acknowledgment of the receipt of your request on September 17, which indicated that the request would be answered on approximately October 31. On November 10, you received portions of several documents. In some cases, the documents' source is identified; in others there is no indication of the source or origin of the documentation. Further, you wrote on the documentation that it was not the material that you requested, for it

was neither policy "made by the District", nor was it "made by Ms. Doreen Hall". Throughout the materials, your written additions to them suggest that you are seeking a definition of "excessive absence".

In this regard, I offer the following comments.

First, with respect to your requests for materials concerning "excessive absence", I am unaware of the nature or scope of records maintained by the District that would contain the information sought. Some of the materials made available to you represent portions of Chancellor's regulations and what appears to be a collective bargaining agreement. It is unclear whether other aspects of the document represent "statements and policies" made by the District Office or Ms. Hall. If neither the District Office nor Ms. Hall prepared statements or policies on the subject, I believe that the response to the request should have so indicated. On the other hand, if the response failed to include statements or policies "made by" the District or Ms. Hall, I would agree that the request was constructively denied. In either event, it is suggested that you discuss the matter with Ms. Johnson for the purpose of seeking a clarification.

Second, if indeed Statements or policies were made by the District or by Ms. Hall, and those records were denied, it appears that the denial would have been improper. As a general matter, 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 section 87(2)(a) through (i) of the Law.

Of likely relevance, should such records exist, 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. Under the circumstances, a "statement",

"policy" or directive concerning excessive absence would likely constitute instructions to staff that affect the public available under section 8(2)(g)(ii) or perhaps final agency policy accessible pursuant to section 87(2)(g)(iii). To the extent that a statement might be internal and reflective of opinion, advice, recommendation and the like, it could, in my view, be withheld under section 87(2)(g).

Third, you did not clearly indicate that the other aspects of your request, those involving the contents of your personnel folder and attendance records filed by Ms. Hall, were answered.

Rights of access to your personnel folder would be governed by the Freedom of Information Law. Much of its contents would likely consist of "intra-agency material" that would be accessible or deniable on the basis of section 87(2)(g), which was discussed earlier. Further, often a collective bargaining agreement contains provisions that deal specifically with rights of access by employees to personnel files pertaining to them. Often such agreements provide rights in excess of rights conferred by the Freedom of Information Law, and it is suggested that you review any collective bargaining agreement to which you may be a party.

With respect to attendance records filed by Ms. Hall, it is assumed that you are referring to records of her attendance. In brief, to the extent that those records indicate dates of absences, or the number of days used or accumulated in the categories of sick, vacation or personal leave, I believe, based upon a recent decision of the Court of Appeals, that such records would be available [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Lastly, for future reference, I point out that the Freedom of Information Law and the regulations promulgated by the Committee (21 NYCRR Part 1401), prescribe time limits within which an agency must respond 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 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, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Enclosed, as requested, are copies of the Freedom of Information Law, the Committee's regulations, and "Your Right to Know". In addition, in an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be sent to Ms. Argie Johnson.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc
cc: Ms. Argie Johnson

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4390

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 30, 1986

Mr. David McKay Wilson
Reporter Dispatch
4 Gannett Drive
White Plains, NY 10604

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wilson:

I have received your letter of December 3 in which you requested an advisory opinion under the Freedom of Information Law. Please accept my apologies for the delay in response.

Your inquiry concerns access to tape recordings pertaining to meetings of the White Plains City Council and the Urban Renewal Agency. While there appears to be no question concerning your right to listen to the tapes, you described problems relative to your capacity to hear the tapes in a timely manner. The two officials maintaining the tapes have required that you "set up appointments with them" to listen to the tapes. You wrote that, in one instance, you could not hear a tape at a particular time because the Planning Commissioner, Edward Steinberg, "was in meetings all day". In another, you could not listen to a tape maintained by the City Clerk, William McGuire, because "he would be out of town" on certain days.

In this regard, I offer the following comments.

First, 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 (see attached 21 NYCRR Part 1401). In turn, section 87(1) requires the governing body of a public corporation (i.e., a city council) to adopt "uniform rules and regulations for all agencies in such public corporation pursuant to" the Committee's regulations and consistent with the Law.

Second, section 1401.2 of the Committee's regulations pertains to the designation and duties of the "records access officer", "who shall have the duty of coordinating agency response to public requests for access to records". From my perspective, the records access officer, the Clerk, or the Planning Commissioner need not be physically present to ensure compliance with the Law or to enable you to listen to a tape recording. I do not believe that the absence of the Clerk due, for example, to a busy schedule or vacation leave can justifiably result in a delay of your capacity to listen to a tape recording that is clearly accessible. Further, the Law [section 89(3)] indicates that an agency must respond to a request within five business days of the receipt of the request, stating that the agency "shall make such record available..." or "deny the request in writing". Under the circumstances, it appears that your requests were granted, but that the records were not made available to you in a timely manner due to the inability of the custodians of the records to be present while you might listen to the tape. In my opinion, their physical presence is unnecessary, and the officials in question could have designated a City employee to supervise while you could listen to the tapes.

I point out, too, that section 1401.4 of the regulations provides that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

An appointment procedure, in my view, must be adopted by agencies that do not have regular business hours. While an agency need not respond instantly to a request, I believe that accessible records must nonetheless be made available within five business days of the receipt of a request, unless a reason for delay is stated in writing in an acknowledgment that the request has been received [see Freedom of Information Law, section 89(3)].

In short, as I understand the situation, delays have resulted due to the inability of certain officials to be present while you listen to a tape recording. I believe that the problem could be solved or avoided if the records access officer could "coordinate" the City's responses to requests by ensuring that agency personnel make the records available in a timely manner, perhaps under the supervision of agency staff.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: William McGuire, City Clerk
Edward Steinberg, Planning Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4391

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 30, 1986

Ms. Lucille Lantz
[redacted]

The staff of the Committee on 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. Lantz:

I have received your letter of November 28, and a later, undated letter which reached this office on December 8. Please accept my apologies for the delay in response.

In brief, you and your organization are interested in obtaining the names of students enrolled to attend the Yonkers Public Schools. Your requests for the names have been denied pursuant to the Freedom of Information Law.

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. section 1232g), which is commonly known as the Buckley Amendment".

In brief, the Buckley Amendment applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, the Buckley Amendment includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record", a term that is broadly defined, that identifies a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over, an "eligible student", similarly waives his or her right to confidentiality.

An exception to the rule of confidentiality in the Buckley Amendment involves "directory information". Directory information is defined in the regulations of the United States Department of Education to include:

> "...the student's name, address, telephone number, date and place of birth, major filed 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 adopted 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.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:gc

cc: Donald M. Batista, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4392

162 WASHINGTON AVENUE, ALBANY, NEW YORK, 12231
(518) 474-2518, 2791

December 31, 1986

Mr. Fred Greenberg
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Greenberg:

I have received your letter of December 4 and the materials attached to it. Please accept my apologies for the delay in response.

You have requested an advisory opinion concerning a denial of a request by John R. Nolan, Secretary to the New York City Board of Education and Records Appeals Officer. The records sought involve "Any and all applications for representations legal assistance during the period 3/1/86 through 4/30/86 including any applications by..." a series of named individuals. Although Mr. Nolan denied the request on the basis of section 87(2)(g) of the Freedom of Information Law, you wrote that it is your understanding that the "documents are final determinations".

In this regard, I do not believe that you have provided sufficient information concerning the applications to enable me to offer specific direction concerning rights of access.

Assuming that the applications are made by public employees to public agencies, I believe that they could be characterized as "inter-agency" or "intra-agency materials" subject to section 87(2)(g) of the Freedom of Information Law. As you are aware, within those materials, the public has the right to obtain:

i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public; or
iii. final agency policy or determinations."

Concurrently, those portions of inter-agency or intra-agency materials that do not consist of the kinds of information described in subparagraphs (i), (ii) or (iii) of section 87 (2)(g) could be withheld. From my perspective, if an application is pending, for example, it would not be reflective of a final agency determination.

Further, it is possible that other grounds for denial appearing in the Freedom of Information Law might apply. While I have no knowledge of the nature or content of the applications, since they involve legal assistance, it is possible that they may be subject to the attorney-client privilege. When there is such a privileged relationship, communications between an attorney and a client are considered confidential (see CPLR, section 4503). In such a situation, I believe that section 87(2)(a) of the Freedom of Information Law may be asserted. That provision pertains to the capacity to withhold records that are "specifically exempted from disclosure by state or federal statute".

Moreover, there may be considerations of personal privacy, depending upon the nature and content of the applications.

In short, without additional information concerning the applications, I cannot offer significant guidance.

Lastly, you asked whether Mr. Nolan forwarded his determination of your appeal to this office. A review of our records indicates that he did forward the materials, which were received by this office on November 27.

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

RJF:gc
cc: John R. Nolan